

STATE OF MICHIGAN
IN THE COURT OF APPEALS

ASSOCIATED BUILDERS AND
CONTRACTORS OF MICHIGAN,

Plaintiff-Appellant,

v

DEPARTMENT OF TECHNOLOGY,
MANAGEMENT AND BUDGET,

Defendant-Appellee,

and

MICHIGAN BUILDING AND
CONSTRUCTION TRADES COUNCIL,

Intervening Defendant-Appellee.

Court of Appeals No. 363601

Court of Claims No. 22-000111-MZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid.

DEFENDANT-APPELLEE'S APPENDIX

Scott L. Damich (P74126)
Kyla L. Barranco (P81082)
Assistant Attorneys General
Attorneys for Defendant-Appellee
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7573
damichs@michigan.gov
barrancok@michigan.gov

Dated: March 24, 2023

RECEIVED by MCOA 3/24/2023 8:53:44 AM

TABLE OF CONTENTS

| Description | Page No. |
|-------------------|----------|
| Opinion and Order | 1-20 |
| Complaint | 21-84 |

STATE OF MICHIGAN
COURT OF CLAIMS

ASSOCIATED BUILDERS AND
CONTRACTORS OF MICHIGAN
(also known as ABC OF MICHIGAN),

Plaintiff,

v

DEPARTMENT OF TECHNOLOGY,
MANAGEMENT & BUDGET, a State
Government Agency,

Defendant,

and

MICHIGAN BUILDING AND CONSTRUCTION
TRADES COUNCIL,

Intervening Defendant.

_____ /

OPINION AND ORDER

Case No. 22-000111-MZ

Hon. Douglas B. Shapiro

At a session of said Court held in the City of
Lansing, County of Ingham, State of Michigan.

Pending before the Court is plaintiff's motion for a preliminary injunction and defendant's MCR 2.116(C)(4) and (C)(8) motion for summary disposition. Having reviewed the briefing and hearing arguments on September 20, 2022, the Court GRANTS defendant's motion for summary disposition and DISMISSES plaintiff's motion for a preliminary injunction as moot.

I. BACKGROUND

At issue in this matter is whether defendant, Department of Technology, Management & Budget (DTMB), lawfully established a prevailing-wage policy for contractors working on state

projects several years after the repeal of the Prevailing Wage Act, MCL 408.551 *et seq.*, repealed by 2018 PA 171.

Before it was repealed in 2018, the Prevailing Wage Act provided, in relevant part, that

[e]very contract executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics . . . and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his subcontractors, shall be not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed. [MCL 408.552, repealed by 2018 PA 171.]

The Prevailing Wage Act further required the contracting agent (the state entity) to have the commissioner (of the Department of Labor) determine the prevailing-wage rates and fringe-benefit rates for all classes of construction mechanics outlined in the proposed contract and to include a schedule of the rates within the specifications for the work. MCL 408.553, repealed by 2018 PA 171. The Prevailing Wage Act also made it a misdemeanor to violate the provisions of the statute. MCL 408.557, repealed by 2018 PA 171.

In June 2018, the Legislature approved a voter-initiated petition, under Const 1963, art 2, § 9, that repealed the Prevailing Wage Act. See 2018 PA 171. The repealer, which appears in 2018 PA 171, simply stated “408.551-408.588 Repealed. 2018, Act 171, Imd. Eff. June 6, 2018.” “Enacting section 2” of the repealer appropriated certain funds toward communicating the repeal of the Prevailing Wage Act to the public, and “[e]nacting section 3” contained a severability clause. The corresponding Compiler’s Note stated, “Public Act 171 of 2018 was proposed by initiative petition pursuant to Const 1963, art 2, § 9. On June 6, 2018, the initiative petition was approved by an affirmative vote of the majority of the Senate and the House of Representatives, and filed with the Secretary of State.” The repealer did *not* restrict defendant from establishing its own

prevailing-wage policy based on its authority to develop the terms of state contracts, as outlined in the Management and Budget Act, MCL 18.1101 *et seq.*

On October 7, 2021, Governor Gretchen Whitmer issued a press statement announcing that defendant would require contractors and subcontractors bidding on DTMB projects greater than \$50,000 to pay their employees the prevailing wage in the region. At the time, the Governor’s Office explained, “Michigan’s repeal eliminated the state’s prevailing-wage requirement, but left the door open for DTMB to require prevailing wage under its authority to develop the terms of state contracts.” Thus, “[t]he move reinstates the prevailing wage requirement, which was repealed in June 2018, and ensures that any construction worker working on a state construction project receives a fair wage.” Unlike a violation of the Prevailing Wage Act, violation of defendant’s prevailing-wage policy does *not* constitute a crime.

Beginning with contracts initially posted for bidding after March 1, 2022, defendant required state contractors and subcontractors to pay the applicable prevailing wage. Defendant posted certain requirements and frequently asked questions for the prevailing-wage policy on its website, providing the following administrative guide citation:

1.3.13 Prevailing Wage

With the exception of lease build-outs, if a project greater than \$50,000 involves employing construction mechanics (e.g., asbestos, hazardous material handling, boilermaker, carpenter, cement mason, electrician, office reconstruction and installation, laborer including cleaning debris, scraping floors, or sweeping floors in construction areas, etc.) and is sponsored or financed in whole or in part by State funds, state contractors must pay prevailing wage. [*Prevailing Wage for DTMB Construction Contracts—Administrative Guide Citation, Effective March 1, 2022*, available at <https://www.michigan.gov/dtmb/procurement/design-and-construction/prevailing-wage-information> (last accessed October 7, 2022).]

On July 21, 2022, plaintiff, a trade association representing approximately 900 construction and construction-related firms, sued in this Court for declaratory and injunctive relief, claiming that (1) defendant's prevailing-wage policy violated the separation-of-powers doctrine; (2) the prevailing-wage policy was not enacted in compliance with the Administrative Procedures Act of 1969 (APA), MCL 24.201 *et seq.*; and (3) defendant's conduct was an *ultra vires* exercise of legislative power. Plaintiff also moves for a preliminary injunction to enjoin enforcement of defendant's prevailing-wage policy, arguing that it is likely to prevail on the merits, and that its members will sustain irreparable financial harm without an injunction and if forced to pay a prevailing wage. Finally, plaintiff argues, an injunction would not harm defendant or the public because the injunction would return the contract-bidding process to the status quo between 2018 and 2022.

Defendant responded to the motion for a preliminary injunction and moved for summary disposition as its first response to the complaint. Defendant first argues, in its motion for summary disposition, that plaintiff lacks standing to sue and its claims are unripe. Next, defendant argues it did not violate separation of powers or commit an *ultra vires* act by establishing a prevailing-wage policy for DTMB contracts. The APA did not bind defendant because it was exercising a legislative grant of power when enacting the prevailing-wage policy. In its response to plaintiff's motion for a preliminary injunction, defendant adds that plaintiff failed to sue for nine months after Governor Whitmer's announcement, and nearly five months after defendant's prevailing-wage policy went into effect. Also, according to defendant, plaintiff's claim for irreparable harm

remains speculative and is outweighed by the harm to local economies if defendant were prohibited from enforcing the prevailing-wage policy.¹

The Court heard arguments on both motions on September 20, 2022, and the parties agreed that the Court may decide both motions simultaneously.

II. ANALYSIS

A. JUSTICIABILITY CHALLENGE

Defendant challenges plaintiff's standing to sue on behalf of its membership and the ripeness of its claims.² The Court disagrees with defendant's arguments and concludes that plaintiff's claims are justiciable.

¹ The Court permitted Michigan Building and Construction Trades Council to intervene as a defendant. Michigan Building and Construction Trades Council has concurred in defendant's response to plaintiff's motion for a preliminary injunction and in defendant's motion for summary disposition.

² Defendant requests summary disposition under MCR 2.116(C)(4) on the basis that plaintiff's claims are not justiciable. Summary disposition is appropriate under MCR 2.116(C)(4) when the Court lacks subject-matter jurisdiction over the case. *Ind Mich Power Co v Community Mills, Inc*, 336 Mich App 50, 54; 969 NW2d 354 (2020). “ ‘When viewing a motion under MCR 2.116(C)(4), [the] Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact.’ ” *Id.* (citation omitted).

Defendant further argues that plaintiff has failed to state a claim for relief under MCR 2.116(C)(8). This motion tests the legal sufficiency of the complaint. *Bailey v Antrim Co*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 357838); slip op at 5. “A motion under MCR 2.116(C)(8) may . . . be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery.” *Id.* The court will consider the factual allegations in the complaint as true, but may also consider documentary evidence attached to the complaint. *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 206; 920 NW2d 148 (2018).

To the extent the Court is required to interpret the Management and Budget Act, the Court will examine the language of the statutes to determine the Legislature's intent. *D'Agostini Land Co LLC v Dep't of Treasury*, 322 Mich App 545, 554; 912 NW2d 593 (2018). “The Legislature is

[A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [*Groves v Dep't of Corrections*, 295 Mich App 1, 5; 811 NW2d 563 (2011) (alteration in original), citing *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010) (*LSEA*).]

The Court of Appeals has explained that the doctrine of ripeness is like the doctrine of standing in that both doctrines focus on the timing of the lawsuit. *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 553; 904 NW2d 192 (2017). For a matter to be ripe, the plaintiff must have an actual injury to bring a claim, and cannot premise their lawsuit on a hypothetical injury. *Id.* at 554.

Defendants argue that plaintiff lacks standing to sue under the “disappointed bidder doctrine.” As the Court of Appeals acknowledged in *Groves*, “Michigan jurisprudence has never recognized that a disappointed bidder . . . has the right to challenge the bidding process.” *Groves*, 295 Mich App at 5. This is because a contract bidder lacks an expectancy interest in the public contract to be awarded. *Id.* at 5-6. The rationale behind the rule is that competitive bidding for public contracts is designed to benefit taxpayers and not the parties seeking the contracts. *Id.* at 7.

presumed to intend the meaning clearly expressed, and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature’s terms.” *Id.* As for the Prevailing Wage Act’s repealer, 2018 PA 171, to the extent the Court is required to interpret its provisions, the court will do so in line with the intent of the electors who initiated the law. *DeRuiter v Byron Twp*, 505 Mich 130, 139; 949 NW2d 91 (2020).

The problem with defendant’s theory is that plaintiff is not a disappointed bidder to a specific state contract. As plaintiff notes, each case defendant cites addressed a losing bidder’s challenge to a state contract after it was made. See *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 492 Mich 40, 43-44; 821 NW2d 1 (2012) (the plaintiff, the lowest bidder, sued the defendant for tortious interference after a public body awarded a contract to the defendant, the second-lowest bidder); *Detroit v Wayne Circuit Judges*, 128 Mich 438, 438-439; 87 NW 376 (1901) (the city of Detroit accepted a bid to repave a street and the plaintiff, the lowest bidder, challenged the decision); *MCNA Ins Co v Dep’t of Tech, Mgt & Budget*, 326 Mich App 740, 741-742; 929 NW2d 817 (2019) (the petitioner submitted a proposal in response to a state request for submissions and challenged the respondent’s decision to accept another proposal); *Groves*, 295 Mich App at 4 (the plaintiff sued after another entity won a state-contract bid); and *Rayford v Detroit*, 132 Mich App 248; 347 NW2d 210 (1984) (laid-off police officers sued to get their jobs back after a change to the city budget). In this case, plaintiff is challenging defendant’s authority to enforce the prevailing-wage policy—not its decision to enter into a specific contract. Thus, the disappointed bidder doctrine does not preclude plaintiff’s lawsuit.

The Court looks, instead, to whether plaintiff has met the criteria to request declaratory relief under MCR 2.605. MCR 2.605(A)(1) provides, “In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.” Defendant challenges whether there is an “actual controversy” in this matter, arguing that plaintiff’s injury is purely hypothetical. It argues that plaintiff and its members have no special injury or right distinct from the public at large, which renders its claims unripe.

The most relevant case on this topic is *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486; 815 NW2d 132 (2012) (*UAW*). In *UAW*, the plaintiff sued on behalf of its members to enjoin enforcement of a policy relating to the political candidacy of the defendant's employees. *Id.* at 489-492. The defendant argued there was no actual controversy, for standing purposes, because it had not yet applied the policy to any employees. *Id.* at 492. The Court of Appeals held that courts may not decide hypothetical (or unripe) issues, but clarified that a court may grant declaratory relief to guide or direct future conduct. *Id.* at 495. "The essential requirement of an 'actual controversy' under the rule is that the plaintiff pleads and proves facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." *Id.* (quotation marks and citation omitted). Thus, the Court concluded that even though the defendant had not yet acted on the policy, the plaintiff had standing to settle the issue before it ripened into a violation of the law. *Id.* at 496-497.

Likewise, although plaintiff does not allege that defendant has denied its members a contract based on the prevailing-wage requirements, the Court concludes that, as a representative for bidders on state contracts, plaintiff has demonstrated an adverse interest that is distinct from the public at large and that necessitates a sharpening of the issues at this juncture. Plaintiff's injury is not purely hypothetical because its members must alter their business practices to obtain a state-government contract. Plaintiff has standing to sue for declaratory relief, and its claim is ripe for this Court's review.

B. SEPARATION OF POWERS

Next, defendant argues that the prevailing-wage policy was a proper exercise of its discretionary authority under the Management and Budget Act. On this point, the Court agrees.

Plaintiff's first challenge to defendant's authority to enact a prevailing-wage policy is on the basis of separation of powers. Article 3, § 2 of the Michigan Constitution provides for separation of powers among the three branches of government as follows: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

The Michigan Supreme Court has explained that " 'the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers.' " *Taxpayers of Mich against Casinos v Michigan*, 478 Mich 99, 105; 732 NW2d 487 (2007) (citation omitted). Rather, an overlap is permissible if " 'the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other' " *Id.* (citation omitted). Thus, the branches of government are not "wholly separate." *Id.* at 105-106 (quotation marks and citation omitted).

The separation-of-powers principle has led to the development of a standard known as the nondelegation doctrine. *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8; 658 NW2d 127 (2003). The nondelegation doctrine essentially prohibits the Legislature from delegating its power to either the executive branch or judicial branch, but permits the Legislature to obtain assistance from the other branches of government under certain circumstances. *Id.* By way of example, the Legislature may delegate a task to an executive-branch agency if the Legislature provides "sufficient standards" for the executive agency to follow, at which point the task becomes a proper exercise of executive power. *Id.* at 10 n 9.

The Legislature has delegated certain powers to defendant in the Management and Budget Act. Among other powers, MCL 18.1261(2) grants defendant broad discretionary authority over the award, solicitation, and amendment of state contracts. The statute provides, “The department shall *make all discretionary decisions* concerning the solicitation, award, amendment, cancellation, and appeal of state contracts.” MCL 18.1261(2) (emphasis added).

With that said, the Legislature also gave defendant ample guidance to support its discretionary decision making, as required under the nondelegation doctrine. By way of example, the Legislature requires defendant to award a construction contract to the “responsive and responsible best value bidder.” MCL 18.1241(4). The Legislature defined the term “responsive and responsible best value bidder” to mean the bidder who meets the following criteria:

- (a) A bidder who complies with all bid specifications and requirements.
- (b) A bidder who has been determined by the department to be responsible by the following criteria:
 - (i) The bidder’s financial resources.
 - (ii) The bidder’s technical capabilities.
 - (iii) The bidder’s professional experience.
 - (iv) The bidder’s past performance.
 - (v) The bidder’s insurance and bonding capacity.
 - (vi) The bidder’s business integrity.
- (c) A bidder who has been selected by the department through a selection process that evaluates the bid on both price and qualitative components to determine what is the best value for this state. Qualitative components may include, but are not limited to, all of the following:
 - (i) Technical design.
 - (ii) Technical approach.

(iii) Quality of proposed personnel.

(iv) Management plans. [MCL 18.1241(4)(a)-(4)(c).]

By providing the above criteria, the Legislature provides defendant with “sufficient standards” to follow, making the Management and Budget Act a proper delegation of legislative power. But beyond providing the above standards, the Legislature does not regulate defendant’s discretionary powers at the granular level. For example, when deciding the quality of proposed personnel, defendant has the discretion to determine what metrics it uses to measure the quality of the personnel, such as experiential background. Nor does the Legislature, provide detailed guidance on how to measure the bidder’s business integrity, leaving the specifics of that decision to defendant as well. The Legislature also does not direct defendant on what materials to require as part of the “technical design” or the “technical approach.”

The only case plaintiff cites to limit defendant’s discretionary authority to award a state contract is *Leavy v City of Jackson*, 247 Mich 447, 450; 226 NW 214 (1929), in which the Michigan Supreme Court held that a public body’s exercise of discretion to accept or reject contract bids is only curtailed when necessary to prevent fraud, violation of trust, or an injustice. But plaintiff does not allege that defendant has acted with fraud or has committed a violation of trust. 2018 PA 171 simply repealed the Prevailing Wage Act without substituting any language in its place or providing any rationale for the repeal. See 2018 PA 171. The Court declines to read any prohibitions into the Prevailing Wage Act repealer that do not appear in, and cannot be implied from, the language of the statute. See *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 564; 741 NW2d 549 (2007) (“A court cannot read into a clear statute that which is not within the manifest intention of the Legislature as derived from the language of the statute itself.”).

The Court finds *Associated Builders & Contractors v Lansing*, 499 Mich 177; 880 NW2d 765 (2016), instructive in this context. In *Associated Builders*, the plaintiff alleged that the defendant (a municipality) lacked authority to adopt an ordinance regulating wages paid by third parties, even when the work was done on municipal contracts and through the use of municipal funds. *Id.* at 181. The Michigan Supreme Court, however, held that municipalities had broad constitutional powers over local concerns, which included the power to set terms for municipal contracts with third parties. *Id.* at 187-188. Thus, because the Michigan Constitution granted municipalities broad control over local concerns, and because there was no other source of law prohibiting the city of Lansing from setting a wage policy, Lansing’s ordinance withstood the plaintiff’s challenge. *Id.* at 189-190. Similarly, in this case, the Prevailing Wage Act repealer did not limit defendant’s broad authority under the Management and Budget Act to enact policies relating to state contracts, including a prevailing-wage policy.

Had the Legislature wished to limit defendant’s ability to set a prevailing wage, it could have done so through statute. The Local Government Labor Regulatory Limitation Act, MCL 123.1381 *et seq.*, expressly prohibits local governments from requiring employers to pay an employee a wage or benefit based on the prevailing wage in the locality. MCL 123.1386 provides, in relevant part, “A local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution requiring an employer to pay to an employee a wage or fringe benefit based on wage and fringe benefit rates prevailing in the locality.” The statute did not apply to state projects subject to the Prevailing Wage Act (which was still in effect at the time the Local Government Labor Regulatory Limitation Act was enacted). *Id.* The rationale for the Local Government Labor Regulatory Limitation Act was the Legislature’s conclusion that “regulation of the employment relationship between a nonpublic employer and its employees is a matter of

state concern and is outside the express or implied authority of local governmental bodies to regulate, absent express delegation of that authority to the local governmental body.” MCL 123.1382. This statute demonstrates that the Legislature knew how to limit another governmental body’s ability to set a prevailing wage. The Legislature declined to do so here. And while plaintiff notes that the repeal of the Prevailing Wage Law was initiated by voter petition (not by proposed legislation), the Legislature could have proposed an alternative law for voter consideration that expressly prohibited prevailing wage. Or, now that the 2018 legislative session has expired, the Legislature could pass a new law at any time prohibiting defendant from establishing a prevailing-wage policy.

Finally, plaintiff argues that defendant’s interpretation of its powers under the Management and Budget Act conflicts with certain prohibitions outlined in the Fair and Open Competition in Governmental Construction Act, MCL 408.871 *et seq.* The implication is that by violating the Fair and Open Competition in Governmental Construction Act, defendant has violated the separation-of-powers doctrine as well.

The purpose of Fair and Open Competition in Governmental Construction Act is to “provide for more economical, nondiscriminatory, neutral, and efficient procurement of construction-related goods and services by this state and political subdivisions of this state as market participants, and providing for fair and open competition best effectuates this intent.” MCL 408.872.³ Plaintiff cites MCL 408.875, which provides:

³ As intervening-defendant notes, the Sixth Circuit has concluded that the Fair and Open Competition in Governmental Construction Act is proprietary—as opposed to regulatory—in nature. *Mich Bldg and Constr Trades Council v Snyder*, 729 F3d 572, 577 (CA 6, 2013).

Subject to section [MCL 408.878], a governmental unit awarding a contract on or after the effective date of the amendatory act that added [MCL 408.872] for the construction, repair, remodeling, or demolition of a facility and any construction manager acting on its behalf shall not, in any bid specifications, project agreements, or other controlling documents:

(a) Require or prohibit a bidder, offeror, contractor, or subcontractor from entering into or adhering to an agreement with 1 or more labor organizations in regard to that project or a related construction project.

(b) Otherwise discriminate against a bidder, offeror, contractor, or subcontractor for becoming or remaining or refusing to become or remain a signatory to, or for adhering or refusing to adhere to, an agreement with 1 or more labor organizations in regard to that project or a related construction project.

Plaintiff argues that the prevailing-wage policy discriminates in favor of bidders who enter into collective bargaining agreements with unionized employees, in violation of MCL 408.875(b). It points to language in a Michigan Department of Labor and Economic Opportunity (LEO) document titled “DTMB Prevailing Wage Commercial Survey,” which defendant used to set the prevailing-wage rates. Plaintiff argues that the survey violated the Fair and Open Competition in Governmental Construction Act because the survey directs prospective bidders, “It is critical that you provide a copy of the pertinent collective bargaining agreement and the applicable understanding or understandings, if any, for each listed rate, and that you indicate the page numbers where all information is found as requested on the form.” But plaintiff does not cite the entirety of the provision.

The complete text of relevant provision in the commercial survey provides:

Please provide prevailing wages and fringe benefits currently in effect under the applicable collective bargaining agreement, and under any applicable understandings associated with the agreement. List rates separately for each geographic area and, if applicable, for each size of project for which there are different rates in effect.

On each rate sheet you complete, if there is only one pay rate in effect for a job classification, list that rate as the prevailing wage. If there is more than one pay

rate in effect, list as the prevailing wage the one that has been the most frequently or commonly paid during the 60 days prior to completing this Survey. In determining the most common or frequent wage, include the pay rates in effect in the area even if a collective bargaining agreement or understanding excludes those rates from prevailing wage projects.

It is critical that you provide a copy of the pertinent collective bargaining agreement and the applicable understanding or understandings, if any, for each listed rate, and that you indicate the page numbers where all information is found as requested on the form.

Rates cannot be included in the state prevailing wage schedules if they are not submitted with a current collective bargaining agreement or understanding.

Considering the survey as a whole, the language of the survey does not constitute a “bid specification,” a “project agreement” or another “controlling document” as outlined in MCL 480.875. Rather, the survey is intended to assist defendant in establishing the prevailing wage in a given locality. There is no indication, from this document alone, that defendant has discriminated against (or intends to discriminate against) any specific bidder for refusing to enter into a collective-bargaining agreement. In fact, in another document titled *Informational Sheet: Prevailing Wages on DTMB Projects*, attached to plaintiff’s complaint, defendant has explained, “Prevailing rates are compiled from the rates contained in collectively bargained agreements which cover the locations of the state projects. While the DTMB prevailing wage rates are compiled through surveys of collectively bargained agreements, a collective bargaining agreement is *not required* for contractors to be on or be awarded state projects.” (Emphasis added.) The survey, in and of itself, does not violate the Fair and Open Competition in Governmental Construction Act or establish a separation-of-powers violation.

The bottom line is that plaintiff attempts to read language into the initiative petition repealing the Prevailing Wage Act that does not appear in the repealer. The voter-initiated law simply repealed the Prevailing Wage Act, without otherwise limiting defendant’s authority under

the Management and Budget Act. When the Prevailing Wage Act was repealed, the Management and Budget Act became the status quo. At present, the Management and Budget Act provides defendant with broad discretionary authority, which encompasses the ability to establish a prevailing-wage policy. Plaintiff has not pointed to a single source that denies defendant that discretion or prohibits defendant from setting a prevailing wage for construction contracts. For these reasons, defendant's implementation of a prevailing-wage policy does not violate separation of powers.

C. APA COMPLIANCE

Plaintiff next argues that defendant failed to follow the appropriate procedures to enact the prevailing-wage policy as a "rule" under the APA. Plaintiff further contends that when the Legislature repealed the Prevailing Wage Act, there was no longer an "executive agency actor" who had the power to make or enforce a prevailing-wage requirement. But the Management and Budget Act grants defendant broad discretionary authority relating to solicitation and award of state contracts. See MCL 18.1261(2). So defendant continued to serve as the executive agency actor with the power to set or enforce a prevailing-wage requirement.

Moreover, defendant does not claim that its prevailing-wage policy was a "rule" within the meaning of the APA. Rather, defendant's position is that the policy falls within an exception to the APA's rulemaking requirements, as outlined in MCL 24.207(j). MCL 24.207 defines the term "rule" to mean, in relevant part:

an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency.

In general, an administrative agency cannot rely on a guideline or policy in lieu of a rule promulgated under the APA. *Romulus v Mich Dep't of Environmental Quality*, 260 Mich App 54, 82; 678 NW2d 444 (2003). The APA requires agencies to follow certain procedures, including providing notice and holding a hearing. *Id.*, citing MCL 24.241 (outlining the notice and hearing requirements for a proposed rule). The failure to do so will render the rule invalid. *Id.*

But there are several exceptions. Defendant relies on the exception for “[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.” MCL 24.207(j). As the Court of Appeals has explained, “If an agency policy follows from its statutory authority, the policy is an exercise of permissive statutory power and not a rule requiring formal adoption.” *Pyke v Dep't of Social Servs*, 182 Mich App 619, 630; 453 NW2d 274 (1990). MCL 24.207(p) also excludes from the definition of rule “[t]he provisions of an agency’s contract with a public or private entity including, but not limited to, the provisions of an agency’s standard form contract.”

The Court of Appeals explored a similar situation in *Village of Wolverine Lake v Mich State Boundary Comm*, 79 Mich App 56; 261 NW2d 206 (1977). In *Wolverine Lake*, both Commerce Township and the Village of Wolverine Lake submitted separate petitions to the State Boundary Commission (SBC) to incorporate their existing township and village. *Id.* at 57. The SBC granted Commerce Township’s petition, denied Wolverine Lake’s petition, and adjusted the boundaries for Commerce Township to include the Village of Wolverine Lake. *Id.* at 57-58.

Wolverine Lake challenged the decision, arguing that the SBC had adopted a “rule,” without engaging in proper rulemaking procedures, that disfavored small cities in the metropolitan Detroit area. *Id.* at 58. The Court concluded, however, that the SBC exercised a permissive

statutory power under MCL 123.1009, which provided the SBC with criteria when considering a petition for proposed incorporation. Like the Management and Budget Act, the statute at issue in *Wolverine Lake* did *not* expressly permit favoring larger communities, but allowed the SBC to consider certain factors, including “past and probable future urban growth,” “probable future needs for services,” “practicability of supplying such services,” “the probable effect on the cost and adequacy of services in the area to be incorporated and on the remaining portion of the unit from which the area will be detached,” and “the financial ability of the incorporating municipality to maintain urban type services in the area.” *Id.* at 59.

The Court concluded that, because the statutory criteria favored “future growth and ability to provide services,” the SBC was bound to favor larger communities with an industrial-tax base. *Id.* Thus, the statute—not the SBC’s internal policies--created the perceived bias against small communities. *Id.* at 59-60. See also *Hinderer v Dir, Mich Dep’t of Social Servs*, 95 Mich App 716, 727; 291 NW2d 672 (1980) (citing *Wolverine Lake* for the proposition that “if an agency policy . . . follows from its statutory authority, the policy is an exercise of a permissive statutory power and not a rule requiring formal adoption”).

Here, as discussed earlier, the Management and Budget Act grants defendant broad discretionary powers when awarding state contracts, but provides certain criteria for defendant to consider when awarding a contract to the responsive and responsible best-value bidder. Defendant’s prevailing-wage policy follows from its permissive statutory authority to make *all* discretionary decisions about the solicitation and award of state contracts. See MCL 18.1261(2). Thus, the prevailing-wage policy falls within the exception to rulemaking outlined in MCL 24.207(j). Additionally, the prevailing-wage policy applies to, and forms a term of, defendant’s contracts with private entities. So the rulemaking exception outlined in MCL 24.207(p) applies in

this circumstance as well.⁴ Accordingly, defendant was not required to follow the APA’s formal rulemaking process when enacting the prevailing-wage policy.

D. *ULTRA VIRES* ACTIVITY

Plaintiff also argues that the prevailing-wage policy was an *ultra vires* exercise of governmental power. An *ultra vires* activity is one that is “not expressly or impliedly mandated or authorized by law.” *Richardson v Jackson Co*, 432 Mich 377, 381; 443 NW2d 105 (1989). For the reasons discussed earlier, defendant did not engage in an *ultra vires* activity because its decision to implement a prevailing-wage policy was within its discretionary powers outlined in the Management and Budget Act.⁵

III. CONCLUSION

For these reasons, the Court GRANTS defendant’s motion for summary disposition. Because the Court concludes that defendant is entitled to summary disposition, the Court need not

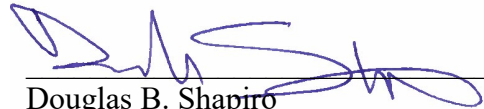
⁴ Even if the prevailing-wage policy were a “rule,” MCL 24.264 provides that the validity of a rule may be determined in a declaratory-judgment action only if it impairs the legal rights or privileges of the plaintiff. Plaintiff’s members have no legal right or privilege to obtain a state contract or to prohibit the state from considering their wages when granting a government contract. The outcome for plaintiff’s members, if they fail to abide by the prevailing-wage policy, is the denial of a state contract; they are still eligible for local or private jobs.

⁵ Plaintiff also cites the Michigan Supreme Court’s recent decision in *People v Peeler*, ___ Mich ___; ___ NW2d ___ (2022) (Docket Nos. 163667, 163672, and 164191), for the position that “an administrative official [cannot] revive the content and meaning of a statute that has been specifically amended to remove that content.” *Peeler* explored the exercise of a “one-man grand jury,” as outlined in MCL 767.3 and MCL 767.4. *Id.* at ___; slip op at 2. The Court concluded that although the Legislature had initially permitted judges to issue indictments, it later amended the relevant statute to remove that authority. *Id.* at ___; slip op at 12. The Court held, therefore, that the statute did not permit a judicial indictment initiating a criminal prosecution. *Id.* at ___; slip op at 12-13, 15. Where this case differs from *Peeler* is the fact that the Legislature *has* provided defendant with broad discretionary powers in relation to the solicitation, award, amendment, cancellation, and appeal of state contracts. See MCL 18.1261(2). *Peeler* is inapplicable in this context.

address the merits of plaintiff's motion for a preliminary injunction, which is DISMISSED AS MOOT.

This is a final order that dismisses the final claim and closes the case.

Date: October 10, 2022



Douglas B. Shapiro
Judge, Court of Claims

STATE OF MICHIGAN
COURT OF CLAIMS

ASSOCIATED BUILDERS AND
CONTRACTORS OF MICHIGAN (aka ABC
OF MICHIGAN), a nonprofit Michigan
Corporation

Case No.: 22- 000111 -MZ

Plaintiff,

Hon. [Douglas B. Shapiro](#)

v.

Verified Complaint

DEPARTMENT OF TECHNOLOGY,
MANAGEMENT & BUDGET, a state
government agency.

Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Patrick J. Wright (P54052)
Mackinac Center Legal Foundation
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900 – voice
wilcox@mackinac.org

VERIFIED COMPLAINT

There is no other pending or resolved civil action arising out of the same transaction or occurrence alleged in the complaint.

NOW COMES Plaintiff, ABC Michigan, and for its Verified Complaint alleges and states as follows:

INTRODUCTION

The State of Michigan’s Department of Technology, Management & Budget (“DTMB”) has, at the instruction of Governor Whitmer, instituted a requirement that those bidding on state

contracts for a project greater than \$50,000 must pay their construction employees the “prevailing wage” in a given region. A contractor cannot make a bid on a contract that includes payments to construction employees of less than this required rate. This policy is commonly referred to as “prevailing wage,” and this description will be used throughout this Complaint.

Prevailing wage in Michigan was previously permitted by statute, but had been repealed in 2018 following voter-initiated legislation.

The Governor has seemingly revived this repealed procedure, but has not done so by either enforcing legislation or through the procedures of the Administrative Procedures Act. Rather, the policy has been implemented by unilateral edict from the Governor’s office. This is not a proper method of governance and is not binding on Plaintiff.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, ABC of Michigan (“ABC”), is a Michigan nonprofit incorporated trade association headquartered in Ingham County, Michigan.
2. ABC is a trade association representing more than 900 construction and construction-related firms through the State of Michigan and in bordering states. ABC’s members include both unionized and non-union construction contractors who share a belief that construction work should be awarded to and performed by the lowest responsible bidder based upon merit. ABC employer members employ a combined workforce of more than 30,000 individuals. ABC’s members have been injured by the unlawful acts of the Defendants, and the relief sought by ABC would redress its members’ injuries.
3. As bidders on state contractors, ABC’s members have standing to challenge the policies that are the subject of this action. ABC’s members have standing because they have a substantial interest in Defendant’s application of the subject policy and will be

detrimentally affected in a manner different from the citizenry at large under the enforcement of this subject policy.

4. Because ABC's members have standing, ABC has standing. "Nonprofit organizations, such as plaintiffs, have standing to bring suit in the interest of their members where such members would have standing as individual plaintiffs." *National Wildlife Federation v Cleveland Cliffs Iron Co.*, 471 Mich 608, 814 (2004).
5. ABC's members are able to offer comparative advantages over competitors without prevailing wage by providing high-quality services at a lower cost to the taxpayer. Prevailing wage hurts ABC's members by preventing them from being able to compete on the highly important factor of price, which many smaller and entrepreneurial members are able to leverage to their advantage.
6. Defendant, the Department of Technology, Management & Budget ("DTMB") is a state government agency headquartered in Ingham County, Michigan.
7. Venue is proper pursuant to MCL 600.6419(1)(a).
8. This court has jurisdiction under MCL 24.264 to issue declaratory judgments pertaining to the Administrative Procedures Act of 1969 ("APA"), MCL 24.207 *et seq.*
9. Pursuant to MCL 600.6419(1)(a), the Court of Claims has jurisdiction over this claim.

**THE REVIVAL OF THE PREVAILING WAGE POLICY WAS NOT DONE IN A
VALID MANNER**

10. The Plaintiff hereby incorporates the preceding paragraphs as if fully restated herein.
11. Michigan had enacted a prevailing wage statute via 1965 PA 166, "PREVAILING WAGES ON STATE PROJECTS." "An act to require prevailing wages and fringe benefits on state projects; to establish the requirements and responsibilities of contracting

agents and bidders; to prescribe penalties,” (MCL 408.551 to 408.558, since repealed).
(See Exhibit A in the attached Appendix for relevant portions - Sec. 1 through 4.)

12. This 1965 prevailing wage Act was repealed by 2018 PA 171. “Public Act 171 of 2018 was proposed by initiative petition pursuant to Const 1963, art 2, § 9. On June 6, 2018, the initiative petition was approved by an affirmative vote of the majority of the Senate and the House of Representatives, and filed with the Secretary of State.” (Exhibit B in the Appendix. ¹)

13. 2018 PA 171 specifically stated: “408.551-408.558 Repealed. 2018, Act 171, Imd. Eff. June 6, 2018.” (Exhibit B, supra.)

14. Governor Whitmer announced the reimplementation of this repealed prevailing wage policy on or about October 7, 2021 via a press release. (Exhibit C in the Appendix. ²)

15. There was no executive order which accompanied the October 7, 2021 press release.

16. There was no executive directive which accompanied the October 7, 2021 press release.

17. In the October 7, 2021 press release, the Governor claimed the authority to re-implement prevailing wage by claiming: “Michigan's repeal eliminated the state's prevailing wage requirement, but left the door open for DTMB to require prevailing wage under its authority to develop the terms of state contracts. Governor Whitmer is proud to make that call and reinstate prevailing wage.” (Exhibit C, supra.)

18. Sometime before March 1, 2022, DTMB posted certain requirements on its website:
“Beginning March 1, 2022, the State of Michigan will require state contractors and

¹ See also, <http://legislature.mi.gov/documents/2017-2018/initiative/pdf/prevailingwage.pdf>, last accessed April 19, 2022.

² See also, <https://www.michigan.gov/whitmer/news/press-releases/2021/10/07/gov--whitmer-to-reinstate-prevailing-wage-for-state-construction-projects>, last accessed April 19, 2022.

subcontractors to pay prevailing wage on construction-based contracts issued by the Department of Technology, Management & Budget. These changes do not impact or change any provisions in place to comply with the Federal Davis-Bacon act.” (See Exhibit D attached to the Appendix.³)

19. DTMB similarly published a number of requirements that contract bidders must comply with. See Exhibit E⁴ and F⁵.

20. On October 21, 2021, the Mackinac Center for Public Policy (which is not a party to this action, although attorneys affiliated with the Mackinac Center are the representing attorneys of record) submitted a Freedom of Information Act (“FOIA”) request to DTMB requesting records of any directive issued by the Governor requiring the implementation of this prevailing wage policy. Specifically, the FOIA request asked for: “The executive directive issued by Governor Whitmer requiring the Department to implement prevailing wage requirements for state construction projects. To assist you in your search, this action was announced by Governor Whitmer on October 7, 2021.” The request linked to the Governor’s October 7th press release that is attached as Exhibit C to the Appendix. (See Exhibit G in the Appendix, October 20, 2021 email from Jarrett Skorup to DTMB.)

³ See also, <https://www.michigan.gov/dtmb/procurement/design-and-construction/prevailing-wage-information>, last accessed April 19, 2022.

⁴ See also, <https://www.michigan.gov/leo/-/media/Project/Websites/leo/Documents/WAGE-HOUR/WH-99xx-Information-Sheets/WH-9917-PW-FRINGE-BENEFIT-INFO-SHEET/WH-9917->

[SOM_commercial_Issued_Schedule_Attachments_2022.pdf?rev=a943b3ed039d4e8a8b82fd73fdbbf18a&hash=AB3A1518BEF29B0C7CF55A86D17A1133](https://www.michigan.gov/leo/-/media/Project/Websites/leo/Documents/WAGE-HOUR/WH-99xx-Information-Sheets/WH-9917-PW-FRINGE-BENEFIT-INFO-SHEET/WH-9917-SOM_commercial_Issued_Schedule_Attachments_2022.pdf?rev=a943b3ed039d4e8a8b82fd73fdbbf18a&hash=AB3A1518BEF29B0C7CF55A86D17A1133), last accessed April 19, 2022.

⁵ See also, https://www.michigan.gov/leo/-/media/Project/Websites/leo/Documents/WAGE-HOUR/WH-99xx-Information-Sheets/WH-9918-PW-REQUIREMENTS-INFO-SHEET/WH-9918-DTMB-PW-rates-1-31-2022_ad-jf_.pdf?rev=c57b0d340ff949628e047b97ad0ec7e8&hash=7EB99D633A319BF2F786BAE24E60396E. last accessed April 19, 2022.

21. On October 25, 2021, DTMB responded to this request with a denial, stating: “It is hereby certified that, to the best of the undersigned’s knowledge, information, and belief, records do not exist within the Department of Technology, Management and Budget, under the description you provided or under another name reasonably known to the department.” (See Exhibit H in the Appendix, “October 25, 2021 DTMB letter to Jarrett Skorup.”)
22. It is thereby the position of the DTMB that, as of October 25, 2021, it had not received any direction from the Governor to implement the prevailing wage policy.
23. On March 2, 2022, Mackinac Center again submitted another related FOIA request. This time it requested: “Any instruction from Governor Whitmer to the Department of Technology, Management, and Budget (DTMB) regarding prevailing wage requirements. The executive directive issued by Governor Whitmer requiring the Department to implement prevailing wage requirements for state construction projects. Any documents with DTMB which demonstrates their ability to enforce ‘prevailing wage’ requirements.” (See Exhibit I in the Appendix, “March 2, 2022 FOIA request.”)
24. On May 12, 2022, DTMB responded by granting the Center’s response in part and denying it in part. DTMB also produced documents and correspondence, much of which appears to have been between the Attorney General’s Office and DTMB. The cover letter for this response is attached herein as Exhibit J to the Appendix, “May 12, 2022 Letter to Jarrett Skorup.” The package included a pdf document with 752 pages, which has not been attached in its entirety here, although specific individual pages will be.
25. Regardless, the records produced on May 12, 2022 demonstrate that representatives from the Governor’s office communicated with DTMB. For example, Zach Kolodin (the then-Deputy Legal Counsel and Public Policy Counsel for the Officer of the Governor) was in

communication with DTMB regarding prevailing wage. (See Exhibit K, Kolodin email, attached herein to the Appendix, which is page 67 out of 752 in the pdf document produced pursuant to FOIA.)

26. Upon information and belief, the subject of these communications described in the previous paragraph was, at least in part, the creation of prevailing wage requirements on state construction projects, as well as legal and practical issues surrounding the same.
27. Another email June 4, 2021 email from Brom Stibitz, the Director and Chief Information Officer for DTMB, to Totten reveals that DTMB engaged in discussions with the Attorney General's office at Totten's request. Upon information and belief, the subject of that redacted discussion was the implementation of prevailing wage for state construction projects. The subject line is "Prevailing Wage." (See Exhibit L, attached herein to the Appendix, which is page 713 out of 752 in the pdf document produced pursuant to FOIA.)
28. Upon information and belief, DTMB was prompted to adopt prevailing wage requirements after a request to do so originating from the Governor's office.
29. The subject prevailing wage requirements were not legislatively enacted.
30. The DTMB was not granted specific legislative authority, through the Administrative Procedures Act or any other delegation, to adopt the subject prevailing wage requirements.
31. The subject prevailing wage requirements do not constitute a form with instructions that in itself does not have the force and effect of law but is merely explanatory.
32. The subject prevailing wage requirements are not an interpretive statement that in itself does not have the force and effect of law but is merely explanatory.
33. The subject prevailing wage requirements are not a guideline that in itself does not have the force and effect of law but is merely explanatory.

34. The subject prevailing wage requirements are not an informational pamphlet that in itself does not have the force and effect of law but is merely explanatory.
35. The subject prevailing wage requirements are not any other material (other than those cited in the preceding four paragraphs) that in itself does not have the force and effect of law but is merely explanatory.
36. The subject prevailing wage requirements causes harm to Plaintiff and hurts its members' competitive advantage in bidding on contracts.

COUNT I

VIOLATION OF THE SEPARATION OF POWERS

37. Plaintiff incorporates the preceding paragraphs herein as though restated in their entirety.
38. "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const. 1963, Art. III, § 2.
39. The executive branch cannot exercise the powers belonging to the legislature absent a clear grant of authority from the legislature.
40. "Statutes that grant power to administrative agencies are strictly construed and the authority granted the administrative agency must be plainly granted." *Michigan State Employees Ass'n v Dept of Corrections*, 275 Mich App 474 (2007).
41. The legislature had enacted a prevailing wage statute via 1965 PA 166, "PREVAILING WAGES ON STATE PROJECTS."
42. The legislature acted again when it repealed the prevailing wage Act with 2018 PA 171.

43. Prior to 2021, enacting or repealing prevailing wage in Michigan for those contracting with the state had always been done by legislation.
44. The executive branch cannot, under our 1963 Constitution, perform legislative functions such as creating a prevailing wage law, absent an explicit legislative grant of authority.
45. The DTMB, is an agency in the executive branch.
46. Neither the Governor nor DTMB can exercise the powers of the legislature absent a clear grant of that authority from the legislature.
47. The executive branch and its agencies have no legislative mandate to exercise legislative powers regarding prevailing wage after the repeal in 2018 PA 171.
48. Neither Plaintiff nor its members are employees of the executive branch.
49. No entity who bids on a contract which is subject to this prevailing wage requirement is an employee of the executive branch
50. If an entity bids on contract that is subject to this prevailing wage requirement, and its bid is accepted and it performs the work, it is still not a state employee. It is an independent contractor.

COUNT II

NONCOMPLIANCE WITH THE ADMINISTRATIVE PROCEDURES ACT

51. Plaintiff incorporates the preceding paragraphs herein as though restated in their entirety.
52. The subject prevailing wage requirements were not promulgated in accordance with the Administrative Procedures Act of 1969 (“APA”), MCL 24.201 et seq.
53. The DTMB is an administrative agency subject to the provisions of the APA.
54. After the repeal of the prevailing wage requirements in 2018 PA 171, the DTMB lacked the authority to promulgate rules on prevailing wage pursuant to the APA.

55. The subject prevailing wage requirements, to be valid as administrative rules, should have been promulgated as rules in accordance with the APA, MCL 24.201 et seq.
56. The subject prevailing wage requirements have the effect of law and must be a “rule” under the APA to be enforceable.
57. The definition of “rule” under MCL 24.207 is broadly construed to reflect the APA's preference for policy determinations pursuant to rules, while the exceptions are narrowly construed. *AFSCME v Dep't of Mental Health*, 452 Mich 1, 10 (1996).
58. An agency may not avoid the requirements for promulgating rules by issuing its directives under different labels. *AFSCME v Dep't of Mental Health*, 452 Mich 1, 9 (1996).
59. The subject prevailing wage requirements were not published in the administrative code.
60. Pursuant to MCL 24.243(1), “Except for an emergency rule promulgated in the manner described in section 48, a rule is not valid unless it is processed in compliance with section 66, if applicable, section 42, and in substantial compliance with section 41(2), (3), (4), and (5).”
61. The subject prevailing wage requirements were not processed in compliance with the required sections of MCL 24.243(1).
62. The subject prevailing wage requirements are not “rates” or a “tariffs” as defined in MCL 24.207(c).
63. The subject prevailing wage requirements are not “guidelines” as defined in MCL 24.203(7).
64. The subject prevailing wage requirements are not a “provision of an agency’s contract” as defined in MCL 24.207(p).

65. There was no notice and public hearing on the subject prevailing wage requirements as required by MCL 24.241.

66. There was no filing and publication of the subject prevailing wage requirements as a rule which would fulfill the requirements of MCL 24.261.

COUNT III

ACTING ULTRA VIRES

67. The Plaintiff restates the preceding paragraphs as though fully restated herein.

68. The subject prevailing wage requirements were not validly enacted as legislation, binding rules under the APA, or any other process which would make these legally binding on Plaintiff.

69. The policy imbedded in these prevailing wage requirements is more than a mere development of the form of state contracts. This is demonstrated by the fact that this policy had, in the past, been both enacted and removed via legislation.

70. The DTMB cannot simply do by developing contract forms what had previously required legislative enactment.

71. Our courts apply the general/specific canon, *generalia specialibus non derogant*, when there is a conflict between a general provision and a specific provision. “The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission.” *RadLAX Gateway Hotel, LLC v Amalgamated Bank*, 566 US 639, 645; 132 S Ct 2065 (2012); “If there is a conflict between a general provision and a specific provision, the specific provision prevails” Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p. 183; “[T]he rule only applies when there is some

statutory tension or conflict between two possible treatments of a subject” *Detroit Edison Co v Dep’t of Treasury*, 498 Mich 28, at 44 (2015).

72. Here, the above cited general/specific cannon prevents DTMB from enacting a policy under its *general* authority when that same policy had been disallowed by a *specific* revocation, as occurred in 2018 PA 171.

73. Our Supreme Court has defined *ultra vires* activities as those governmental activities which are “not expressly or impliedly mandated or authorized by constitution, statute, or other law.” See *Ross v Consumers Power Co* (On Rehearing), 420 Mich 567 (1984).

74. The DTMB is enforcing requirements which are not expressly or impliedly mandated or authorized by constitution, statute, valid rule, or other law.

75. The subject prevailing wage requirements are therefore *ultra vires*, invalid, and unenforceable.

RELIEF REQUESTED

For the reasons stated above, the subject prevailing wage policy is unenforceable. Plaintiff requests a declaratory judgment pursuant to MCR 2.605; injunctive relief pursuant to MCR 3.310(A); and any other relief in law or equity that this court deems appropriate, along with attorney fees and costs.

Respectfully submitted,

July 21, 2022

By:


Jimmy E. Greene
President, ABC Michigan

STEPHEN DELIE
Notary Public, State of Michigan
County of Ingham
My Commission Expires 07-29-2025
Acting In the County of Midland

STATE OF MICHIGAN
COURT OF CLAIMS

ASSOCIATED BUILDERS AND
CONTRACTORS OF MICHIGAN (aka ABC
OF MICHIGAN), a nonprofit Michigan
Corporation

Case No.: 22-_____ -MZ

Plaintiff,

Hon.

v.

Appendix to the Verified Complaint

DEPARTMENT OF TECHNOLOGY,
MANAGEMENT & BUDGET, a state
government agency.

Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Patrick J. Wright (P54052)
Mackinac Center Legal Foundation
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900 – voice
wilcox@mackinac.org

APPENDIX

EXHIBIT A

EXHIBIT A

EXHIBIT A

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM

Michigan Compiled Laws Annotated

Chapter 408. Labor

Prevailing Wages on State Projects [Repealed]

This section has been updated. [Click here for the updated version.](#)

M.C.L.A. 408.551

408.551. Definitions

Effective: [See Text Amendments] to June 5, 2018

Sec. 1. As used in this act:

(a) “Construction mechanic” means a skilled or unskilled mechanic, laborer, worker, helper, assistant, or apprentice working on a state project but shall not include executive, administrative, professional, office, or custodial employees.

(b) “State project” means new construction, alteration, repair, installation, painting, decorating, completion, demolition, conditioning, reconditioning, or improvement of public buildings, schools, works, bridges, highways, or roads authorized by a contracting agent.

(c) “Contracting agent” means any officer, school board, board or commission of the state, or a state institution supported in whole or in part by state funds, authorized to enter into a contract for a state project or to perform a state project by the direct employment of labor.

(d) “Commissioner” means the department of labor.

(e) “Locality” means the county, city, village, township, or school district in which the physical work on a state project is to be performed.

M. C. L. A. 408.551, MI ST 408.551

The statutes are current through P.A.2022, No. 93, of the 2022 Regular Session, 101st Legislature. Some statute sections may be more current; see credits for details.

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM

Michigan Compiled Laws Annotated

Chapter 408. Labor

Prevailing Wages on State Projects [Repealed]

This section has been updated. [Click here for the updated version.](#)

M.C.L.A. 408.552

408.552. Contracts for state projects; provision as to minimum wage rates; exception

Effective: [See Text Amendments] to June 5, 2018

Sec. 2. Every contract executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics, other than those subject to the jurisdiction of the state civil service commission, and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his subcontractors, shall be not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed. Contracts on state projects which contain provisions requiring the payment of prevailing wages as determined by the United States secretary of labor pursuant to the federal Davis-Bacon act (United States code, title 40, section 276a et seq.) or which contain minimum wage schedules which are the same as prevailing wages in the locality as determined by collective bargaining agreements or understandings between bona fide organizations of construction mechanics and their employers are exempt from the provisions of this act.

M. C. L. A. 408.552, MI ST 408.552

The statutes are current through P.A.2022, No. 93, of the 2022 Regular Session, 101st Legislature. Some statute sections may be more current; see credits for details.

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.

| |
|---|
| Michigan Compiled Laws Annotated |
| Chapter 408. Labor |
| Prevailing Wages on State Projects [Repealed] |

This section has been updated. [Click here for the updated version.](#)

M.C.L.A. 408.553

408.553. Contracts for state projects; prevailing rates of wages and fringe benefits; schedule of rates to be made part of specifications

Effective: [See Text Amendments] to June 5, 2018

Sec. 3. A contracting agent, before advertising for bids on a state project, shall have the commissioner determine the prevailing rates of wages and fringe benefits for all classes of construction mechanics called for in the contract. A schedule of these rates shall be made a part of the specifications for the work to be performed and shall be printed on the bidding forms where the work is to be done by contract. If a contract is not awarded or construction undertaken within 90 days of the date of the commissioner's determination of prevailing rates of wages and fringe benefits, the commissioner shall make a redetermination before the contract is awarded.

M. C. L. A. 408.553, MI ST 408.553

The statutes are current through P.A.2022, No. 93, of the 2022 Regular Session, 101st Legislature. Some statute sections may be more current; see credits for details.

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.

| |
|---|
| Michigan Compiled Laws Annotated |
| Chapter 408. Labor |
| Prevailing Wages on State Projects [Repealed] |

This section has been updated. [Click here for the updated version.](#)

M.C.L.A. 408.554

408.554. Commissioner to establish prevailing wages; hearings

Effective: [See Text Amendments] to June 5, 2018

Sec. 4. The commissioner shall establish prevailing wages and fringe benefits at the same rate that prevails on projects of a similar character in the locality under collective agreements or understandings between bona fide organizations of construction mechanics and their employers. Such agreements and understandings, to meet the requirements of this section, shall not be controlled in any way by either an employee or employer organization. If the prevailing rates of wages and fringe benefits cannot reasonably and fairly be applied in any locality because no such agreements or understandings exist, the commissioner shall determine the rates and fringe benefits for the same or most similar employment in the nearest and most similar neighboring locality in which such agreements or understandings do exist. The commissioner may hold public hearings in the locality in which the work is to be performed to determine the prevailing wage and fringe benefit rates. All prevailing wage and fringe benefit rates determined under this section shall be filed in the office of the commissioner of labor and made available to the public.

M. C. L. A. 408.554, MI ST 408.554

The statutes are current through P.A.2022, No. 93, of the 2022 Regular Session, 101st Legislature. Some statute sections may be more current; see credits for details.

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MCCOC 7/21/2022 11:53:17 AM

RECEIVED by MCOA 3/24/2023 8:53:44 AM

EXHIBIT B

EXHIBIT B

EXHIBIT B

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM

PREVAILING WAGES ON STATE PROJECTS
Act 166 of 1965

408.551-408.558 Repealed. 2018, Act 171, Imd. Eff. June 6, 2018.

Compiler's note: Public Act 171 of 2018 was proposed by initiative petition pursuant to Const 1963, art 2, § 9. On June 6, 2018, the initiative petition was approved by an affirmative vote of the majority of the Senate and the House of Representatives, and filed with the Secretary of State.

Compiler's note: Enacting sections 2 and 3 of Act 171 of 2018 provide:

"Enacting section 2. For the fiscal year ending September 30, 2018, \$75,000.00 is appropriated from the general fund to the department of licensing and regulatory affairs. The appropriation under this section is designated as a work project under section 451a of the management and budget act, 1984 PA 431, MCL 18.1451a, for the purpose of implementing and communicating information about the repeal of 1965 PA 166, MCL 408.551 to 408.558, to be accomplished by state employees or by contract with an estimated cost not exceeding \$75,000.00 and an estimated completion date by December 31, 2019."

"Enacting section 3. If any part or parts of this act are found to be in conflict with the State Constitution of 1963, the United States Constitution, or federal law, this act shall be implemented to the maximum extent that the State Constitution of 1963, the United States Constitution, and federal law permit. Any provision held invalid or inoperative shall be severable from the remaining portions of this act."

EXHIBIT C

EXHIBIT C

EXHIBIT C

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM

Michigan.gov

Whitmer

Gov. Whitmer to Reinstate Prevailing Wage for State Construction Projects

October 07, 2021

FOR IMMEDIATE RELEASE

October 7, 2021

Contact: Press@Michigan.gov

Gov. Whitmer to Reinstate Prevailing Wage for State Construction Projects

State contractors and subcontractors required to pay prevailing wage, uplifting working people and ensuring Michigan has high-quality infrastructure

LANSING, Mich. - Today, Governor Gretchen Whitmer announced that the State of Michigan will require state contractors and subcontractors to pay prevailing wage for construction projects. The move reinstates the prevailing wage requirement, which was repealed in June 2018, and ensures that any construction worker working on a state construction project receives a fair wage. The governor is proud to lead by example at the state-level and deliver real change for working people in Michigan.

"By reinstating prevailing wage, we are ensuring that working people get treated with dignity and respect, which starts with a fair wage," said **Governor Whitmer**. "As governor, I am proud to stand shoulder to shoulder with working people and unions who built the middle class. By reinstating prevailing wage, we are ensuring working people can earn a decent standard of living, saving taxpayers money and time on crucial infrastructure projects, and offering Michigan a highly-trained workforce to rely on as we build up our roads and bridges, replace lead pipes, install high-speed internet, and more."

"We applaud Governor Whitmer's decision to restore prevailing wage requirements on state projects." said **Tom Lutz**, Executive Secretary-Treasurer of the Michigan Regional Council of Carpenters and Millwrights. "This decision protects Michigan's investments in

Appellee's Appx 043

infrastructure because when prevailing wages are the expectation, contractors have to compete on a level playing field based on quality of their skilled work, not on the exploitation of their workers."

"The actions that have been taken today, help to restore confidence by workers and employers alike," said **Steve Claywell**, President of the Michigan Building and Construction Trades Council. "The restoring of prevailing wage provides a fair and equal bidding process allowing for highly trained men and women to be paid a good wage. We appreciate the courage of this Governor and stand ready to build Michigan with her."

History of Prevailing Wage

Michigan's prevailing wage was repealed by the Michigan legislature in June 2018. A total of 24 states have repealed their prevailing wage laws. Michigan's repeal eliminated the state's prevailing wage requirement, but left the door open for DTMB to require prevailing wage under its authority to develop the terms of state contracts. Governor Whitmer is proud to make that call and reinstate prevailing wage.

Today's action rewards hard work and ensures working people can earn a decent standard of living, take care of their families, and have a secure retirement. By reinstating prevailing wage, Michigan can continue making progress on critical infrastructure, including roads, bridges, water infrastructure, high-speed internet, and more.

Budget

Last week, the governor signed the Fiscal Year 2022 budget bill that delivers on the kitchen-table fundamental issues that matter most to working families. The budget puts 167,000 Michiganders on a tuition-free path to higher-education or skills training through the Michigan Reconnect and Futures for Frontliners programs, expands low or no-cost childcare to 105,000 kids, repairs or replaces 100 bridges while creating 2,500 jobs, and more.

Earlier this year, Governor Whitmer and legislature worked together to put Michigan students first and passed the largest significant education investment in state history, closing the funding gap between schools in Michigan and delivering resources for schools to hire more nurses, counselors, and social workers.

###

Governor

Press Release

10 - October

2021

Related News

Whitmer Highlights Bipartisan Budget Investments in Working Families and Connected Communities

Whitmer Hosts Roundtable with Parents on Bipartisan Education Budget

Whitmer Calls on Federal Government to Protect Michiganders Seeking Reproductive Health Care or Prescription Medication in Canada

Governor Whitmer on Death of Detroit Police Officer Loren Courts

Community Revitalization Projects Bringing New Housing Options and Economic Growth to Communities

Whitmer and MDHHS Launch Effort to Educate Michiganders on Difference Between Emergency Contraception and Medication Abortion

Whitmer Celebrates Record Bipartisan Education Budget

Appellee's Appx 045

Investments

Whitmer Continues to Fix the Damn Roads with Projects in Several Counties Starting Next Week

Gilchrist Kicks Off Thriving Seniors Tour with Event in Detroit

Whitmer Continues to Fix Roads and Bridges with Projects Starting This Week



Gov. Whitmer to Reinstate Prevailing Wage for State Construction Projects

Copyright State of Michigan

RECEIVED by MCOOC 7/21/2022 11:53:17 AM

RECEIVED by MCOA 3/24/2023 8:53:44 AM

EXHIBIT D

EXHIBIT D

EXHIBIT D

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM

Michigan.gov

DTMB

Prevailing Wage for DTMB Construction Contracts

Beginning March 1, 2022, the State of Michigan will require state contractors and subcontractors to pay prevailing wage on construction-based contracts issued by the Department of Technology, Management & Budget. These changes do not impact or change any provisions in place to comply with the Federal Davis-Bacon act.

Administrative Guide Citation - Effective March 1, 2022

1.3.13 Prevailing Wage

With the exception of lease build-outs, if a project greater than \$50,000 involves employing construction mechanics (e.g., asbestos, hazardous material handling, boilermaker, carpenter, cement mason, electrician, office reconstruction and installation, laborer including cleaning debris, scraping floors, or sweeping floors in construction areas, etc.) and is sponsored or financed in whole or in part by State funds, state contractors must pay prevailing wage.

Additional information on the requirements of prevailing wage can be found on the [Labor and Economic Opportunity - Bureau of Employment Relations - Wage and Hour](#)

Appellee's Appx 048

[Division](#) website.

State-funded Project Prevailing Wage Requirements - Effective March 1, 2022

1. The Contractor (and its Subcontractors) represents and warrants that it pays all mechanics and laborers employed directly on the site of the work, unconditionally and at least once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications as prevailing wages based on locality, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and the laborers and mechanics.
2. The Contractor represents and warrants that Contractor will post the scale of wages to be paid in a prominent and easily accessible place at the site of the work.

Frequently Asked Questions

Q: Why is Michigan requiring prevailing wage rates for construction projects?

A: Prevailing wage rates are shown to support working people by ensuring that jobs created are well paid. Prevailing wage rates also support local employers by ensuring that all qualified bids received are competitive with area labor standards so local employers and workers are not underbid by low wage employers.

Q: How are Michigan's prevailing wage rates established?

A: Rates are established for each County in Michigan through a process of submission and review of established wages, benefits, and training investments from bona fide employee and employer organizations. The establishment of rates drills down to the smallest locality possible, so in some cases may be established for specific townships or cities as well. Further questions can be sent to WHINFO@michigan.gov.

Q: Do the established rates apply to any State or publicly funded construction projects?

A: The state of Michigan has made a change to procurement policy that requires vendors to pay prevailing wages on construction-based contracts issued by the Department of Technology, Management & Budget. If other entities apply prevailing wage rates to their projects they can visit [Prevailing Wage page on the Labor & Economic Opportunity site](#) for the most recent wage rate schedule.

Q: Don't prevailing wage rates increase the cost to the state for these projects?

A: Independent studies from organizations such as the Midwest Economic Policy Institute suggest have been conducted on the impact of prevailing wage rates in both Federal and other State contracts and no discernable cost savings are found when prevailing wages are eliminated.

Q: How do prevailing wages help workers?

A: Because prevailing wage rates are established based on local wages, fringe benefits, and training investments, prevailing wage ensures that all workers are paid according to local standards. Ensuring that workers are receiving strong wages and other benefits supports our local communities and enhances our ability to attract and retain critical workers in these industries.

Q: What is DTMB's policy?

A: DTMB will require prevailing wages to be paid in all construction-related contracts initially posted for bidding after March 1, 2022.

Q: What projects will be required to pay DTMB prevailing wage rates?

A: All construction-related projects initially posted for bidding after March 1, 2022. Any contract requiring prevailing wage will have that information clearly explained in the bidding documents so all potential vendors are aware when developing and submitting bids.

Q: When will this take effect?

A: All construction contracts initially posted for bidding after March 1, 2022 will require prevailing wage.

Q: What will be the penalties if a business does not comply with the DTMB contract requirements

A: Failure to pay prevailing wage would be a breach of contract and may result in contract termination.

Q: How can I find out if a DTMB contract requires prevailing wage?

A: Contracts requiring prevailing wage will include wage schedules and prevailing wage language in the bid documents. Further questions can be sent to zakrzewskik@michigan.gov.

Q: I am a worker on a State of Michigan construction project, how will I know if prevailing wages are required, and how will I know what the prevailing wage is if required?

A: Employers on covered projects will be required to notify workers of the prevailing wage obligation as well as the rates. Further, the rates must be posted on the project in a place that can be viewed by workers.

Q: Who can file a complaint, and how is a complaint filed?

A: A complaint may be filed by a person working on the project as well as by a third party on behalf of the worker. Complaints may be sent to WHINFO@michigan.gov.

Q: How long do I have to file a complaint?

A: Workers or third parties should file a complaint as soon as they become aware of the potential violation. Further, complaints are best filed while the project is in progress and still under contract.

Q: What happens if an employer is found to be in violation?

A: Following a complaint and investigation, Wage & Hour will send the determination to DTMB who may then pursue the issue under the terms of the contract.



Prevailing Wage for DTMB Construction Contracts

Copyright State of Michigan

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM

EXHIBIT E

EXHIBIT E

EXHIBIT E

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM



STATE OF MICHIGAN
Informational Sheet: DTMB Prevailing Wages on State Projects

General Information Regarding Fringe Benefits

Certain fringe benefits **may** be credited toward the payment of the Prevailing Wage Rate:

- If a fringe benefit is paid directly to a construction mechanic
- If a fringe benefit contribution or payment is made on behalf of a construction mechanic
- If a fringe benefit, which may be provided to a construction mechanic, is pursuant to a written contract or policy
- If a fringe benefit is paid into a fund, for a construction mechanic

When a fringe benefit is not paid by an hourly rate, the hourly credit will be calculated based on the annual value of the fringe benefit divided by 2080 hours per year (52 weeks @ 40 hours per week).

The following is an example of the types of fringe benefits allowed and how an hourly credit is calculated:

| | | |
|----------------------------|--|---------------|
| Vacation | 40 hours X \$14.00 per hour = \$560/2080 = | \$0.27 |
| Dental insurance | \$31.07 monthly premium X 12 mos. = \$372.84 /2080 = | \$0.18 |
| Vision insurance | \$5.38 monthly premium X 12 mos. = \$64.56/2080 = | \$0.03 |
| Health insurance | \$230.00 monthly premium X 12 mos. = \$2,760.00/2080 = | \$1.33 |
| Life insurance | \$27.04 monthly premium X 12 mos. = \$324.48/2080 = | \$0.16 |
| Tuition | \$500.00 annual cost/2080 = | \$0.24 |
| Bonus | 4 quarterly bonus/year x \$250 = \$1000.00/2080 = | \$0.48 |
| 401k Employer Contribution | \$2000.00 total annual contribution/2080 = | \$0.96 |
| Total Hourly Credit | | \$3.65 |

Other examples of the types of fringe benefits allowed:

- Sick pay
- Holiday pay
- Accidental Death & Dismemberment insurance premiums

The following are examples of items that **will not** be credited toward the payment of the Prevailing Wage Rate

- Legally required payments, such as:
 - Unemployment Insurance payments
 - Workers' Compensation Insurance payments
 - FICA (Social Security contributions, Medicare contributions)
- Reimbursable expenses, such as:
 - Clothing allowance or reimbursement
 - Uniform allowance or reimbursement
 - Gas allowance or reimbursement
 - Travel time or payment
 - Meals or lodging allowance or reimbursement
 - Per diem allowance or payment
- Other payments to or on behalf of a construction mechanic that are not wages or fringe benefits, such as:
 - Industry advancement funds
 - Financial or material loans



STATE OF MICHIGAN
Informational Sheet: DTMB Prevailing Wages on State Projects

OVERTIME PROVISIONS for MICHIGAN PREVAILING WAGE RATE COMMERCIAL SCHEDULE

- Overtime is represented as a nine character code. Each character represents a certain period of time after the first 8 hours Monday thru Friday.

| | Monday thru Friday | Saturday | Sunday & Holidays | Four 10s |
|---------------|--------------------|----------|-------------------|----------|
| First 8 Hours | | 4 | 8 | 9 |
| 9th Hour | 1 | 5 | | |
| 10th Hour | 2 | 6 | | |
| Over 10 hours | 3 | 7 | | |

Overtime for Monday thru Friday after 8 hours:

the 1st character is for time worked in the 9th hour (8.1 - 9 hours)
the 2nd character is for time worked in the 10th hour (9.1 - 10 hours)
the 3rd character is for time worked beyond the 10th hour (10.1 and beyond)

Overtime on Saturday:

the 4th character is for time worked in the first 8 hours on Saturday (0 - 8 hours)
the 5th character is for time worked in the 9th hour on Saturday (8.1 - 9 hours)
the 6th character is for time worked in the 10th hour (9.1 - 10 hours)
the 7th character is for time worked beyond the 10th hour (10.01 and beyond)

Overtime on Sundays & Holidays

The 8th character is for time worked on Sunday or on a holiday

Four Ten Hour Days

The 9th character indicates if an optional 4-day 10-hour per day workweek can be worked **between Monday and Friday without paying overtime after 8 hours worked, unless otherwise noted in the rate schedule. To utilize a 4 ten workweek, notice is required from the employer to employee prior to the start of work on the project.**

- Overtime Indicators Used in the Overtime Provision:

H - means TIME AND ONE-HALF due
X - means TIME AND ONE-HALF due after 40 HOURS worked
D - means DOUBLE PAY due
Y - means YES an optional 4-day 10-hour per day workweek can be worked without paying overtime after 8 hours worked
N - means NO an optional 4-day 10-hour per day workweek *cannot* be worked without paying overtime after 8 hours worked

- EXAMPLES:

HHHHHHHDN - This example shows that the 1½ rate must be used for time worked after 8 hours Monday thru Friday (characters 1 - 3); for all hours worked on Saturday, 1½ rate is due (characters 4 - 7). Work done on Sundays or holidays must be paid double time (character 8). The N (character 9) indicates that 4 ten-hour days is not an acceptable workweek at regular pay.

XXXHHHDY - This example shows that the 1½ rate must be used for time worked after 40 hours are worked Monday thru Friday (characters 1-3); for hours worked on Saturday, 1½ rate is due (characters 4 – 7). Work done on Sundays or holidays must be paid double time (character 8). The Y (character 9) indicates that 4 ten-hour days is an acceptable alternative workweek.

RECEIVED by MCOA 7/21/2022 11:53:17 AM

RECEIVED by MCOA 3/24/2023 8:53:44 AM



STATE OF MICHIGAN
Informational Sheet: DTMB Prevailing Wages on State Projects

ENGINEERS - CLASSES OF EQUIPMENT LIST

UNDERGROUND ENGINEERS

CLASS I

Backfiller Tamper, Backhoe, Batch Plant Operator, Clam-Shell, Concrete Paver (2 drums or larger), Conveyor Loader (Euclid type), Crane (crawler, truck type or pile driving), Dozer, Dragline, Elevating Grader, End Loader, Gradall (and similar type machine), Grader, Power Shovel, Roller (asphalt), Scraper (self propelled or tractor drawn), Side Broom Tractor (type D-4 or larger), Slope Paver, Trencher (over 8' digging capacity), Well Drilling Rig, Mechanic, Slip Form Paver, Hydro Excavator.

CLASS II

Boom Truck (power swing type boom), Crusher, Hoist, Pump (1 or more 6" discharge or larger gas or diesel powered by generator of 300 amps or more, inclusive of generator), Side Boom Tractor (smaller than type D-4 or equivalent), Tractor (pneu-tired, other than backhoe or front end loader), Trencher (8' digging capacity and smaller), Vac Truck.

CLASS III

Air Compressors (600 cfm or larger), Air Compressors (2 or more less than 600 cfm), Boom Truck (non-swinging, non-powered type boom), Concrete Breaker (self-propelled or truck mounted, includes compressor), Concrete Paver (1 drum, 1/2 yard or larger), Elevator (other than passenger), Maintenance Man, Mechanic Helper, Pump (2 or more 4" up to 6" discharge, gas or diesel powered, excluding submersible pump), Pumpcrete Machine (and similar equipment), Wagon Drill Machine, Welding Machine or Generator (2 or more 300 amp or larger, gas or diesel powered).

CLASS IV

Boiler, Concrete Saw (40HP or over), Curing Machine (self-propelled), Farm Tractor (w/attachment), Finishing Machine (concrete), Firemen, Hydraulic Pipe Pushing Machine, Mulching Equipment, Oiler (2 or more up to 4", exclude submersible), Pumps (2 or more up to 4" discharge if used 3 hrs or more a day-gas or diesel powered, excluding submersible pumps), Roller (other than asphalt), Stump Remover, Vibrating Compaction Equipment (6' wide or over), Trencher (service) Sweeper (Wayne type and similar equipment), Water Wagon, Extend-a-Boom Forklift.

HAZARDOUS WASTE ABATEMENT ENGINEERS

CLASS I

Backhoe, Batch Plant Operator, Clamshell, Concrete Breaker when attached to hoe, Concrete Cleaning Decontamination Machine Operator, Concrete Pump, Concrete Paver, Crusher, Dozer, Elevating Grader, Endloader, Farm Tractor (90 h.p. and higher), Gradall, Grader, Heavy Equipment Robotics Operator, Hydro Excavator, Loader, Pug Mill, Pumpcrete Machines, Pump Trucks, Roller, Scraper (self-propelled or tractor drawn), Side Boom Tractor, Slip Form Paver, Slope Paver, Trencher, Ultra High Pressure Waterjet Cutting Tool System Operator, Vactors, Vacuum Blasting Machine Operator, Vertical Lifting Hoist, Vibrating Compaction Equipment (self-propelled), and Well Drilling Rig.

CLASS II

Air Compressor, Concrete Breaker when not attached to hoe, Elevator, End Dumps, Equipment Decontamination Operator, Farm Tractor (less than 90 h.p.), Forklift, Generator, Heater, Mulcher, Pigs (Portable Reagent Storage Tanks), Power Screens, Pumps (water), Stationary Compressed Air Plant, Sweeper, Water Wagon and Welding Machine.

RECEIVED by MCOOC 7/21/2022 11:53:17 AM

RECEIVED by MCOA 3/24/2023 8:53:44 AM



STATE OF MICHIGAN
Informational Sheet: DTMB Prevailing Wages on State Projects

CARPENTER CRAFT JURISDICTION

Michigan recognizes the Carpenters for any and all work related to weatherization that has historically been the work of the Carpenter. This work shall include, but not be limited to: all work defined under the Federal Weatherization Assistance Program.

The jurisdiction of Carpenters, as to all work that has historically and traditionally been performed consisting of the milling, fashioning, joining, assembling, erecting, fastening or dismantling of all materials of wood, plastic, metal, fiber, cork, or composition and all other substitute materials, as well as the handling, cleaning, erecting, installing and dismantling of all machinery, equipment and all materials used by Carpenters.

The jurisdiction, therefore, extends over the following divisions and subdivisions of the trade: Carpenters and Joiners, Millwrights, Pile Drivers, Bridge, Dock and Wharf Carpenters, Underpinners, Timbermen, and Core-drillers, Shipwrights, Boat Builders, Ship-hand, Stair-Builders, Millmen, Wood and Resilient Floor Decorators, Floor Finishers, Carpet-layers, Shinglers, Siders, Insulators, Acoustic and Drywall Applicators, Sharers and House Movers, Loggers, Lumber and Sawmill Workers, Reed and Rattan Workers, Shingle Weavers, Casket and Coffin Makers, Railroad Carpenters and Car Builders, regardless of material used and all those engaged in the operation of woodworking or other machinery required in fashioning, milling or manufacturing of products used in the trade, and the handling, erecting and installing materials on any of the above divisions or sub-divisions, burning, welding and rigging incidental to the trade. When the term "Carpenter and Joiner" is used, it shall mean all the subdivisions of the trade. The trade autonomy of Carpenters therefore extends over the divisions and subdivisions of the trade, which are set forth as follows:

- (a) The framing, erecting and prefabrication of roofs, partitions, floors and other parts of buildings of wood, metal, plastic or other substitutes; application of all metal flashing used for hips, valleys and chimneys; the erection of Stran Steel section or its equal. The building and setting of all forms and centers for brick and masonry. The fabrication and erection of all forms for concrete and decking, the dismantling of same (as per International Agreement) when they are to be re-used on the job or stored for re-use. The cutting and handling of all falsework for fireproofing and slabs. Where power is used in the setting or dismantling of forms, all signaling and handling shall be done by carpenters. The setting of templates for anchor bolts for structural members and for machinery, and the placing, leveling and bracing of these bolts. All framing in connection with the setting or metal columns. The setting of all bulkheads, footing forms and the setting of and fabrication of, screeds and stakes for concrete and mastic floors where the screed is notched or fitted, or made up of more than one member. The making of forms for concrete block, bulkheads, figures, posts, rails, balusters and ornaments, etc.
- (b) The handling and erecting of rough material and drywall, the handling, assembly, setting and leveling of all fixtures, display cases, all furniture such as tables, chairs, desks, coat racks, etc., all de-mountable or moveable partitions such as Von wall, E Wall, Steel Case, Herman Miller, Haworth, American Seating, Westinghouse, Lazy Boy, rosewood, etc. All rebuilding, remodeling and setting up of all kinds of partitions, finished lumber, metal and plastic trim to be erected by Carpenters shall be handled from the truck or vehicle delivering same to the job by Carpenters.



STATE OF MICHIGAN
Informational Sheet: DTMB Prevailing Wages on State Projects

CARPENTER CRAFT JURISDICTION

- (c) The building and moving of all scaffolding runways and staging where carpenters' tools are used, the building from the ground up of all scaffolds over fourteen (14) feet in height including metal and specially designed scaffolding. The building and construction of all hoists and derricks made of wood; the making of mortar boards, boxes, trestles, all shoring, razing and moving of buildings. Lift type trucks are to be considered a tool of the trade. Metal siding and metal roofing fall within the scope of jurisdiction for the carpenters.
- (d) The cutting or framing and fireproofing of the openings for pipes, conduits, ducts, etc., where they pass through floors, partitions, walls, roofs or fixtures composed in whole or in part of wood. The laying out of making and installation of all inserts and sleeves for pipes, ducts, etc., where carpenters' tools and knowledge are required. The making and installing of all wooden meter boards, crippling and backing for fixtures. The welding of studs and other fastenings to receive material being applied by carpenters.
- (e) The installation of all grounds, furring or stripping, ceilings and sidewalks, application of all types of shingling and siding, etc.
- (f) The installation of all interior and exterior trim or finish of wood, aluminum, kalamein, hollow or extruded metal, plastic, doors, transoms, thresholds, mullions and windows. The setting of jambs, bucks, window frames of wood or metal where braces or wedges are used. The installation of all wood, metal or other substitutes of casing, molding, chair rail, wainscoting, china closets, base of mop boards, wardrobes, metal partitions as per National Decisions or specific agreements, etc. The complete laying out, fabrication and erection of stairs. The making and erecting of all fixtures, cabinets, shelving, racks, louvers, etc. The mortising and application of all hardware in connection with our work. The sanding and refinishing of all wood, cork or composition floors to be sanded or scraped, filled, sized and buffed, either by hand or power machines. The assembling and setting of all seats in theaters, halls, churches, schools, auditorium, grandstands and other buildings. All bowling alley work.
- (g) The manufacture, fabrication and installation of all screens, storm sash, storm doors and garage doors; the installation of wood, canvas, plastic or metal awnings or eye shades, door shelters, jalousies, etc. The laying of wood, wood block and wood composition in floors.
- (h) The installation of all materials used in drywall construction, such as plasterboard, all types of asbestos boards, transite and other composition board. The application of all material which serves as base for acoustic tile, except plaster. All acoustical applications as per National Agreement or specific agreement.
- (i) The building and dismantling of all barricades, hand rails, guard rails, partitions and temporary partitions. The erection and dismantling of all temporary housing on construction projects.
- (j) The installation of rock wool, cork and other insulation material used for sound or weatherproofing. The removal of caulking and placing of staff bead and brick mold and all Oakum caulking, substitutes, etc., and all caulking in connection with carpentry work.
- (k) The installation of all chalk boards/marker boards.



STATE OF MICHIGAN
Informational Sheet: DTMB Prevailing Wages on State Projects

CARPENTER CRAFT JURISDICTION

- (l) The operation of all hand operated winches used to raise wooden structures.
- (m) The erection of porcelain enameled panels and siding.
- (n) The unloading and distribution of all furnished, prefabricated and built-up sections such as door bucks, window frames, cupboards, cabinets, store fixtures, counters and show cases or comparably finished or prefabricated materials, to the job sites or points of installation as used in the construction, alteration and remodeling industry.
- (o) The handling of doors, metal, wood or composite, partitions and other finished bulk materials used for trim from the point of delivery.
- (p) All processing of these materials and handling after processing.
- (q) The making up of panels and fitting them into walls, all bracing and securing, all removal of panels from the casting including all braces, walers, hairpins, etc.
- (r) The handling and setting of all metal pans and sections from the stock piles of reasonable distance as required by job needs shall be performed by carpenters. The stripping of such metal pans, panels or sections is to be performed by carpenters.
- (s) The sharpening of all carpenter hand or power tools, or those used by carpenters.
- (t). The layout, fabrication, assembling of and erection and dismantling of all displays made of wood, metal, plastic, composition board or any substitute material; the covering of same with any type of material, the crating and un-crating, the handling from the point of unloading and back to the point of loading of all displays and other materials or components.
- (u) The same shall apply to all other necessary component parts used for display purposes such as turntables, platforms, identification towers and fixtures, regardless of how constructed, assembled or erected or dismantled.
- (v) The make-up, handling, cutting and sewing of all materials used in buntings, flags, banners, decorative paper, fabrics and similar materials used in the display decorative industry for draperies and back drops. The decorative framing of trucks, trailers and autos used as floats or moving displays. The slatting of walls to hand fabrics and other decorative materials, drilling of all holes to accommodate such installations. Setting up and removal of booths constructed of steel or aluminum tubing as stanchions, railings, etc., handling and placing of furniture, appliances, etc., which are being used to complete the booth at the request of the exhibitor. Fabricating and application of leather, plastic and other like materials used for covering of booths. The handling of all materials, fabricating of same. The loading and unloading, erecting and assembling at the exhibit of show area, also in or out of storage when used in booth decorations.



STATE OF MICHIGAN
Informational Sheet: DTMB Prevailing Wages on State Projects

CARPENTER CRAFT JURISDICTION

- (w) A display shall be construed as any exhibit or medium of advertising, open to private or public showing, which is constructed of wood, metal, plastic or any other substitute to accomplish the objectives of advertising or displaying.
- (x) Handling, fitting, draping, measuring and installation of fixtures and other hardwares for draperies, all manner of making, measuring, repairing, sizing, hanging and installation of necessary fixtures and hardware for shades and Venetian blinds.
- (y) Work consisting of cutting and/or forming of all materials in preparation for installing of floors, walls and ceilings; the installation of all resilient floor and base; wall and ceiling materials to include cork, linoleum, prefabricated, laminated, rubber, asphalt, vinyl, metal, plastic, seamless floors and all other similar materials in sheet, interlocking liquid or tile form; the installation of all artificial turf, the installation, cutting and/or fitting of carpets; installation of padding, matting, linen crash and all preformed resilient floor coverings; the fitting of all devices for the attachment of carpet and other floor, wall and ceiling coverings; track sewing of carpets, drilling of holes for sockets and pins, putting in dowels and slats; and all metal trimmings used; the installation of all underlayments, sealants in preparation of floors, walls and ceilings, the unloading and handling of all materials to be installed and the removal of all materials in preparing floors when contracted for by the employer, shall be done only by employees covered under this Agreement.
- (z) The installation of all sink-tops and cabinets, to include all metal trim and covering for same. All cork, linoleum, congo-wall, linewall, veos tile, plexiglass, vinawall tile, composition tile, plastic tile, aluminum tile and rubber in sheets or tile form and the application thereof. All bolta-wall and bolta-wall tile and similar products.
- (aa) The handling and placing of all pictures and frames and the assembly of bed frames and accessories. The hanging and placing of all signage.
- (bb) The installation of all framework partitions and trim materials for toilets and bathrooms made of wood, metal, plastics or composition materials; fastening of all wooden, plastic or composition cleats to iron or any other material for accessories.
- (cc) The erection of cooling towers and tanks.
- (dd) The setting, lining, leveling and bracing of all embedded plates, rails and angles. The setting of all stay in place forms.
- (ee) Environmental: Clean room, any type of environmental chamber, walk in refrigerated coolers and all refrigerated rooms or buildings.



STATE OF MICHIGAN
Informational Sheet: DTMB Prevailing Wages on State Projects

CARPENTER CRAFT JURISDICTION

PILE DRIVING AND CAISSON DRILLING

(ff) All unloading, handling, signaling and driving of piles, whether wood, steel, pipe, beam pile, composite, concrete or molded in place, wood and steel sheeting, cofferdam work, trestle work, dock work, floating derricks, caisson work, foundation work, bridge work, whether old or new, crib work, pipe line work and submarine work. Cutting of all wood, steel or concrete pile, whether by machine or hand; welding and cutting, peeling, and heading of all wood pile, steel sheeting and wood sheeting. The erecting and dismantling of all pile driving rigs, also derricks whether on land or water; also the moving, shoring and underpinning of all buildings. The loading and unloading of all derricks, cranes and pile driving materials. The tending, maintenance and operation of all valves pertaining to the operation of driving of pile. All diving and tending essential to the completion of jurisdictional claims.

All work done in the established yards of the Company and all work not enumerated above, shall be handled and manned as the Employer decides.

The pile driver will unload all material shipped in by rail from the point that the rail car is spotted.

All cleaning and preparation of all piling prior to driving.

The welding and attachment of all boot plates, pile points, splice plates, connectors, rock crosses, driving crosses, driving rigs, point reinforcements and overboots.

The construction, reconstruction, repair, alteration, demolition and partial or complete removal of all marine work including, but not limited to, docks, piers, wharves, quays, jetties, cribs, causeways, breakwaters, lighthouses and permanent buoys, etc. (mixing and placing of concrete excepted).

The driving and pulling of all wood, steel and concrete foundation piles and sheet piling.

The heading, pointing, splicing, cutting and welding of all piles.

The placing of all wales, bolts, studs, lagging, rods and washers including the cutting, drilling, boring or breaking of all holes or openings thereof.

The removal of all materials and/or obstructions of any nature (rip-rap included) that retard or interfere with the driving of piles or with the placing of wales, bolts and rods.



STATE OF MICHIGAN
Informational Sheet: DTMB Prevailing Wages on State Projects

CARPENTER CRAFT JURISDICTION

This is to be subject to the discretion of the contractor who may choose to use blasting specialists or other demolition specialists.

The handling on the job of all materials used in the work.

The manning of all floating equipment (towing equipment excepted) engaged in the work enumerated, including deck engines, except machinery manned by Operating Engineers.

The placing of all rip-rap, fill stone, bedding stone, cover stone and concrete blocks in connection with marine construction. Work normally performed by Employers, such as soil tests, shoring, underpinning of buildings, cribbing, driving of sheet piling, marine divers, tenders, underwater construction workers and similar operations shall continue to be included in the jurisdiction of this Agreement.

All burning, cutting, welding and fabrication of pipe, H-beams, sheet pile (metal or wood), done on the job site or in the yard of the Employer shall be done by pile drivers. The driving of bearing piles, sheet piling with heavy equipment, caissons, pile caps, auger drilling and boring, the setting up for load testing for any type of piling, all layout and spotting for piling, caisson and boring work, all earth retention, ditch boarding, installing tiebacks.

ASBESTOS ABATEMENT CARPENTERS

(gg) All erection and maintenance of barriers and partitions used in the removing of asbestos or any abatement work. The abatement of any materials previously installed by the carpenter such as transite, ceiling and floor tiles. All operating and maintaining of current equipment used in any abatement work.



STATE OF MICHIGAN
Informational Sheet: DTMB Prevailing Wages on State Projects

ELECTRICIAN – SOUND AND COMMUNICATION / DATA/ VOICE JURISDICTION

The installation, testing, service and maintenance, of systems which utilize the transmission and/or transference of voice, sound, vision or digital for commercial, education, security and entertainment purposes for the following: TV monitoring and surveillance, CATV and CCTV, background-foreground music, intercom and telephone interconnect, inventory control systems, microwave transmission, multi-media, multiplex, radio page, school intercom and sound, burglar alarms, low voltage fire alarm systems, low voltage master clock systems, distributed antenna systems (DAS), IP data networks, and all surface-mounted (non-power) telecommunications wiremold. Shall additionally include the installation of all raceway systems of unlimited length in telecommunications rooms, entrance facilities, equipment rooms, and similar areas. Energy management systems. Security systems; perimeter, vibration, card access, access control and sonar/infrared monitoring equipment. Communications systems that transmit or receive information and/or control systems that are intrinsic to the above listed systems; SCADA (Supervisory Control and Data Acquisition), PCM (Pulse Code Modulation), Digital Data Systems, Broadband and Baseband and Carriers, POS (Point of Sale systems), VSAT Data Systems, RF and Remote Control Systems, Fiber Optic Data Systems and Voice and Data Infrastructure and Backbone.

RECEIVED by MCOOC 7/21/2022 11:53:17 AM

RECEIVED by MCOA 3/24/2023 8:53:44 AM

EXHIBIT F

EXHIBIT F

EXHIBIT F

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM



STATE OF MICHIGAN

Wage and Hour Division
PO Box 30476
Lansing, MI 48909
517-284-7800

Informational Sheet: Prevailing Wages on DTMB Projects

REQUIREMENTS

The purpose of establishing prevailing rates is to provide minimum rates of pay that must be paid to workers on Department of Technology, Management and Budget (DTMB) construction projects that are financed or financially supported by the state. Prevailing rates are compiled from the rates contained in collectively bargained agreements which cover the locations of the state projects. While the DTMB prevailing wage rates are compiled through surveys of collectively bargained agreements, a collective bargaining agreement is not required for contractors to be on or be awarded state projects. The prevailing rate schedule provides an hourly rate which includes wage and fringe benefit totals for designated construction mechanic classifications. The overtime rates also include wage and fringe benefit totals. Please pay special attention to the overtime and premium pay requirements. The DTMB prevailing wage is satisfied when wages plus fringe benefits are equal to or greater than the required rate.

State of Michigan responsibilities:

- The department establishes the prevailing rate for each classification of construction mechanic requested by DTMB prior to contracts being let out for bid on a state project.

DTMB responsibilities

- If a contract is not awarded or construction does not start within 90 days of the date of the issuance of rates, a re- determination of rates must be requested by DTMB
- Rates for classifications needed but not provided on the DTMB Prevailing Rate Schedule, **must** be obtained **prior** to contracts being let out for bid on a state project.

Contractor responsibilities:

- Every contractor and subcontractor shall keep posted on the construction site, in a conspicuous place, a copy of all prevailing rates prescribed in a contract.
- Every contractor and subcontractor shall keep an accurate record showing the name and occupation of and the actual wages and benefits paid to each construction mechanic. This record shall be available for reasonable inspection by DTMB or the department.
- Each contractor or subcontractor is separately liable for the payment of the prevailing rate to its employees.
- The prime contractor is responsible for advising all subcontractors of the requirement to pay the prevailing rate prior to commencement of work.
- A construction mechanic *shall only* be paid the apprentice rate if registered with the United States Department of Labor, Bureau of Apprenticeship and Training and the rate is included in the contract.

Enforcement:

A person who has information of an alleged prevailing wage violation on a DTMB project may file a complaint with the State of Michigan. The department will investigate and attempt to resolve the complaint informally. During the course of an investigation, if the requested records and posting certification are not made available in compliance with contractual requirements, the State may consider the Contractor to be in material breach of the contract and may terminate the contract for cause at the States sole discretion.

RECEIVED by MCOAC 7/21/2022 11:53:17 AM

RECEIVED by MCOAC 3/24/2023 8:53:44 AM

EXHIBIT G

EXHIBIT G

EXHIBIT G

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM

From: [Skorup, Jarrett](#)
To: [DTMB](#)
Subject: FOIA - DTMB prevailing wage directive
Date: Wednesday, October 20, 2021 1:15:33 PM

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

October 20, 2021

FOIA Request for prevailing wage directive

Pursuant to the Michigan compiled Laws Section 15.231 et seq., and any other relevant statutes or provisions of your agency's regulations I am making the following Freedom of Information Act request.

- The executive directive issued by Governor Whitmer requiring the Department to implement prevailing wage requirements for state construction projects.

To assist you in your search, this action was announced by Governor Whitmer on October 7, 2021.

See, <https://www.michigan.gov/whitmer/0,9309,7-387-90499-569931--,00.html>. The directive was also mentioned in contemporaneous media coverage. See, <https://www.freep.com/story/news/politics/elections/2021/10/07/whitmer-prevailing-wage-michigan-union/6032968001/>.

I request this information be delivered via email.

Jarrett Skorup

140 W. Main St.

Midland, Michigan 48640

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM

EXHIBIT H

EXHIBIT H

EXHIBIT H

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM



STATE OF MICHIGAN

GRETCHEN WHITMER
GOVERNOR

DEPARTMENT OF TECHNOLOGY, MANAGEMENT & BUDGET
LANSING

JULIA DALE
DIRECTOR

FREEDOM OF INFORMATION ACT (FOIA) RESPONSE

October 25, 2021

Mr. Jarrett Skorup
140 W. Main St.
Midland, Michigan 48640

Dear Mr. Skorup:

This notice is in response to your request dated October 20, 2021 (attached), for information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* Your request was received by the Department of Technology, Management and Budget on October 21, 2021.

You requested:

1. The executive directive issued by Governor Whitmer requiring the Department to implement prevailing wage requirements for state construction projects.

The following action has been taken in response to your request:

REQUEST DENIED. It is hereby certified that, to the best of the undersigned's knowledge, information, and belief, records do not exist within the Department of Technology, Management and Budget, under the description you provided or under another name reasonably known to the department.

As to the denial determination, pursuant to section 10 of the FOIA, you may do either of the following:

1. Appeal this decision in writing to the Director of the Department, Julia Dale, Elliott-Larsen Building, 320 South Walnut, P.O. Box 30026, Lansing, Michigan 48909. The writing must specifically state the word "appeal" and must identify the reasons you believe the denial should be reversed. The head of the department must respond to your appeal within 10 business days of its receipt. Under unusual circumstances, the time for response to your appeal may be extended by 10 business days.

Mr. Jarrett Skorup

October 25, 2021

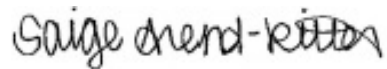
Page 2 of 2

2. File an action in the Court of Claims within 180 days after the final denial determination. If you prevail in such an action the court is to award reasonable attorney fees, costs, disbursements, and possible damages.

ADDITIONAL COMMENTS:

The Department's written procedures and guidelines and a summary can be viewed at: www.michigan.gov/foia-dtmb.

Sincerely,



Saige Arend-Ritter
DTMB FOIA Coordinator

Enclosure(s)

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM

EXHIBIT I

EXHIBIT I

EXHIBIT I

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM

Arend-Ritter, Saige (DTMB)

Subject: FW: FOIA - DTMB prevailing wage

From: Skorup, Jarrett <Skorup@mackinac.org>

Sent: Wednesday, March 2, 2022 1:48 PM

To: DTMB-ORS-FOIA-Requests <DTMB-ORS-FOIA-Requests@michigan.gov>

Subject: FOIA - DTMB prevailing wage

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

March 2, 2022

FOIA Request for funding information

Pursuant to the Michigan compiled Laws Section 15.231 et seq., and any other relevant statutes or provisions of your agency's regulations I am making the following Freedom of Information Act request.

- Any instruction from Governor Whitmer to the Department of Technology, Management, and Budget (DTMB) regarding prevailing wage requirements.
- The executive directive issued by Governor Whitmer requiring the Department to implement prevailing wage requirements for state construction projects.
- Any document with DTMB which demonstrates their ability to enforce "prevailing wage" requirements.

I request this information be delivered via email.

Jarrett Skorup
Mackinac Center
140 W. Main St.
Midland, Michigan 48640

EXHIBIT J

EXHIBIT J

EXHIBIT J

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM



STATE OF MICHIGAN

DEPARTMENT OF TECHNOLOGY, MANAGEMENT & BUDGET

LANSING

GRETCHEN WHITMER
GOVERNOR

MICHELLE LANGE
ACTING DIRECTOR

FREEDOM OF INFORMATION ACT (FOIA) RESPONSE

May 12, 2022

Mr. Jarrett Skorup
140 W. Main St.
Midland, Michigan 48640

Dear Mr. Skorup:

This notice is in response to your request dated March 2, 2022 (attached), for information under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* Your request was received by the Department of Technology, Management and Budget on March 3, 2022. A statutorily-permitted extension of time to respond, was taken through March 24, 2022.

You requested:

1. Any instruction from Governor Whitmer to the Department of Technology, Management, and Budget (DTMB) regarding prevailing wage requirements.
2. The executive directive issued by Governor Whitmer requiring the Department to implement prevailing wage requirements for state construction projects.
3. Any document with DTMB which demonstrates their ability to enforce "prevailing wage" requirements.

On March 23, 2022 DTMB sent an invoice requesting the deposit amount of \$346.30 to begin the processing of this request. The deposit was received on March 31, 2022. The DTMB is accepting this amount as payment in full and no balance is due.

The following action has been taken in response to this request:

REQUEST GRANTED IN PART, DENIED IN PART, as follows:

Request Granted In Part. As to items 1 and 3 listed above, responsive documents non-exempt from disclosure, are being mailed to you on a flashdrive. Please use Skorup_MC2022 to unlock it.

Request Denied In Part. As to item 2 listed above, it is hereby certified that, to the best of the undersigned's knowledge, information, and belief, records do not exist within the

RECEIVED by MCOOC 7/21/2022 11:53:17 AM

RECEIVED by MCOA 3/24/2023 8:53:44 AM

Mr. Jarrett Skorup

May 12, 2022

Page 2 of 3

department under the description you provided or under another name reasonably known to the department.

As to item 3 listed above, redactions have been made under the following statutory exemptions:

MCL 15.243(1)(g) – “Information or records subject to the attorney-client privilege.”

MCL 15.243(1)(m) – “Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.”

In further explanation, the attorney client privileged parts of records are readily noted within the enclosed documents.

As to the deliberative process privilege recognized under MCL 15.243(1)(m), the exempted material is composed of non-factual, deliberative opinions and candid communications of agency employees. Thus, to encourage such communications of agency employees, the statute allows the exemption; however, the factual parts of the communications remain intact.

As to the partial denial determination, pursuant to section 10 of the FOIA, you may do either of the following:

1. Appeal this decision in writing to the Acting Director of the Department, Michelle Lange, Elliott-Larsen Building, 320 South Walnut, P.O. Box 30026, Lansing, Michigan 48909. The writing must specifically state the word "appeal" and must identify the reasons you believe the partial denial should be reversed. The head of the department must respond to your appeal within 10 business days of its receipt. Under unusual circumstances, the time for response to your appeal may be extended by 10 business days.
2. File an action in the Court of Claims within 180 days after the final denial determination. If you prevail in such an action the court is to award reasonable attorney fees, costs, disbursements, and possible damages.

ADDITIONAL COMMENTS:

The Department's written procedures and guidelines and a summary can be viewed at: www.michigan.gov/foia-dtmb.

Mr. Jarrett Skorup

May 12, 2022

Page 3 of 3

Sincerely,

Saige Arend-Ritter

Saige Arend-Ritter
DTMB FOIA Coordinator

Enclosure(s)

RECEIVED by MCOA 3/24/2023 8:53:44 AM

Appellee's Appx 076

RECEIVED by MCOA 7/21/2022 11:53:17 AM

EXHIBIT K

EXHIBIT K

EXHIBIT K

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM

[REDACTED]

From: Kolodin, Zach <KolodinZ@michigan.gov>
Sent: Wednesday, October 6, 2021 6:21 PM
To: Lange, Michelle (DTMB) <LangeM3@michigan.gov>
Subject: Re: FAQ

The biggest question is:
what jobs does this actually apply to?

From: Kolodin, Zach
Sent: Wednesday, October 6, 2021 6:20:24 PM
To: Lange, Michelle (DTMB) <LangeM3@michigan.gov>
Subject: FAQ

- What projects will this cover? Will cover any local contracts?
- Would DTMB maintain a list of contractors who violate the requirement?
- How will the state investigate complaints?
- How will prevailing wage be determined for each county?
-

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM

EXHIBIT L

EXHIBIT L

EXHIBIT L

RECEIVED by MCOA 3/24/2023 8:53:44 AM

RECEIVED by MCOA 7/21/2022 11:53:17 AM

Lansing, Michigan 48909
tottenm1@michigan.gov
(517) 241-0061

****This email and any associated documents may contain information that is privileged or otherwise exempt from disclosure. It is intended for use only by the person to whom it is addressed. Please contact me before disclosure. If you have received this email in error, please (1) do not forward or use this information in any way; and (2) contact me immediately.**

From: Stibitz, Brom (DTMB) <StibitzB@michigan.gov>
Sent: Friday, June 4, 2021 4:28 PM
To: Totten, Mark <TottenM1@michigan.gov>
Cc: Kolodin, Zach <KolodinZ@michigan.gov>; Teegardin, Rachel <TeegardinR1@michigan.gov>; Lange, Michelle (DTMB) <LangeM3@michigan.gov>
Subject: RE: Prevailing Wage

Mark,

Per your request, we engaged in discussion with the AG's Office [REDACTED]
[REDACTED]
[REDACTED]

According to Suzanne Hassan, AAG- State Operations Division, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RECEIVED by MCOOC 7/21/2022 11:53:17 AM

RECEIVED by MCOA 3/24/2023 8:53:44 AM

[REDACTED]

[REDACTED]

[REDACTED]

Happy to discuss further.

Brom Stibitz (h /h m/h s)
Director and Chief Information Officer
Michigan Department of Technology Management and Budget
stibitz@michigan.gov
Cell: 313 933 3333



From: Totten, Mark <TottenM1@michigan.gov>
Sent: Tuesday, May 25, 2021 11:46 AM
To: Stibitz, Brom (DTMB) <StibitzB@michigan.gov>
Cc: Kolodin, Zach <KolodinZ@michigan.gov>; Teegardin, Rachel <TeegardinR1@michigan.gov>
Subject: RE: Prevailing Wage

Sounds good!

Mark Totten
Chief Legal Counsel
Office of the Governor, State of Michigan
George W. Romney Building
111 S. Capitol Avenue
Lansing, Michigan 48909
tottenm1@michigan.gov
(517) 241-0061

****This email and any associated documents may contain information that is privileged or otherwise exempt from disclosure. It is intended for use only by the person to whom it is**

MACKINAC LEGAL CENTER FOUNDATION

July 21, 2022

Clerk of the Court of Claims
Hall of Justice
925 W. Ottawa St.
Lansing, MI 48909

RE: Written Claim per MCL 600.6431 against the Department of Technology, Management & Budget

Dear Clerk:

This verified letter is to fulfill the requirements of MCL 600.6431(1) as a written notice against Department of Technology, Management & Budget ("DTMB") for a claim by ABC of Michigan.

On or about October 21, 2021, the Governor announced that the DTMB would reinstate the policies of a repealed law. The policies where rules related to the amount of wages that were mandated on contractors submitting bids on government contracts. Such a policy had been in place before and had been enacted by legislation. But the policy and legislation in question was repealed by legislative action.

This policy was then implemented by the DTMB. The policy injures the contractors who are members of plaintiff ABC of Michigan. It denies contracts to those who pay wages that are less than the prevailing wage, or who use different and innovative job classifications.

ABC of Michigan claims that the unilateral implementation of such a policy by an administrative agency without explicit legislative authority is a violation of the separation of powers doctrine, and violates Michigan's Constitution. Further, DTMB also did not follow the usual rule making process under the Administrative Procedures Act. As such, the policies are invalid and void.

ABC seeks an injunction and declaratory relief against DTMB, along with any costs and/or attorneys fees that the court sees fit to grant.

Sincerely,

Handwritten signature of Jimmy E. Greene in blue ink.

Jimmy E. Greene

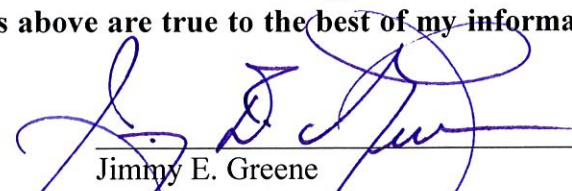
RECEIVED by MCOOC 7/21/2022 11:53:17 AM

RECEIVED by MCOA 3/24/2023 8:53:44 AM

MACKINAC  CENTER
LEGAL FOUNDATION

I declare that the statements above are true to the best of my information, knowledge, and belief.

Dated: July 21, 2022


Jimmy E. Greene

Subscribed and sworn to by Jimmy Greene before me on the
July day of 21, 2022.

Signature Angela Studer

Angela Studer, Notary Public
State of Michigan, Midland County
My Commission Expires: 11/24/24
Acting in the County of Midland

RECEIVED by MCOOC 7/21/2022 11:53:17 AM

RECEIVED by MCOA 3/24/2023 8:53:44 AM

STATE OF MICHIGAN
COURT OF CLAIMS

Bundle Cover Sheet

| | | |
|---|------------------------------------|----------------------------------|
| Lower Court: | L Ct No.: | COC No.: TEMP-GXOZGG9X |
| Case Title: ABC OF MICHIGAN v. DEPT OF TECHNOLOGY MANAGEMENT AND BUDGET | | |
| Priority: NONE | Filing Option: File Only | |

Filer Information

Filer
Derk Wilcox
140 West Main Street
Midland, MI 48640

Attorney
Derk Wilcox, 66177(MI)
140 West Main Street
Midland, MI 48640

wilcox@mackinac.org

wilcox@mackinac.org

Filing Summary

| Filing Type | Filing Name | Fee |
|-----------------------|--|-----------------|
| Other | 2022 07 21 Signed notice letter | \$0.00 |
| Summons and Complaint | 2022 07 21 Signed Complaint | \$150.00 |
| | eFiling System Fee: | \$25.00 |
| Other | 2022 07 21 Appendix to Complaint with exhibits | \$0.00 |
| Other | MC 01, Summons | \$0.00 |
| | NON-REFUNDABLE Automated Payment Service Fee: | \$5.25 |
| | Total: | \$180.25 |

Alternate Payment Reason: None

The document(s) listed above were electronically filed with the Michigan Court of Claims.

TEMP-GXOZGG9X-25978974

Appellee's Appx 084

RECEIVED by MCOOC 7/21/2022 11:53:17 AM

RECEIVED by MCOA 3/24/2023 8:53:44 AM