



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
PO Box 44000 Olympia Washington 98504-4000

April 22, 2016

Mr. John Payne
Grady Excavating
c/o Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 4040
Seattle, WA 98104

Re: Request for redetermination with regard to Offsite Bulldozing Work Associated with the SR 520 Pontoon Project; WSDOT Contract # 7826, Subcontract #1572

Dear Mr. Payne:

Thank you for your March 6, 2013 request for redetermination of the Determination dated August 29, 2012 issued by Industrial Statistician Ann Selover, pertaining to the prevailing rate of wage for the offsite bulldozing work associated with the disposal of surplus excavated material from the SR 520 pontoon casting basin construction project.

This is a reconsideration of a determination of the Industrial Statistician regarding coverage of the referenced work under Washington's prevailing wage laws and is made pursuant to WAC 296-127-060(3). See the attached document, "Prevailing Wage Determination Request and Review Process."

ISSUE

Do the prevailing wage requirements of chapter 39.12 RCW apply to certain off-site bulldozing work performed at the disposal sites for the excavated materials hauled away from a public works project? This bulldozing work was performed at disposal sites to move, flatten, place or level excavated material from the SR520 pontoon project. Must the worker performing that bulldozing work be paid the prevailed rate of wage for that work? If so, the applicable prevailing wage scope of work would be Operating engineers (equipment operators), WAC 296-127-01354.

PROCEDURAL HISTORY

1. February 7, 2012 request for a determination from Josh Swanson, I.U.O.E. Local 302.
2. August 29, 2012 determination by Ann Selover, Industrial Statistician.
3. October 22, 2012 request for modification from John M. Payne, Esq. on behalf of Grady Excavating.
4. February 6, 2013 Ann Selover, Industrial Statistician, response to and denial of the request for modification.

5. March 6, 2013 request for an Assistant Director reconsideration of the determination and denial of request for modification from John M. Payne, Esq. on behalf of Grady Excavating.

CONSIDERED RESPONSE

In this case we must consider whether the bulldozing performed at a disposal site on the materials removed from the SR 520 pontoon site was work covered by the Prevailing Wage Act, and whether the worker who performed the bulldozing should have been paid the appropriate prevailed rate of wage for his time spent performing this work. In making this decision, the standard for the decision is whether, after consideration of the Industrial Statistician's determination and a careful review of the entire record, the evidence supports the work being subject to the requirements of the Prevailing Wage Act. I will evaluate the totality of the specific facts and circumstances when making policy and determination decisions.

RELEVANT LAW

The state's Prevailing Wage Act is chapter 39.12 RCW. The administrative rules for the Prevailing Wage Act are in chapter 296-127 WAC. RCW 39.12.020 requires prevailing wages to be paid on public works. References to the Revised Code of Washington (RCW) and the Washington Administrative Code (WAC) are included.

Under RCW 39.12.015:

All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.

Under WAC 296-127-060(3):

Any party in interest who is seeking a modification or other change in a wage determination under RCW 39.12.015, and who has requested the industrial statistician to make such modification or other change and the request has been denied, after appropriate reconsideration by the assistant director shall have a right to petition for arbitration of the determination."

Public works projects are subject to Washington's prevailing wage laws. RCW 39.12.020. A public work includes "all work, construction, alteration, enlargement, improvement, repair, and/or demolition that is executed by contract, purchase order, or any other legal agreement and that is executed at the cost of the state of Washington or of any municipality." WAC 296-127-010(7)(a)(i).

The hourly wages to be paid to laborers, workers, or mechanics upon all public works is subject to the prevailing wage and "shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality within the state where such labor is performed." RCW 39.12.020.

Other provisions of chapter 39.12 RCW state the requirement more broadly and require the payment of prevailing wages:

... to laborers, workers, or mechanics in each trade or occupation required for such public work employed in the performance of the contract either **by the contractor, subcontractor or other person doing or contracting to do the whole or any part of the work contemplated by the contract...**

See RCW 39.12.030. [Emphasis added].

Workers involved in the removal of excavated materials from a public works construction site pursuant to contract requirements or specifications must be compensated in accordance with the provisions of chapter 39.12 RCW. See WAC 296-127-018(2)(c).

There are a number of important legal decisions that directly pertain to the decision in this matter. The first is *Heller v. McClure & Sons, Inc.*, 92 Wn. App. 333, 340, 963 P.2d 923 (1998). In this case, "workers on public work projects who are classified as 'laborers, workers, or mechanics' are entitled to the prevailing wage when their work **directly relates to the prosecution of the work that is contracted to be performed and necessary for the completion of that work.**" [Emphasis added].

Another decision also informs this matter, *Everett Concrete Prods, Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 826, 748 P.2d 1112 (1988). In this case, Everett argued that the fabrication of non-standard concrete tunnel liner segments off-site did not require payment of prevailing wages because the work did not have "a sufficient nexus" to the public works project. The court disagreed, citing the differences between the Davis-Bacon Act (which governs federal public works projects) and RCW 39.12. Specifically, the fact that the Davis-Bacon Act provides for the payment of prevailing wages for mechanics and laborers employed "directly upon the site of the work", whereas RCW 39.12 requires payment of prevailing wages to laborers, workmen or mechanics, "upon all public works." And it was the courts conclusion that the "legislature intended the scope of the State prevailing wage law to be broader than that of the Davis-Bacon Act..." Following this direction in *Everett*, the fact that the work was performed off-site does not preclude a prevailing wage requirement and the question is whether that off-site work has a sufficient connection to the public works contract.

BACKGROUND

Request for determination

On February 7, 2012, Industrial Statistician Ann Selover received a request for determination from Josh Swanson, representative for International Union of Operating Engineers, Local #302. He was seeking clarification on the prevailing wage requirements for the work performed at an offsite disposal site with regard to the SR 520 pontoon project and the appropriate scope of work.

Project description

The SR520 pontoon project was a public works project in Washington State, with the purpose of building 77 total concrete pontoons. These pontoons, once constructed, would be joined together end-to-end on Lake Washington to form the backbone of the new SR 520 floating bridge. The largest pontoons ever built in Washington, these pontoons are 360 feet long, 75 feet wide, nearly 30 feet tall, and weigh 11,000 tons. The new SR 520 floating bridge is supported by the 77 concrete pontoons that form the floating foundation of the new bridge. Of these, 33 were built in Aberdeen, Wash., (the other 44 were built in Tacoma, Wash., as part of a separate contract).

Contracted work and relationships

The contract for this public works project was awarded by the Washington State Dept. of Transportation (WSDOT) to Kiewit-General (K-G), contract #7826, dated January 11, 2010. The Pontoon Construction Project broke ground in February 2011 at a 55-acre site in Aberdeen. Kiewit-General built

a casting basin facility featuring a concrete batch plant, on-site water treatment, and a 4-acre casting basin, in order to stage construction of 33 pontoons. Grady Excavating (hereafter referred to as Grady) was a subcontractor to Kiewit-General, and had a contract (Company No. 323, Job No. 14285, Subcontract No. 1572, dated November 16, 2010) on the SR 520 casting basin construction project. In the signed Subcontract document, Article 1, Grady Excavating agreed to “furnish all supervision, labor, tools, equipment, materials and supplies necessary to perform, and to perform, the following described work (“Work”) in accordance with the terms and conditions of the Prime Contract and this subcontract. See Attachment SC.”

Disposal sites for excavated materials

Grady Excavating employed truck drivers to haul excavated material from the casting basin construction site to the approved disposal sites. The surplus excavated material was moved to two disposal sites:

- Bayview RediMix– received fill material from the pontoon construction site, and bulldozing occurred by a Grady employee.
- City of Hoquiam sewage lagoon – received fill material from the pontoon construction site, and bulldozing occurred by a Grady employee.

Grady Excavating performed related work at two other sites:

- Newkah Sand and Gravel - a disposal site receiving wood waste from the pontoon construction project, rather than dirt or rock. That we know, no bulldozing work was performed on surplus material at this site.
- Quality Rock, Grand Mound, was a source of aggregate rock supplying the Aberdeen pontoon project site. The Grady Excavating employee/ operator performed work mining rock with an excavator at this site for approximately 3 weeks. That we know, no bulldozing work was performed on surplus material at this site.¹

Differing perspectives

Mr. Swanson reported that bulldozing was performed on the above referenced project at different disposal sites in a multi-shift (round robin) operation. The bulldozing operator was employed by Grady to perform the function of pushing the fill material into the pits. After the Grady trucks delivered the excavated material to the disposal site and dumped it, the Grady bulldozing operator used a bulldozer to push the material into the final location and grade it accordingly. It was Mr. Swanson’s opinion that this work required prevailing wages and best fit under the Equipment operator prevailing wage scope of work, WAC 296-127-01354.

Grady’s position is that this bulldozing work at the disposal site is not subject to prevailing wage laws. Grady contended that it does not matter what Grady chooses to do with the excavated material at the disposal site, because the material became private material and the public works project had no control or say over the material once it crossed what it calls the “project boundary.” It also points out that the disposal sites Grady utilized in connection with this project were not “exclusive” to the work under consideration.

¹ At Quality Rock in Grand Mound, there’s no record of a surplus excavated material dump site there, but the worker said that excavating to mine rock/aggregate was performed by the worker to supply rock that would go to the pontoon work site. Since that is not germane to the disposal matter at hand in the reconsideration, I am choosing to not address that further.

Industrial Statistician - program actions

On August 29, 2012, Industrial Statistician Selover issued a letter establishing her determination on the bulldozing work performed at disposal sites. She determined that the work performed was prevailing wage and the appropriate scope of work was Operating engineers (equipment operators), WAC 296-127-01354.

On October 22, 2012, Grady requested modification to the Determination dated August 29, 2012. In the request for modification, Grady stated that they believed Selover's Determination was based on three arguments: (1) the application of RCW 39.12; (2) *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 748 P.2d 1112 (1988); and (3) *Heller v McClure*, 92 Wn. App. 333, 963 P.2d 923 (1998).

On February 6, 2013, Industrial Statistician Selover responded to the request for modification of the Determination dated August 29, 2012. The request for modification was denied. On March 6, 2013, you requested this reconsideration of the Determination dated August 29, 2012.

To ascertain more facts, Ms. Selover requested her staff to gain more relevant facts and establish more detail about the work being performed at the dump sites. Interviews of individuals responsible for disposal sites were conducted by Labor and Industries staff, Marcus Ehrlander, then an Industrial Relations Agent 4/Prevailing Wage Technical Specialist, and Laura Herman, who is currently an Industrial Relations Agent 4/Prevailing Wage Technical Specialist with Labor & Industries.

On April 5, 2013, then L&I staff member Marcus Ehrlander, spoke with Marvin Prince of Bayview RediMix who identified himself as one of the owners. He was familiar with the dumping performed by Grady Excavating for this project. Speaking with Mr. Ehrlander, Mr. Prince confirmed that he had established an agreement allowing Grady to dump the excavated material on the site if Grady would perform grading and dozing to place, flatten, and level the excavated material. Mr. Ehrlander inquired as to why this was a requirement. Mr. Prince stated that he didn't want to do it himself.

Ms. Herman, spoke with Brian Shay, Hoquiam City Administrator, with regard to the City of Hoquiam waste water lagoon dump site. He stated that the parties dumping materials at the former waste water site were required to push the materials into the hole/pond. Grady could dump the materials at the site as long as Grady bulldozed the materials into the desired location after they were dumped.

Further evidence and communications

On May 21, 2013 Jacob Black, attorney for I.U.O.E. Local 302 sent correspondence in support of the August 29, 2012 Determination. On August 7, 2013, Associated General Contractors of Washington (AGC) requested redetermination of the Determination dated August 29, 2012.

On March 30, 2015, I met with Bob Braun and you with regard to this matter. In that meeting, we established a number of questions concerning the work performed. You provided those answers in your May 8, 2015 letter. My first question was whether the work was performed in conjunction with the drivers actually dumping the material. You stated the bulldozing work was performed intermittently, and confirmed that at Bayview and the City of Hoquiam dump sites work was performed "at times" when trucks were dumping. You stated that Grady did not have an agreement with Bayview or Hoquiam dump sites for those sites to buy/sell the material. There was no agreement with the dump sites to the role or timing of the bulldozing duties. You stated that the bulldozing was not a necessary part of the contract. You confirmed that Grady did not have the permit, that Kiewit had the permit, "but only to deposit the

material at a particular site.” You stated the final owner of the material and its use was not part of the contract or permit. You further stated that there was no agreement that required the material be dumped or bulldozed at certain areas, and stated your “client has no recollection or knowledge of any such agreement.”

To assist with the analysis, I gathered more information about the specific work performed at the involved sites.

- Bayview RediMix– received fill material from the pontoon construction site, and bulldozing occurred.
 - L&I staff gathered information from both the worker running the bulldozer and the disposal site owner.
 - The worker performing the bulldozing provided information about the site, stating “the Bayview site had room for a truck and a trailer. The fill went into a pond about 90 feet deep. Without the dozer work, continued dumping would not be possible at this site – the road would have been obstructed and the next truck could not enter and discharge its load.
 - This site was a two-way haul, excavated debris in, and rock out.
 - When asked why he required Grady to perform the bulldozing as a condition of dumping, the site owner told L&I staff: “I didn’t want to do it.”
- City of Hoquiam sewage lagoon – received fill material from the pontoon construction site, and bulldozing occurred.
 - L&I staff gathered information from both the worker running the bulldozer and the disposal site owner.
 - The Grady Excavating employee/equipment operator performed work dozing at this site.
 - According to a summary of the project completed by Brian Shay, Hoquiam City Administrator, for an Association of Washington Cities Award, “The City of Hoquiam was able to partner with the Washington State Department of Transportation’s general contractor for the 520 Floating Bridge Pontoon Project, Kiewit General, who transported and placed 50,000 cubic yards of free surplus fill material into the lagoon. The excavated pontoon dirt filled 5 acres and reduced WSDOT’s disposal costs at sites much further from the pontoon construction site in Aberdeen.”
<http://www.awcnet.org/Apps/ma/projects/2012Hoquiam.pdf>
 - According to the City Administrator, the city required pushing the materials into the hole/lagoon as a condition of dumping there.
- Newskah Sand and Gravel - a disposal site receiving wood waste from the pontoon construction project, rather than dirt or rock
 - That we know, no bulldozing work was performed at this site.
- Quality Rock, Grand Mound, was a source of aggregate rock supplying the Aberdeen pontoon project site.
 - That we know, no dumping or disposal of surplus fill material occurred there.
 - L&I staff gathered information from the Grady Excavating employee/ operator that he ran an excavator mining rock at the Quality Rock site for approximately 3 weeks, in order to supply the material to pontoon site.

The public works contract requirements

To understand the obligations and requirements of the contracted work, it is important to review in detail the specific requirements of both the Prime Contract and the Subcontract.

The Prime Contract for this public works project was awarded to Kiewit-General, WSDOT contract #7826, dated January 11, 2010. Grady Excavating was a subcontractor to Kiewit-General, and had a contract (Company No. 323, Job No. 14285, Subcontract No. 1572, dated November 16, 2010) to perform specific trucking work on the SR 520 casting basin construction project.

Subcontract requirements

In the Subcontract document signed by Grady Excavating, these contract obligations are laid out:

- Article 1, Grady Excavating agreed to “furnish all supervision, labor, tools, equipment, materials and supplies necessary to perform, and to perform, the following described work (“Work”) in accordance with the terms and conditions of the Prime Contract and this subcontract. See Attachment SC.”
- Article 2 of the signed Subcontract details that Kiewit General agreed to pay Grady Excavating \$5,728,715.00 for the performance of this subcontract.
- Article 3 of the signed Subcontract details that “The General Provisions together with any Additional Provisions, are attached hereto and are made a part of this subcontract.”

In Attachment SC, referred to in Article 1 of the Subcontract, the scope of work that the contract would include is detailed. It outlines that Grady Excavating would perform the following work:

- Supply, trucking, and placement of aggregates on grade as needed.
- Exporting the material from the job site to the Subcontractor’s approved dump site as well as material hauling onsite as needed.
- Provide all applicable permits for disposal sites and prior to processing or delivering aggregates.
- Grady Excavating, Inc., provided an itemization of work table that included hourly estimates for:
 - Hourly truck and trailer hauling
 - Hourly solo hauling
 - Sweeper truck
 - Water truck
 - Low Boy Hauling (55 ton)
- Quantity descriptions include reference to the 2008 WSDOT Standard Specifications

Article 3 of the subcontract signed by Grady Excavating refers to the General Provisions and Additional Provisions. In the “General Provisions-Subcontract” document for Grady Excavating, Section 1, Contract Documents speaks to the requirements of the Subcontract:

- Subsection (a) states that “The term Prime Contract as used herein refers to all the general, supplementary and special conditions, drawings, specifications, amendments, modifications and all other documents forming or by reference made a part of the contract between Contractor and Owner.”
- Subsection (b) states that “Subcontractor, by signing this Subcontract, acknowledges that it has independently assured itself that all of the Prime Contract documents have been available to it,

and confirms that it has examined all such documents and agrees that all of the aforesaid Prime Contract documents shall be considered a part of this Subcontract by reference thereto. Subcontractor agrees to be bound to Contractor and Owner by the terms and provisions thereof so far as they apply to the Work, unless otherwise provided herein.”

In the “Additional Provisions-Subcontract” there are also requirements that relate to this matter, specifically in Sections 50 and 51:

- Section 50. Design Build. “The Prime Contract number 7826 between Washington State Department of Transportation (owner) and Contractor shall be considered part of this Subcontract, and the Subcontractor agrees to be bound to the Contractor and Owner by the terms and provisions of the Prime Contract so far as they apply to the Work unless otherwise specifically provided herein.”
- Section 51. Required Contract Provisions Federal –Aid Construction Contracts. “The following documents are made a part of this subcontract:
 - (c)(1) Washington State Prevailing Wage Rate: Grays Harbor County Effective 09/02/2009”

It is notable that both the General Provisions and Additional Provisions segments of the Subcontract refer to and directly incorporate the requirements of the Prime Contract, contract #7826 executed between Washington State Department of Transportation and Kiewit-General. It is thus important to look at the obligations and requirements which are set forth in that prime contract.

Prime contract requirements

In contract #7826, the Prime Contract, several references are made to documents that dictate or set forth the obligations relating to proper disposal on the SR 520 Pontoon project (relevant items are listed below - others are omitted).

Section 5. Contract Documents

The term “Contract Documents” shall mean the documents listed below:

4. General Provisions - RFP Chapter 1;
5. Technical Requirements – RFP Chapter 2;
7. Amendments to the Standard Specifications – RFP Appendix B1;
8. Division 2 through 9 of the 2008 Standard Specifications for Road, Bridge and Municipal Construction
10. Design-Builder’s Proposal Documents

First – I reviewed the General Provisions, RFP Chapter 1 for the SR 520 Pontoon project, dated August 24, 2009. This document provides a definition for Standard Specifications, and clarifies that it refers to Divisions 2 through 9 of the Standard Specifications for Road, Bridge and Municipal Construction 2008 (M41-10): published by WSDOT².

Next, I reviewed the “Technical Requirements, RFP Chapter 2” document for the SR 520 Pontoon project, dated August 24, 2009. This document lays out Construction Requirements in Section 2.11.5, which covers “Disposal of Surplus Material.” In this section, it states that “**Section 2-03.3(7)C of the Standard Specifications is supplemented with the following** [emphasis added]:

² Document may be found online at this link: <http://www.wsdot.wa.gov/publications/manuals/fulltext/M41-10/SS2008.pdf>

All surplus excavation or other materials shall be disposed of outside the Project limits or reused in a manner that does not impact sensitive resources such as wellhead protection zones, surface water bodies, parks, and child-use areas. Disposing of soils of any kind directly to a topsoil manufacturer is prohibited.

Additionally, surplus material or other material shall not be disposed or reused in areas determined by WSDOT to be environmentally sensitive.

Both the RFP, Chapter 1 – General Provisions, and the RFP – Chapter 2 Technical Requirements documents for Prime Contract #7826 provide language, cited above, that refers to and supplements the 2008 WSDOT Standard Specifications. It is thus important to look at the requirements set forth in the 2008 WSDOT Standard Specifications.

WSDOT specifications applicable to both the prime contract and the Grady subcontract

The 2008 WSDOT Standard Specifications, referred and incorporated into the requirements of both the Prime Contract and Subcontract, provide important requirements and obligations that are relevant to the contractual requirements on Grady Excavating when they performed the disposal work relating to Contract #7826. The 2008 WSDOT Standard Specifications, Section 2-03.3(7) addresses Disposal of Surplus Material, and Section 2-03.3(7)c (which was specifically mentioned in the “Technical Requirements, RFP Chapter 2” document of the Prime Contract) detail requirements for Contractor-Provided Disposal Sites. The specifications state a number of requirements that apply to the subcontracted disposal work that Grady Excavating provided [emphasis added below]:

If the Contracting Agency provides no waste site, but requires disposal of excess excavation or other materials, the Contractor shall arrange for disposal at no expense to the Contracting Agency, except as provided in Section 2-03.3(7)B, Item 2.

The Contractor shall acquire all permits and approvals required for the use of the disposal site. The cost of any such permits and approvals shall be included in the Bid prices for other Work.

The Contractor shall provide the Engineer the location of all disposal sites to be used and also provide copies of the permits and approvals for such disposal sites before any waste is hauled off the project.

Disposal of excess material within a wetland area will not be allowed without a Section 404 permit issued by the U.S. Corps of Engineers and approval by the local agency with jurisdiction over the wetlands. Wetlands are defined as those areas inundated or saturated by ground or surface water at a frequency and duration sufficient to support, and that under normal circumstance do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

The Contractor shall protect, indemnify, and save harmless the Contracting Agency from any damages that may arise from the Contractor’s activities in making these arrangements. Such indemnity shall be in accordance with RCW 4.24.115 as amended by CH. 305, Laws of 1986.

Any action required to satisfy any permit and/or any approval requirements in a Contractor provided disposal site shall be performed by the Contractor at no additional expense to the Contracting Agency.

Reclamation of a Contractor-supplied waste site must conform to the requirements of Section 3-03.

The language in the Subcontract that Grady Excavating signed stated that “the Prime Contract number 7826 between Washington State Department of Transportation (owner) and Contractor *shall be considered part of this Subcontract, and the Subcontractor agrees to be bound to the Contractor and Owner by the terms and provisions of the Prime Contract so far as they apply to the Work unless otherwise specifically provided herein.*” [Emphasis added]. I could find no section of the Subcontract or its Attachments that specifically stipulated other terms or provisions relating to disposal.

ANALYSIS

The Prime Contract, Section 5, Contract Work, included both the RFP Chapter 1 and Chapter 2, as well as Division 2 through 9 of the 2008 Standard Specifications for Road, Bridge and Municipal Construction. The 2008 WSDOT Standard Specifications, cited above, provides specific requirements relating to the disposal and any activities performed in relation to the disposal. These requirements pertain directly to the question of whether the material excavated by Grady and disposed offsite was, in fact, lacking any connection or contractual obligation relating to the requirements of the public work project.

First, the disposal of surplus materials to a disposal site fell within the scope of the prime contract with Standard Specifications. The Subcontract that Grady Excavating signed with Kiewit stated that the excavated material had to be dumped at the “the Subcontractor’s approved dump site.” This aligns with the language in the Standard Specifications that dictate that the site must be selected, disclosed and properly approved by the project. Grady was not, in fact, free to do what it liked with the material. It could not dispose of the materials to a top soil manufacturer, nor on wetlands or environmentally sensitive areas without the proper permits.

Second, the 2008 WSDOT Standard Specifications states two requirements relevant to this question.

- First, it states that “The Contractor shall acquire all permits and approvals required for the use of the disposal site. **The cost of any such permits and approvals shall be included in the Bid prices for other Work.**” [Emphasis added].
- Second, it states that “Any action required to satisfy any permit and/or any approval requirements in a Contractor provided disposal site shall be performed by the Contractor **at no additional expense** to the Contracting Agency.” [Emphasis added].

The first statement indicates that it was Grady’s responsibility to “acquire all permits and approvals required for the use of the disposal site.” In this case, the approval necessary was from the owners of the four disposal sites. This indicates that the disposal site bulldozing work, which Grady performed as a requirement in order to secure the approval of the dump site, was established in the WSDOT Standard Specifications as having been included in the bid price for other work and paid for by the total contract value for Grady’s excavating and disposal work.

Just as the disposal of materials was required by the prime contract, the bulldozing was a condition of the disposal and was necessary for the completion of the contract work. This demonstrates that the bulldozing work was performed at a cost to the state, and thus, is subject to the requirements of RCW 39.12, the Prevailing Wage Act.

The second statement [with emphasis added], “**Any action required** to satisfy any permit and/or any approval requirements in a Contractor provided disposal site shall be performed by the Contractor **at no additional expense** to the Contracting Agency” indicates that the total established contract value was meant to pay for all actions, which would include work performed in relation to the disposal site.

In this case, Grady dumped the material at the Bayview and City of Hoquiam sites. In order to secure the “approval” from those sites to dump, Grady had to agree to bulldoze and place or level off the dumped material. This dozing action, necessary to satisfy the approval requirements at the disposal site, was performed by Grady at no additional expense to WSDOT, in accordance with Section 2-03.3(7)B, Item 2. Because the required bulldozing “action” was performed at “no additional expense”, it was performed under the previously established contract value, which means that it was performed at a cost to the state, and is thus an activity subject to the Prevailing Wage Act.

FINDINGS

After consideration of the Industrial Statistician’s determination, and a careful review of the entire record, I am persuaded that the evidence supports that the Industrial Statistician’s August 29, 2012 determination be affirmed.

The prevailing wage rate should be paid for the bulldozing and leveling work performed at the disposal sites, because this work was completed by the contractor, was contemplated by the contract, and directly related to the prosecution of the work upon the public work.

Moreover, the bulldozing work was necessary for the completion of the contract. The appropriate scope of work is Operating Engineers (Equipment Operators), WAC 296-127-01354, for the bulldozing work performed.

The conclusion below is limited to the facts of this particular project and its associated disposal sites. Should those facts change or are not the same as found herein: the conclusion may differ as well.

METHODOLOGY FOR DECISION

Chapter 39.12 RCW states the requirements of Prevailing Wage Act more broadly, and goes on to address the requirement of payment of prevailing wages for the “**whole or any part of the work contemplated by the contract.**” RCW 39.12.030 [emphasis added]. The question is whether this bulldozing work was, in fact, part of the work upon the public work. RCW 39.12.020 requires prevailing wages for work “upon all public works,” which includes workers employed off-site in the performance of the contract for public work. *Everett Concrete Prods. v. Dep’t of Labor and Indus.*, 109 Wn.2d 819, 826 (1988).

Key here is the requirement that the workers who are classified as “laborers, workers, or mechanics” are entitled to the prevailing wage when their work “**directly relates to the prosecution of the work that is contracted to be performed and necessary for the completion of that work.**” *Heller v. McClure*, 92 Wn. App. 333, 340 (1998) [emphasis added].

The building of the casting basins for the pontoons for this project required the removal of substantial amounts of dirt and fill from the construction site in Aberdeen. The removed dirt was relocated to two specific disposal sites. The bulldozing work at these two disposal sites, though not specifically enumerated in the Subcontract between Grady and Kiewit-General, was specifically contemplated in the Prime Contract between Kiewit-General and WSDOT. The Prime Contract enumerates in the RFP, Chapter 2, the specific Technical Requirements for the work. In the Technical Requirements, Section 22.11.5.1 details provisions for "Disposal of Surplus Material." This section states that the 2008 WSDOT Standard Specifications for Disposal apply, and in those requirements, WSDOT lays out controlling requirements for the method and manner of surplus soil disposal. These details demonstrate that the bulldozing activities by the Subcontractor at the disposal site were:

- Directly related to the prosecution and completion of the contract,
- Necessary to perform the contract, and
- Activities contemplated by the contract for the public work.

The Grady subcontract to this state contract included the disposal of the excavated materials. The City of Hoquiam allowed disposal of clean fill material at no charge. These materials were disposed of into a former wastewater treatment facility pond. As a condition of that disposal at their site, the City required Grady Excavating to push the materials into the pond.

On the Bayview RediMix site near Elma, as part of remediation work on part of the site, and to meet a requirement for disposal of the excavated materials there, the bulldozing operator was required to partly fill the pond in the quarry so its side walls sloped rather than having a more vertical drop. Based on our conversation with personnel from the dumpsite, pushing the dumped material into the pond was necessary to allow continued room for the contracted disposal work and a requirement for the dumping at Bayview.

Here, the work of the bulldozing operator was the work of a "laborer, worker, or mechanic" at both the City of Hoquiam sewage lagoon site and the Bayview RediMix site. The performance of the bulldozing work at both of these locations was necessary in order for Grady to fulfill the contractual expectation that the dirt be fully removed and moved into an appropriate final resting place.

Based on these requirements, the evidence supports that the work that Grady Excavating performed was directly related to and necessary to perform the public works contract, and was work contemplated by that public works contract. All work directly related to and necessary to perform the public works contract, or being work contemplated by the contract, leads to a prevailing wage requirement under chapter 39.12 RCW.

CONCLUSION

While I have carefully considered your viewpoint and concerns, it is my decision to uphold the determination letter issued on August 29, 2012 in regards to the bulldozing work performed at offsite disposal sites with regard to the SR520 Pontoon Project.

Should you disagree with my redetermination, I have included "*Prevailing Wage Determination Request and Review Process*" as information on the next steps in the process.

Mr. John Payne
April 22, 2016
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I greatly appreciate your participation and cooperation with the fact finding related to my inquiry. I apologize for the long delay in issuing this redetermination. The need to make an informed decision with regard to this matter was of utmost importance to me.

Sincerely,



Elizabeth Smith, Assistant Director
Fraud Prevention & Labor Standards

Cc: Jacob Black, Robblee Detwiler & Black
Jerry Vanderwood, Associated General Contractors of Washington
Kathleen Garrity and Wendy Novak, Associated Builders and Contractors of Washington, Inc.
Jim Christensen, Prevailing Wage Program Manager and Industrial Statistician
Josh Swanson, I.U.O.E. Local 302