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March 21, 2016

Mr. Jim Christensen
Industrial Statistician and Prevailing Wage Program Manager
Department of Labor and Industries
P. O. Box 44540
Olympia, WA 98504-4540

Dear Mr. Christensen:

This letter constitutes a formal request for a determination of coverage under the WA State Public Works statute, 39.12 RCW under the definition of public work established in RCW 39.04.010(4), for all work performed on the Seattle's Metropolitan Tract. The Metropolitan Tract takes up approximately 11 acres of downtown Seattle. The real estate is wholly owned by the University of Washington.

The specific buildings to which this request applies are as follows:

1. Financial Center
2. IBM Building
3. Puget Sound Plaza
4. Skinner Building
5. Cobb Building
6. Rainier Tower
7. Olympic Garage
8. Garage next to Puget Sound Plaza and Cobb Building

These buildings are managed under a lease agreement between Unico and the University of WA [UW.] There will be no request for a determination of coverage of the Olympic Fairmont Hotel at this time, and a separate request for coverage of the upcoming Rainier Square project will follow under separate cover.

Governing Statute:
RCW 39.04.010(4) defines "Public work" as follows:

> "Public work" means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein.

The statute further mandates that:

> All public works, including maintenance when performed by contract shall comply with chapter 39.12 RCW.

We believe that "all work" at the above listed locations, fully meets both criteria established for coverage.

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Authority of the Industrial Statistician to make determinations of coverage under 39.04 RCW.

The Industrial Statistician, on behalf of the Director of the Department of Labor and Industries, has full authority for making determinations of coverage under public works law. Such determinations can only be made by applying the criteria set forth in RCW 39.04.

In *Everett Concrete Products, Inc. v. Dept. of Labor & Industries,* 109 Wn.2d 819, 748 P.2d 1112 (1988), the WA State Supreme Court recapped the course of events leading to the department's determination of coverage under 39.12 RCW for the offsite custom fabrication of non-standard items by Everett Concrete Products [ECP] by describing the course of events that led up to the resulting conclusion as follows:

> In May 1984, general counsel for the Washington and Northern Idaho Council of the Laborers' International Union of North America wrote to the Department of Labor and Industries and asked whether the prevailing wage law applied to ECP's manufacture of tunnel liners for the Mt. Baker project. In response to this inquiry, Labor and Industries sent an industrial statistician to inspect ECP's facility in Everett and the tunnel site in Seattle. After conferring with his superiors, **the statistician determined that the prevailing wage law did apply to ECP.** [emphases added.]
>
> Neither ECP nor the Supreme Court questioned the authority of the Industrial Statistician or the department as a whole, to make such determinations. Rather, the Court dealt exclusively with the validity of the conclusion reached by the department. Likewise, in *Drake v. Molvik & Olsen Electric, Inc.*, 107 Wn.2d 26, 726 P.2d 1238 (1986), the Supreme Court established that work performed by the Seattle Housing Authority [SHA] was within the scope of the prevailing wage statute.

The Court's primary ruling involved the matter of whether the source of funding was a governing factor in determining coverage under the law. Again, neither the Court nor the parties raised the question of whether the utilization 39.04 RCW by the department, through its industrial statistician, exceeded the department's proper jurisdiction.

In fact, absent the application of RCW 39.04.010(4), there would be no clear definition of when RCW 39.12 RCW would ever apply. Therefore, the agency charged with the administration of 39.12 RCW, must, by definition, be the agency that determines when and how the law will be administered.

This plain, harmonious reading of both statutes makes it clear that L&I, through its industrial statistician, who is charged with the establishment of the prevailing wages [RCW 39.12.015] that must be paid to workers on public work under RCW 39.12.020, is the individual to whom these requested determinations of coverage are properly directed, as well as any requests for reconsiderations under WAC 296-127-060(3) that must be made prior to requesting arbitration.

Just as disputes of wages may include questions of computation or wage applicability by scope, disputes of wages may also arise when prevailing wages are not paid at all on projects that would be covered under the statute. This mandates determinations by the Industrial Statistician of coverage under 39.04 RCW. Otherwise, the Industrial Statistician would be completely unable to dispatch his/her responsibility to establish (or not establish) applicable prevailing wage rates.

General Principals

The Court set out the applicable standard for coverage under the Prevailing Wage Act in Everett Concrete Products, 109 Wn. 2d at 825:

> [1] To determine the scope of Washington's prevailing wage law, we look first to the relevant statutory language. *Service Employees, Local 6 v. Superintendent of Pub. Instruction*, 104 Wn.2d 344, 348, 705 P.2d 776 (1985). If a statute is unambiguous, its meaning must be derived from its language alone. *Stewart Carpet Serv. v. Contractors Bonding & Ins. Co.*, 105 Wn.2d 353, 358, 715 P.2d 115 (1986). If the statute is ambiguous, resort may be had to other sources to determine its meaning. *PUD 1 v. WPPSS*, 104 Wn.2d 353, 369, 705 P.2d 1195, 713 P.2d 1009 (1985).

In this case the statutory language of 39.04 RCW sets forth straight-forward, broad criteria for coverage and, once it is determined that a given project is covered, compliance with 39.12 RCW is mandatory.

The Court's decision in *Drake v. Molvik & Olsen Electric, Inc.*, 107 Wn.2d 26, 726 P.2d 1238 (1986), is instructive. There, the Supreme Court established that work performed by the Seattle Housing Authority [SHA] was within the scope of the prevailing wage statute, setting forth the following criteria for review:

> [1] The first issue is whether the SHA is within the scope of the prevailing wages statute. There is no doubt that a housing authority entity is within the statutory scope of the statutory scheme. RCW 39.04.010, dealing with public works, is so inclusive as to include every governmental body. [emphasis added]
>
> However, the triggering condition of the statute is that a public work exists only if the work is at "the cost of the state [or other covered entity] or which is by law a lien or charge on any property therein". RCW 39.04.010. [emphasis added.]

The Court's primary ruling involved the matter of whether the source of funding was a governing factor in determining coverage under the law, it clearly wrote within the decision that it was not, and that there can be no question that RCW 39.04 010 is the triggering statute for the application of 39.12 RCW.

The Metropolitan Tract:

All work performed on the Metropolitan Tract, other than at the Olympic/Fairmont Hotel, is fully executed at the cost of the state – which means it is executed utilizing public funds and, since the University of Washington is an agency of the state, there is, by definition, a lien or charge on its property. The entirety of the Metropolitan Tract, as a wholly owned property of the state, meets both criteria of 39.04.010(4). The question then is whether the UW lease with Unico to manage the tract properties (except the Olympic/Fairmont) sets the Tract properties apart from any other public works projects.

In *City of Spokane v. Department of Labor and Industries*, 100 Wn. App. 805, 998 P.2d 913 (2000), the court cited the case of *Lycoming County Nursing Home Ass'n, Inc. v. Pennsylvania Dep't of Labor & Indus., 156 Pa.280, 627 A.2d 238 (1993),* finding it to be persuasive on the question of whether a public entity needed to be directly involved in a project for that project to be considered a public work. As the court explained:

> Lycoming County created a private, non-profit association to construct and operate a nursing home. The County leased the land to the association, loaned it $500,000 to cover start-up costs, and issued bonds with the express purpose of lending the money to the association for construction and operation of the nursing home.
>
> Ruling that the project was subject to Pennsylvania's prevailing wage law, the court rejected the association's argument "that because the [a]ssociation actually paid for and contracted for the project, the public nature of the project was destroyed, taking it out of the realm of " 'public work.' " "
>
> Here, the City contracted directly with Wheelabrator to construct, operate and maintain the City-owned waste-to-energy facility. This arrangement is similar to the county-nursing home contractual arrangement in Lycoming.
>
> The Lycoming court noted that a Pennsylvania "public work," requiring the payment of prevailing wages, is defined as construction, reconstruction, demolition, alteration and/or repair work other than maintenance work, done under contract and paid for in whole or in part out of the funds of a public body where the estimated cost of the total project is in excess of twenty-five thousand dollars.

The court reasoned that:

> [t]he definition for "public work" does not require that a "public body" must be directly involved with the project; only that the project must be paid for in whole or in part with public funds.

> The evidence here demonstrates that public funds paid for the project, thus, creating a "public work."627 A.2d at 242 (emphasis added).Similarly, Washington's statutory definition of "public work" does not mandate the City's direct involvement in the AMS work performed by Wheelabrator. RCW 39.04.010. Rather, it requires only that the work be "executed at the cost of" the City. That requirement is met here. In essence, the City finances the work at the SWDP; how efficiently Wheelabrator operates the facility determines its profit margin [emphasis added.

The Unico Lease:

The UW's lease with Unico is a contract that establishes the terms of Unico's involvement in the Tract properties. The involvement includes all of those elements defined in RCW 39.04.010(4). The following reviews the financial arrangement between the UW and Unico, and appends selected pages from their lease agreement that support the conclusion that all work on the above named buildings falls under the definition of prevailing wage which, therefore, triggers the application of 39.12 RCW.

Prior to November 1, 2014, there were questions regarding the application of prevailing wage law to the work performed on the Tract Structures, even though that work was performed at the cost of the state. The UW took the position that, because the Unico lease required Unico to engage in specific construction projects, the public funds deposited in UW trust accounts were actually a security device to ensure compliance with the terms of the lease. Even if this were a valid argument – and we do not believe that it was - the current lease, effective November 1, 2014 contains no such language. Rather, it makes very clear that the UW is in control of Unico and its work on the Tract structures.

Under the current lease (effective November 1, 2014), the Metropolitan Tract properties are managed by Unico Properties LLC pursuant to a Management Agreement between the Board of Regents of the University of Washington and Unico. The Management Agreement contains certain key elements with respect to funding and control, that clearly fall under definition of public work.

First, the Management Agreement clearly establishes that the cost of "all work" performed on the Metropolitan Tract buildings managed by Unico is, in fact, performed at the cost of the University. In this regard, Section 6.04(a) states in express language:

> All obligations or expenses incurred by Manager hereunder in operating and managing the Managed Property, as specifically permitted hereunder, shall be at the expense of the University, except as otherwise specifically provided in this Agreement.

Second, the Management Agreement further establishes that any work, including construction, alteration, repair, improvement, etc., will be paid from a trust account that is the property of the University. As set forth in Section 6.04(b):

> Manager [Unico] shall establish, in the name of the University (and not of the Manager), [sic] and for the University's sole benefit and account, trust accounts as described in this Agreement or such other accounts as the University may otherwise elect (collectively, "Trust Accounts") for the operation of the Managed Property at such institutions or banks of the University's choosing. All funds in all Trust Accounts shall at all times be the property of the University….

Third, under Section 6.04(c) the Management Agreement requires the parties to establish an operating account

> …for the ongoing operation of the Managed Property, into which all funds advanced to the Managed Property by the University or otherwise derived from the operation of the Managed Property shall be deposited, including all Rents, revenues and other income, and from which the payment of all costs and expenses authorized herein shall be made.

Additionally, a reserve account is further required for the purpose of "capital expenditures" under Section 6.04(d). Along with all other expenditures, these must be approved by the UW.

These Sections, are not contradicted anywhere in the Lease Agreement, and they clearly show that the University of Washington does, in fact, incur the entire cost of any construction, alteration, repair, improvement, etc., that is deemed necessary and is so approved, at any of the Buildings that are subject to the terms of the Lease Agreement. Under the current agreement, the UW has full control and authority over all work that is performed on the Tract buildings.

According to 39.04 RCW and 39.12 RCW all of this work is subject to prevailing wage law. The fact that the work may be contracted and awarded by a private entity [Unico] on behalf of the UW, which approves both the work and the expenses, does not exempt any of the UW projects in and on the properties managed by Unico from the requirements of the prevailing wage law.

The full lease is available upon request; however, for your convenience, specific pages containing the noted Sections have been appended to this letter. These provide a short overview of the financial and management relationship between the University of Washington and Unico.

Conclusion:

Based on prior court precedent, the current leasing arrangement between Unico and the UW, and the application of RCW 39.04.010(4) to the work performed on the Metropolitan Tract, we request a formal determination that all work on the buildings noted supra, be established as public work by your office, and subject to all of the requirements of 39.12.RCW.

Respectfully Submitted

Miriam Israel Moses
Executive Director

cc: REBOUND Board of Directors
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