

Date of Hearing: May 20, 2020

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT

Ash Kalra, Chair

AB 2231 (Kalra) – As Amended May 6, 2020

**SUBJECT:** Public works

**SUMMARY:** Defines a public subsidy as de minimis for the purpose of paying the prevailing wage in private projects if it is both less than \$500,000 and less than 2% of the total project cost for bids advertised or contracts awarded after July 1, 2021. If the subsidy is for a residential project consisting entirely of single family dwellings, the subsidy is de minimis so long as it is less than 2 % of the total project cost.

**EXISTING LAW:**

- 1) Requires that not less than the general prevailing rate of per diem wages, determined by the Director of the Department of Industrial Relations (DIR), be paid to workers employed on public works projects, with specified exceptions.
- 2) Authorizes the Director of DIR to determine, upon request, whether a specific project or type of work awarded or undertaken is a public work.
- 3) Defines “public works” to include, among other things, construction, alteration, demolition, installation, or repair work done under contract and paid for, in whole or in part, out of public funds.
- 4) Exempts from the above definition, among other projects, an otherwise private development project if the state or political subdivision provides, directly or indirectly, a public subsidy to the private development project that is de minimis in the context of the project.

**FISCAL EFFECT:** Unknown

**COMMENTS:** According to the author, “AB 2231 would define when a public subsidy is ‘de minimis’ for the purpose of determining when the prevailing wage is applied to private projects using public funds. This would allow a developer, if they choose to seek and/or accept a public subsidy, to know if the Prevailing Wage Act applies to the project.

Currently, the prevailing wage law is triggered for public projects of \$1,000 or more. However, Labor Code Section 1720(c)(3) provides that a project is not subject to the prevailing wage law, even if it receives a public subsidy, if that subsidy is ‘de minimis’ in the context of the project...

Since the term ‘de minimis’ is not statutorily defined, there is no guidance as to the appropriate level of public subsidy that should be considered de minimis. This has led the Department of Industrial Relations (DIR) to offer wildly different determinations on a project-by-project basis as to what is de minimis, leading to confusion and litigation on what the term actually means.”

Committee staff is aware of a 2012 public works case where the DIR defined de minimis without reference to any amount of public subsidy, limiting the application of de minimis to instances where the “amount of public funds is proportionately small enough in relation to the overall cost of the Project, such that the availability of the subsidy does not significantly affect the economic viability of [the] Project.”<sup>1</sup>

### **Prevailing Wages in the Construction Industry**

In California, the prevailing wage rate is an hourly rate paid on public works projects that is often set in the terms of a collective bargaining agreement. According to the DIR, the wage rate relies upon such factors as “the particular craft, classification or type of work within the locality and in the nearest labor market area (if majorities of such workers are paid at a single rate). If there is no single rate paid to a majority, then the single or modal rate being paid to the greater number of workers is prevailing.”

On the federal level, under the Davis-Bacon Act,<sup>2</sup> contractors and subcontractors who perform work on federally funded contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works must pay a prevailing wage to mechanics and laborers. The prevailing wage must be at least equal to locally prevailing wages and fringe benefits for corresponding work on similar projects in the area. The federal Department of Labor determines locally prevailing wage rates.

The policy behind paying a prevailing wage is to ensure that contractors are not awarded public works contracts by virtue of paying low wages and undercutting competitors who provide higher compensation. Prevailing wage creates a level playing field by requiring an across-the-board rate for all bidders on publically subsidized projects.

### **Governor’s Veto Message**

AB 520 (Katra) of 2019 proposed language identical to this bill and was vetoed. The Governor’s veto message stated:

“This measure seeks to codify a definition of the term ‘de minimis’ to define the level of public subsidy that would trigger prevailing wage requirements on an otherwise private project.

While I steadfastly support prevailing wage law, I am concerned that the restrictive nature of this law may have unintended consequences. Further, there is nothing to suggest that the longstanding administrative practice of considering the public subsidy in the context of the project and using two percent as a general threshold is insufficient.”

The author’s office and the sponsor of the bill believe that clarifying the definition of ‘de minimis’ is essential so that DIR can consistently apply the same standard to private projects that rely on public dollars, thus reducing unnecessary litigation.

---

<sup>1</sup> Public Works 2011-033, Blue Diamond Agricultural Processing Facility – City of Turlock (May 9, 2012)

<sup>2</sup> Pub. Law 107-217-Aug. 21, 2002

## **Arguments in Support**

The State Building and Construction Trades Council, a sponsor of the bill, writes, “The prevailing wage allows for all construction workers, nonunion and union, to receive a fair wage when taxpayer funds are provided to developers.

Furthermore, during this extraordinary time when state and local budgets are strained, and taxpayer funds are scarce, we should be looking for ways to maximize the investment of taxpayer dollars to ensure that workers are paid a middle-class wage. The prevailing wage ensures that construction workers will make the wages and are provided the benefits they need for themselves and their families so as not to have to rely upon the social safety net. Furthermore, workers paid the prevailing wage are highly skilled and trained and have been through a state-approved apprenticeship program for their craft. This critical training ensures that the workers are efficient and safe, will get the job done right, and will benefit when taxpayer funds are utilized to help build a private development.”

## **Arguments in Opposition**

The California Building Industry Association writes in opposition, “The housing shortage in California is now estimated at 2 to 4 million housing units. The imbalance between supply and demand has driven California housing costs to be the highest in the nation, with an average median home price now 2.5 times the U.S. median. In California’s coastal areas, the shortage is even greater with median prices in San Francisco and San Jose surpassing \$1M. The impact that COVID-19 has had on the construction industry has set housing back years if not decades, and the Department of Finance published on May 7, 2020, a forecast that permits (a key economic indicator) will precipitously drop by 21% or more this year alone.

At a time when California should be looking to increase supply across all housing types, AB 2231 seeks to stick homeowners and renters with higher monthly rents and mortgages.”

## **Related and prior legislation**

AB 2765 (O’Donnell) of 2020 expands the definition of “public works,” for the purpose of the payment of prevailing wages, to also include any construction, alteration, demolition, installation, or repair work done under private contract on a project for a charter school when it is paid for, in whole or in part, with the proceeds of conduit revenue bonds issued on or after January 1, 2021. This measure is pending before our Committee.

AB 520 (Katra) of 2019 was substantially similar to this bill. It was vetoed by Governor Newsom.

SB 418 (Hernández) Chapter 393, Statutes of 2017 initially provided clarification on de minimis costs on public works projects before it was gut and amended and replaced with provisions related to public contracts and the utilization of a skilled and trained workforce.

AB 251 (Levine) of 2015 would have defined de minimis as a public subsidy that is both less than \$250,000 and less than 2% of the total project cost. The measure was vetoed by the Governor.

SB 854 (Committee on Budget and Fiscal Review) Chapter 28, Statutes of 2014 revised the state's public works program by requiring that, among other things, a contractor be registered and qualified by the DIR in order to bid on, be listed in a bid proposal for, or engage in the performance of any contract for a public work and as part of the registration process, provide specified information to establish the contractor's eligibility to be registered.

AB 302 (Chau) of 2013 would have defined de minimis as a public subsidy that is both less than \$25,000 and 1% of a total project cost. The measure was vetoed by the Governor.

**REGISTERED SUPPORT / OPPOSITION:****Support**

California Labor Federation, Afl-cio  
California State Association of Electrical Workers  
California State Council of Laborers  
California State Pipe Trades Council  
California Teamsters Public Affairs Council  
District Council of Iron Workers of The State of California and Vicinity  
International Union of Elevator Constructors, Local 18  
International Union of Elevator Constructors, Local 8  
International Union of Operating Engineers, Cal-nevada Conference  
State Building and Construction Trades Council of Ca  
Western States Council Sheet Metal, Air, Rail and Transportation

**Oppose**

California Building Industry Association

**Analysis Prepared by:** Megan Lane / L. & E. /