

**THE LABOR AND INDUSTRIAL DIVISION
OF THE STATE OF NEW MEXICO.**

**IN RE THE MATTER OF:
Proposed Amendments to 11.1.2.11 NMAC.**

FINDINGS AND ORDER OF THE DIRECTOR

1. Before the Director are proposed amendments to regulations concerning the Procedure To Be Employed In The Predetermination of Wage Rates on Public Works, Section 11.1.2.11 NMAC.
2. These proposed amendments arise from a prior administrative proceeding and subsequent litigation encaptioned Associated Builders and Contractors, et al. v. New Mexico Labor and Industrial Commission, First Judicial District Court, Cause No. D-0101-CV-2004-01189. The Director accepts and concurs in the Order entered in that case by Judge James Hall on August 23, 2005, and bases his Findings and Order in this matter on the legal and factual determinations contained in Judge Hall's Order.
3. Following notice, a public hearing was held on these proposed amendments on July 19, 2006, at which public comments were offered by Mr. Mark Shumate, Mr. Lee Maxwell, Ms. Dawn Matson, Mr. Duane Trythall, and Mr. Jim Werkmeister, opposing these proposed amendments. Mr. Carl Condit and Mr. Jerry Romero testified in support of the proposed regulations.
4. The testimony of those individuals urging the Director to reject the proposed amendments was based on the argument that the proposed amendments would permit the Director to act arbitrarily by simply adopting, unilaterally, selected collective bargaining agreement wage rates as public works wage rate without giving due and appropriate regard to all other data obtained from the Director's Continuing Program for the compiling of wage rate information.
5. The Director concurs that such arbitrary behavior would indeed raise very serious concerns under the laws of New Mexico, but disagrees that the proposed amendments would authorize the Director to take the feared arbitrary actions.
6. The testimony of those individuals urging the Director to adopt the proposed amendments was based on the argument that the proposed amendments would provide the regulations necessary to lawfully implement the New Mexico Public Wage Act (Section 13-4-1 et seq. NMSA 1978) consistent with the requirements of Judge Hall's Order.

7. The proposed amendments before the Director do not alter the Director's duties under the New Mexico Public Works Minimum Wage Act. Pursuant to the statute and the regulations there under, as amended by these proposed amendments, the Director's duties are:

A. The Director must conduct a continuing program for the obtaining and compiling of wage rate information.

B. If the information obtained from the continuing program is, in the Director's judgment, inadequate to make a valid wage determination, the Director may have a field survey conducted to consider alternate sources of information in addition to that obtained from the continuing program.

All of this must occur, pursuant to regulation, as a prevailing wage rate determination "...based on the survey data assembled and compiled." See Section 11.1.2.11(E) NMAC.

8. The proposed amendments before the Director, when read as a part of the entire regulatory scheme, Section 11.1.2.1 et seq. NMAC, as required by New Mexico law, do not violate the New Mexico Public Works Minimum Wage Act, but instead provide a regulatory process to lawfully implement the statute.

9. The proposed amendments will allow the Director to more accurately determine the proper prevailing wage in New Mexico.

10. In the event a wage determination was not made pursuant to these regulations as amended, but instead was done in an arbitrary manner, then there are existing appellate processes before the Director and the New Mexico Labor and Industrial Commission to correct any such future conduct based upon that case and those facts at that time.

Based upon the foregoing, IT IS HEREBY ORDERED that the proposed amendment to regulation 11.1.2.11 NMAC is adopted. A copy of the adopted regulation is attached hereto and incorporated herein by reference. IT IS FURTHER ORDERED that the amendment to regulation 11.1.2.11 NMAC shall be effective upon filing as provided by law.

Dated: _____

James L. Moran, Director
Labor and Industrial Division
New Mexico Department of Labor