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

June 23, 2017

Mr. Bob Braun
Grady Excavating
c/o Braun Consulting Group
1415 2nd Ave Ste 909
Seattle, WA 98101

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

Dear Mr. Braun:

On March 6, 2013 John Payne requested a 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. Grady Excavating has directed that I reply to you regarding Mr. Payne's request.

This action 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."

This letter serves as a clarification of the redetermination letter issued on April 22, 2016, relating to this subject matter.

The conclusion below is applicable only to the facts presented to the department on this particular project and its associated disposal sites. The application of prevailing wage law is highly fact specific, and often, different facts support different conclusions.

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 away 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, 2103 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:

- 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 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.

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).

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[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.

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 you and John Payne with regard to this matter. In that meeting, we established a number of questions concerning the work performed. Mr. Payne 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. He 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. He 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. He stated that the bulldozing was not a necessary part of the contract. He confirmed that Grady did not have the permit, that Kiewit had the permit, "but only to deposit the material at a particular site." He stated the final owner of the material and its use was not part of the contract or permit. He 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.

<u>Prime contract requirements</u>

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 WSDOT[2].

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]**:**

> 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.

<u>WSDOT specifications applicable to both the prime contract and the Grady subcontract</u>

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.**

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

> 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 transportation 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.

As I mention above, the conclusion below is applicable only to the facts presented to the department on 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.

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/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

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVE HELLER, Appellant, v. McCLURE & SONS, INC., Respondent.	)	No. 38827-4-I DIVISION ONE PUBLISHED FILED: SEP 08 1998

COX, J. -- Washington's prevailing wage statute[1] requires that employers pay the prevailing wage to their laborers, workers, or mechanics upon all public works of the State or political subdivisions that are created by its laws. Because Steve Heller, a mechanic, performed work that qualified under the statute, we reverse the dismissal of his wage claim and remand with instructions.

In late December 1993, Heller began working full-time as a heavy equipment mechanic for McClure & Sons, Inc. at an agreed hourly wage. Shortly thereafter, Heller switched to working part-time for McClure. In the course of this employment, Heller's primary responsibility was to repair, service, and maintain

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[1] RCW 39.12.

various pieces of McClure's construction equipment. McClure owned the equipment and utilized it on various construction projects. These included, at times, five public works projects for municipalities. From time to time, it was expedient for Heller to travel from McClure's shop to the sites of these public works projects to perform his work on McClure's construction equipment. At other times, Heller performed the work at McClure's shop.

Based on disputes between the parties that are not relevant to this appeal, Heller stopped working for McClure in April 1995. It is undisputed that Heller received the full amount of compensation due him under the terms of his agreement with McClure.

In May 1995, Heller commenced this action against McClure.[2] He claimed that he was entitled to receive the "prevailing wage," not his agreed upon hourly wage, for the work he performed on construction equipment that was used on various public works projects where McClure had contracted to perform work. Heller sought additional compensation for his work on this equipment, both at the public works project sites and at McClure's shop.

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[2] RCW 39.12.065 states, in relevant part: "A complaint concerning nonpayment of the prevailing rate of wage shall be filed with the department of labor and industries no later than thirty days from the acceptance date of the public works project. *The failure to timely file such a complaint shall not prohibit a claimant from pursuing a private right of action against a contractor or subcontractor for unpaid prevailing wages.*" (Italics ours.)

At the conclusion of a bench trial, the court dismissed Heller's claim for additional wages.

Heller appeals.

I. Scope of the Prevailing Wage Statute

The question we must decide is whether the work Heller performed on McClure's construction equipment that was located at the sites of various public works projects must be compensated at the prevailing wage rate. We hold that Heller's work as a mechanic on the sites of the public works projects was directly related to the prosecution of the work that McClure contracted to perform and necessary for the completion of that work. Accordingly, Heller must be compensated at the prevailing wage rate. Because Heller conceded, in his reply brief and at oral argument, that he has abandoned his claim with respect to work he performed away from the sites of the public works projects, we decline to decide if that work is likewise compensable at the prevailing wage rate.[3]

The question presented here requires us to apply our prevailing wage statute to undisputed facts. In doing so, we review de novo the trial court's application of the statute to these facts.[4] If a statute is ambiguous, we apply the

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[3] The Department of Labor and Industries states in its amicus brief that the issue of whether off-site work is compensable is not before us. We agree.

[4] State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123, review denied, 125 Wn.2d 1002 (1994).

tools of statutory construction.[5] Our aim is to give effect to the intent and purpose of the Legislature.[6]

RCW 39.12.020 states, in relevant part, that:

> The hourly wages to be paid to laborers, workers, or mechanics, *upon all public works* . . . of the state or any county, municipality or political subdivision created by its laws, 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.[7]

Washington's prevailing wage statute is modeled on the federal Davis-Bacon Act, 40 U.S.C. § 276a.[8] Although the Washington and federal statutes have some important textual differences, cases and regulations interpreting Davis-Bacon may be helpful to our analysis of RCW 39.12.[9]

The purposes of both acts are: (1) to protect employees working on public projects from substandard wages and (2) to preserve local wages.[10] In keeping with these stated purposes, it is the worker, not the contractor, who is

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[5] State v. Bash, 130 Wn.2d 594, 601-02, 925 P.2d 978 (1996).

[6] State v. Hennings, 129 Wn.2d 512, 522, 919 P.2d 580 (1996).

[7] (Italics ours.)

[8] Everett Concrete Prods., Inc. v. Department of Labor & Indus., 109 Wn.2d 819, 823-24, 748 P.2d 1112 (1988).

[9] Everett, 109 Wn.2d at 824.

[10] Everett, 109 Wn.2d at 823.

the intended beneficiary of the statute.[11] RCW 39.12 is remedial and must be construed liberally in order to fulfill its purposes.[12]

Government contracts must generally be awarded to the lowest responsible bidder.[13] The prevailing wage law is designed to discourage contractors on public works projects from paying substandard wages to the classes of their workers that are described in the act to underbid competition. A parallel purpose of the act is to prevent the depression of prevailing wages in the area of public works projects. These dual purposes are best served by applying a more flexible standard than that apparently applied by the trial court here.

The phrase "upon all public works" is the focus of our analysis. The question here is whether Heller's work on equipment owned by McClure and used at the several public works sites is within the scope of that phrase. That phrase is undefined in the statute, and no Washington case authority directly addresses the limits of its scope. We must therefore apply rules of statutory construction to determine the Legislature's intent.

In Everett Concrete,[14] our Supreme Court considered the scope of this phrase in comparison with a similar provision in the Davis-Bacon Act. In the

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[11] Everett, 109 Wn.2d at 823.

[12] Everett, 109 Wn.2d at 823.

[13] See RCW 35.23.352 (cities); RCW 36.32.250 (counties).

[14] 109 Wn.2d 819.

federal act, coverage is limited to workers "employed *directly* upon the site of the work."[15] According to the Everett Concrete court, our Legislature's elimination of the word "directly" from the state statute means that the scope of our prevailing wage law is broader than that of Davis-Bacon.[16] The question here is whether Heller's work activities fall within the broader scope of the state act.

McClure argues that the trial court was correct in concluding that Heller's equipment repair and maintenance work was not covered by the act because it was not incorporated into the public works projects. In making this argument, it relies on this court's decision in Superior Asphalt & Concrete Co. v. Department of Labor & Indus.[17]

But Superior does not support McClure's argument. At issue there was WAC 296-127-018, which states that workers who deliver gravel to a public work site and "incorporat[e] the materials into the project" are entitled to a prevailing

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[15] 40 U.S.C. § 276a (italics ours).

[16] Everett, 109 Wn.2d at 826. Federal courts have also determined that the presence of the word "directly" in the federal act restricts the scope of its coverage. See, e.g., Bldg. & Constr. Trades Dep't, AFL-CIO v. United States Dep't of Labor Wage Appeals Bd., 932 F.2d 985 (D.C. Cir. 1991) (invalidating Department of Labor rule that purported to extend Davis-Bacon coverage to off-site material truck drivers, 29 C.F.R. § 5.2(j)); Ball, Ball & Brosamer, Inc. v. Reich, 24 F.3d 1447 (D.C. Cir. 1994) (invalidating another Department of Labor rule that extended coverage to off-site workers, 29 C.F.R. § 5.2(l)).

[17] 84 Wn. App. 401, 929 P.2d 1120 (1996), review denied, 132 Wn.2d 1009 (1997).

wage for that work.[18] Considering whether the regulation exceeded the scope of our prevailing wage law, this court concluded that the phrase "upon all public works" was broad enough to cover such workers.[19] But the court did not find that the incorporation of materials into the project was necessary for coverage. It expressly declined to reach the issue of whether *mere delivery* of gravel to a public works project site would be covered by the act.[20]

McClure offers no authority, in the act or case law interpreting it, that supports its view that only work that is physically incorporated into a public works project is compensable at the prevailing wage rate. Absent any authority, we decline to impose such a limitation on the scope of our prevailing wage act.

Rather, the better view is that those workers on public works 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. For example, the industrial statistician from the Department of Labor and Industries who testified at trial noted that a construction surveyor performs work that the department views as covered by the prevailing wage act, notwithstanding the fact that the survey work is not incorporated into the project itself.

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[18] WAC 296-127-018(2)(a).

[19] Superior, 84 Wn. App. at 410.

[20] Superior, 84 Wn. App. at 410.

Here, there is no dispute that Heller's work on McClure's construction equipment at the sites was required in order for McClure to perform the work it had contracted to do. In this sense, Heller's work was both directly related to the prosecution of the contracted work and necessary for its completion.

We believe this standard best achieves the legislative intent of avoiding payment of substandard wages to covered workers and preventing the depression of local labor wage rates. We also believe that such a standard is completely consistent with the act's remedial purposes.

Our view appears to be consistent with that of the state Department of Labor and Industries,[21] whose views as the enforcers of the act we give some deference.[22]

McClure also argues that Heller's repair work is excluded from the term "public work" by WAC 296-127-010(7), which states:

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[21] It is unclear from our review of the record whether the trial judge was fully apprised of the Department of Labor and Industries' position. In its amicus brief before this court, the department stated its opinion that Heller is entitled to a prevailing wage for his work on the sites of the several public works projects. In support of this position, it relied on two decisions by the Wage Appeals Board of the Department of Labor, i.e., In re Griffith Co., 1965 WL 8116 (deciding that employees of equipment rental dealer covered by act when they go on public works project sites to repair equipment) and In re Vecellio & Grogan, Inc., 1984 WL 161749 (repair shop employees covered when they come on site to set up, repair, and tear down equipment).

[22] Construction Indus. Training Council v. Seattle Bldg. & Constr. Trades Council, 129 Wn.2d 787, 799, 920 P.2d 581 (agency's interpretation is given deference on review only if the statute is ambiguous and the agency is charged with its administration and enforcement), cert. denied, 117 S. Ct. 1693 (1997).

> (b) The term "public work" shall not include: . . .
> (iii) Ordinary maintenance which is defined as work not performed by contract and that is performed on a regularly scheduled basis . . . to service, check, or replace items that are not broken; or work not performed by contract that is not regularly scheduled but is required to maintain the asset so that repair does not become necessary.

This provision is not applicable here. The purpose of WAC 296-127-010 is to clarify which types of projects undertaken by the state or a municipality are "public works" and which are not. But here, it is undisputed that the sites where Heller performed repair work on McClure's equipment were "public works."

In sum, we conclude that Heller's work on the public works project sites must be compensated at the prevailing wage.

II. Prevailing Wage Rate

The remaining questions are what prevailing wage rate applies to Heller's work and how many hours are compensable at that rate.

The trial court did not make any findings respecting what prevailing wage rate applied. This is not surprising because the court determined, in error, that the work was not covered by the prevailing wage act.

As part of its written findings and conclusions, the court determined that Heller failed to show that he fell within either of two prevailing wage job categories.[23] But the categories stated in the written findings and conclusions do

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[23] Conclusion of law 2 states: "Heller's [sic] failed to establish that the predominant activities of his trade or occupation as a heavy equipment mechanic were the same as the predominant activities of a *construction equipment operator* or *truck driver [mechanic]* and there is no basis for concluding that

not appear to have any relationship to the two categories that were the subjects of testimony at trial: Power Equipment Operator-Mechanics, All (Welders) and Industrial Engine and Machine Mechanic. If there is some explanation for this discrepancy, it is not obvious from the record before us.

The prevailing wage is defined as "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."[24] Thus, the determination of the proper category for Heller's work and the number of hours attributable to that work on the various sites must be determined by the court.

The court also did not reach the issue of how many hours Heller performed work on the public works sites.

Because we conclude that Heller is entitled to compensation at the prevailing wage rate for those hours he worked on the public works project sites, we remand to the trial court for a determination of the applicable prevailing wage rate. We also remand for the court to determine the number of hours for which Heller is entitled to that rate of compensation.

If the trial court determines that Heller is entitled to additional wages, it shall also determine his entitlement to attorney fees for trial and appeal under RCW 49.48.030.

Heller is entitled to additional compensation equivalent to the prevailing wage earned by the trades of construction equipment operators or truck drivers." (Italics ours.)

[24] RCW 39.12.020 (italics ours).

In its reply to the Department of Labor & Industries' amicus brief, McClure advanced several new arguments. Because these arguments address matters beyond the scope of the amicus brief, we do not consider them.[25]

We reverse and remand with instructions.

Cox, J.

WE CONCUR:

Kennedy, C.J.

[25] RAP 10.3(f).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

EVERETT CONCRETE PRODUCTS, INC.,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

No. 53879-4

En Banc

CALLOW, J.--Washington's prevailing wage law, RCW 39.12 et seq., provides that the wages paid to workers on public works projects must be not less than the prevailing wage for similar work in the locality where the labor on the public works project is performed. RCW 39.12.020. This case presents the issue of whether the prevailing wage law applies to the off-site manufacture of prefabricated items for use on a particular public works project.

In early fall, 1982, the Department of Transportation awarded Guy F. Atkinson Construction Co. (Atkinson) the contract for the Mt. Baker Ridge Tunnel Public Works Project. Under the terms of the contract, Atkinson was to excavate and construct a tunnel for the Interstate 90 highway in Seattle. The earth at the tunnel site is loose and could not be excavated by traditional methods. As a result, Atkinson designed and utilized

concrete tunnel liners to provide a supportive ring in the tunnel during excavation.

In April 1983, Atkinson arranged to have Everett Concrete Products (ECP) manufacture the tunnel liners required for the Mt. Baker project. ECP agreed to manufacture 30,000 lineal feet of liners in accordance with measurements specified by Atkinson and the Department of Transportation. ECP manufactured the tunnel liners on special forms built to meet the size and measurement requirements of the tunnel. The manufacture of the liners took place on these forms at ECP's plant in Everett. Atkinson then contracted with trucking companies to deliver the liners to the site of the project.

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 (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.

ECP challenged this determination, and the matter subsequently was referred for arbitration, pursuant to RCW 39.12.060 which provides in part:

> [I]n case any dispute arises as to what are the prevailing rates of wages for work of a similar nature and such dispute cannot be adjusted by the parties in interest . . . the matter shall be referred for arbitration to the director of the department of labor and industries . . .

After a hearing, the administrative law judge (ALJ) upheld Labor and Industries' application of the prevailing wage law to ECP.

I

ECP contends that the ALJ erred in holding that the prevailing wage law applied to ECP. First, ECP argues that RCW 39.12 should not include off-site product manufacturers within its scope, except under certain narrow circumstances. Second, ECP asserts that the ALJ erred in characterizing ECP as a subcontractor rather than a materialman.

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., Inc. 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 1109 (1985).

In this case the relevant statutory language is set forth in RCW 39.12.020, which provides in part:

> The hourly wages to be paid to laborers, workmen or mechanics, upon all public works and under all public building service maintenance contracts of the state or any county, municipality or political subdivision created by its laws, 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.

According to the language of the statute, prevailing wages must be paid to those employed "upon all public works". The ALJ in this case interpreted the phrase "upon all public works" in RCW 39.12.020 to include within its scope work performed off the actual site of the public works project. He held that the

prevailing wage law could be extended to cover off-site workers as long as they were "employed in the performance of the contract."

ECP concedes that the prevailing wage law can be applied to off-site work on a public works project. However, it argues that the ALJ erred in extending the scope of RCW 39.12 to cover ECP's manufacture of tunnel liners. It contends that the prevailing wage requirement should be interpreted in accordance with decisions and regulations in other jurisdictions examining state prevailing wage laws and the federal prevailing wage law, the Davis-Bacon Act (40 U.S.C. § 276a). According to these decisions and regulations the prevailing wage requirement would only be imposed on off-site manufacturers having a sufficient nexus to the public works project. Relevant factors in determining whether such nexus exists should include physical location of the project site, the nature of the relationship between the parties performing the work, and the characteristics of the product itself. See 29 C.F.R. § 5.2(1) (1985); H.B. Zachry Co. v. United States, 344 F.2d 352, 360 (Cl. Ct. 1965); City & Borough of Sitka v. Construction & Gen. Laborers Local 942, 644 P.2d 227, 232 (Alaska 1982).

II

The construction of the phrase "upon all public works" involves a question of law. Therefore, we may engage in de novo review, but should accord substantial weight to the agency interpretation. Franklin Cy. Sheriff's Office v. Sellers, 97 Wn.2d 317, 325, 646 P.2d 113 (1982).

RCW 39.12.020 does not specifically state whether prevailing wages must be paid to workers employed in the performance of

a public works project who are not working on the actual project site. Thus, we must determine its scope from the applicable rules of statutory construction assisted by any interpretation previously given to the statute by the Attorney General or Labor & Industries.

RCW 39.12 is remedial and should be construed liberally. Southeastern Wash. Building & Constr. Trades Coun. v. Department of Labor & Indus., 91 Wn.2d 41, 44, 586 P.2d 486 (1978). A liberal construction should carry into effect the purpose of the statute. See State v. Douty, 92 Wn.2d 930, 936, 603 P.2d 373 (1979).

The purpose behind Washington's prevailing wage law can be discovered by understanding the purpose behind the federal prevailing wage law, the Davis-Bacon Act, 40 U.S.C. § 276a, which served as a model for RCW 39.12. Drake v. Molvik & Olsen Elec., Inc., 107 Wn.2d 26, 29, 726 P.2d 1238 (1986). The Davis-Bacon Act was enacted "to protect the employees of government contractors from substandard earnings and to preserve local wage standards . . . The employees, not the contractor or its assignee, are the beneficiaries of the Act." Unity Bank & Trust Co. v. United States, 756 F.2d 870, 873 (Fed. Cir. 1985). As stated in Building Trades Coun., at 45:

> "purpose of the Davis-Bacon Act was to provide protection to local craftsmen who were losing work because contractors engaged in the practice of recruiting labor from distant cheap labor areas.

This purpose will be served by extending the application of RCW 39.12 to off-site manufacturers involved in public works by preventing contractors from parceling out portions of the work to

various off-site manufacturers as a means of avoiding the prevailing wage requirement.

Another canon of statutory construction provides that "when the legislature of a state adopts a statute which is identical or similar to one in effect in another state or country, the courts of the adopting state usually adopt the construction placed on the statute in the jurisdiction in which it originated." 2A N. Singer, Statutory Construction § 52.02 (4th ed. 1984). As noted, Washington's prevailing wage law is based on the Davis-Bacon Act, 40 U.S.C. 276a. Building Trades Coun., at 44. Thus, cases and regulations interpreting that act may be relevant and persuasive to an analysis of RCW 39.12. The Davis-Bacon Act provides that:

> (a) The advertised specifications for every contract in excess of $2,000, to which the United States . . . is a party, for construction, alteration, and/or repair, . . . of public buildings or public works of the United States . . . which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed . . . and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than 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, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics . . .

Although the Davis-Bacon Act limits application of the prevailing wage law to employees of contractors or subcontractors who are employed "directly upon the site of the work," the site of the work has been construed to encompass off-site manufacturing. 29 C.F.R. § 5.2(l) (1987) states that:

(1) The term "site of the work" is defined as follows:
(1) The "site of the work" is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed and, as discussed in paragraph (1)(2) of this section, other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the "site".
(2) Except as provided in paragraph (1)(3) of this section, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., are part of the "site of the work" provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them.
(3) Not included in the "site of the work" are permanent home offices, branch plant establishments, fabrication plants, and tool yards of a contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial supplier or materialman which are established by a supplier of materials for the project before opening of bids and not on the project site, are not included in the "site of the work". Such permanent, previously established facilities are not a part of the "site of the work", even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

ECP contends that the factors set forth in the regulations interpreting the Davis-Bacon Act should be applied to determine whether ECP's manufacture of tunnel liners should be subject to the requirements of RCW 39.12. ECP contends that because its plant is located 40 miles from the site of the Mt. Baker Tunnel site and in another county, and because ECP is involved in other projects besides the Mt. Baker tunnel, it should not be required to pay prevailing wages to its employees who are manufacturing tunnel liners.

ECP's argument would be persuasive if the language of RCW 39.12 was identical to that in the Davis-Bacon Act. However, a court need not adopt the construction placed on a similar statute in another state if the language of the statute in the adopting state is substantially different from the language in the original statute. 2A N Singer § 52.02. "A provision of the federal

statute cannot be engrafted onto the state statute where the Legislature saw fit not to include such provision." Nucleonics Alliance, Local 1-369 v. WPPSS, 101 Wn.2d 24, 34, 677 P.2d 108 (1984).

In this case, the Washington Legislature departed from the language of the Davis-Bacon Act when it enacted RCW 39.12. The Davis-Bacon Act provides for payment of prevailing wages to "mechanics and laborers employed directly upon the site of the work." 40 U.S.C. 276a (italics ours). In contrast, RCW 39.12.020 provides for payment of prevailing wages to "laborers, workmen or mechanics, upon all public works." The omission of the word "directly" from the language of RCW 39.12.020 leads to the conclusion that the Legislature intended the scope of the State prevailing wage law to be broader than that of the Davis-Bacon Act. ECP's reliance on regulations interpreting the Davis-Bacon Act is misplaced.

Department of Transp. v. State Employees' Ins. Bd., 97 Wn.2d 454, 461, 645 P.2d 1076 (1982), noted that "there is the well known rule of statutory interpretation that the construction placed upon a statute by an administrative agency charged with its administration and enforcement, while not absolutely controlling upon the courts, should be given great weight in determining legislative intent." Here the Department of Labor and Industries interpreted RCW 39.12 in a regulation explaining the definition of "locality" as defined in RCW 39.12.010(2). WAC 296-127-020(3) provides:

> The definition of "locality" in RCW 39.12.010(2) contains the phrase "wherein the physical work is being performed." The department interprets this phrase to mean the actual work site. For example, if materials are prefabricated in a county other than the county wherein the public works project is to be completed, the

> wage for the prefabrication shall be the prevailing wage for the county where the physical work of prefabrication is actually performed. Standard items for sale on the general market are not subject to the requirements of chapter 39.12 RCW.

(Italics ours.) Implicit in this rule is the assumption that off-site manufacturers may be subject to the prevailing wage law. As the Department of Labor and Industries noted in its brief, "[i]t makes no sense to explain how to calculate the rate for off-site prefabrication work if the rate does not apply to such work."

Finally, a 1967 Washington Attorney General's opinion interpreting RCW 39.12 stated that the phrase "upon all public works" should not limit the application of the prevailing wage requirement to employees working at the actual public works project site. 1967 AGO 15, at 6. This opinion responded to an inquiry concerning whether RCW 39.12 applies to subcontractors and the extent to which RCW 39.12 was applicable to prefabricated items construed to become part of a public works project. The opinion summarized its answer to these questions as follows:

> The requirement of chapter 39.12 RCW that the "prevailing rate of wage" be paid to laborers, workmen or mechanics upon all public works of the state, or any county, municipality or political subdivision, is applicable to labor performed in an off-the-job-site prefabrication by employees of the prime contractor, subcontractor, or other persons doing or contracting to do the whole or any part of the work contemplated by the contract, provided that the prefabricated "item or member" is produced specially for the particular public works project and not merely as a standard item for sale on the general market.

1967 AGO 15, at 10. An Attorney General's opinion is not controlling, but is entitled to considerable weight. Bellevue Firefighters Local 1604 v. Bellevue, 100 Wn.2d 748, 751, n.1, 675 P.2d 592 (1984).

ECP urges the court to limit RCW 39.12 by restricting its application to on-site employers and those off-site employers

having a sufficient nexus with the site of the public works project. We find a broader interpretation appropriate in view of the overall purpose behind RCW 39.12, significant differences in language between RCW 39.12.020 and comparable language in the Davis-Bacon Act, and the prior interpretations of RCW 39.12 by the Department of Labor and Industries and the Attorney General.

III

ECP also challenges the ALJ's classification of ECP as a subcontractor rather than a materialman. The ALJ stated that employers supplying materials to public works projects are not required to pay their employees prevailing wages, but held that ECP was a subcontractor, as defined in Neary v. Puget Sound Eng'g Co., 114 Wash. 1, 8, 194 P. 830 (1921). Neary stated that a subcontractor is "one who takes from the principal contractor a specific part of the work." The ALJ determined that ECP fit this definition because it "took the raw materials of sand and gravel and cement and by the application of a particular process turned them into a unique product capable of being used largely only on the Mt. Baker Ridge Tunnel."

Although the ALJ held that the prevailing wage law does not apply to materialmen, this result is not mandated by the language of the statute. RCW 39.12.030 states:

> The specifications for every contract for the construction, reconstruction, maintenance or repair of any public work to which the state or any county, municipality, or political subdivision created by its laws is a party, shall contain a provision stating the hourly minimum rate of wage, not less than the prevailing rate of wage, which may be paid to laborers, workmen 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, and the contract shall contain a stipulation that such laborers, workmen or mechanics shall be paid not less than such specified hourly minimum rate of wage.

(Italics ours.) This language should be contrasted with the Davis-Bacon Act, which limits the application of prevailing wage requirements to employees of contractors and subcontractors. See 40 U.S.C. 276a(a). Because of the inclusion of the phrase "or other person doing or contracting to do the whole or any part of the work contemplated by the contract" in RCW 39.12.030, Washington's prevailing wage law should not be limited in application to employees of contractors and subcontractors, but can be extended to include employees of materialmen in certain situations.

RCW 39.12.030 has been so construed. The 1967 Attorney General's opinion stated that the prevailing wage requirements of RCW 39.12 apply to materialmen engaged in the manufacture of prefabricated items produced specifically for a particular public works project. 1967 AGO 15, at 6, 7. The opinion distinguished between the off-site production of standard materials to be used in a public works project and the off-site manufacture of items manufactured specifically for a project.

It is asserted that the Attorney General's opinion was misguided in its reliance on Hague v. Cleary, 48 P.2d 5 (1935) which was, according to the brief of appellant ECP, overruled sub silentio by Pacific Mfg. Co. v. Leavy, 14 Cal. App. 2d 640, 58 P.2d 1292 (1936). Both cases involved a public works pre- vailing wage ordinance of the City and County of San Francisco. We note that Hague v. Cleary, supra, is from the California Supreme Court and that its decision could not be overruled by a decision of the California Court of Appeals either "sub silentio" or directly. We further note that the cases are not in conflict. Hague holds that when goods are manufactured for a public works contractor

upon special order and not for the general market, the contract can be construed as one for labor. Pacific Mfg. held that millwork purchased by a general contractor for installation in a public school being built by the contractor was material furnished not in specific performance of a public work, but as the furnishing of a general purpose chattel. Pacific Mfg., a suit brought to compel payment for millwork by the city comptroller, does not mention Hague v. Cleary, supra. Hague does stand for the proposition that when off-site prefabrication of a component part takes place for specific use of the item on a specific public works project, then the prevailing wage ordinance of San Francisco applied, while Pacific Mfg. required the City to pay for millwork placed in a public school by the general contractor regardless of whether the millwork manufacturer complied with the ordinance. 1967 AGO 15 is not weakened by the rationale of Pacific Mfg.

While the Attorney General's adoption of the standard/nonstandard distinction to determine whether employees of off-site manufacturers are covered by the prevailing wage law is not determinative, this distinction was also made in WAC 296-127-020. WAC 296-127-020 states that "[s]tandard items for sale on the general market are not subject to the requirements of chapter 39.12 RCW", leading to the conclusion that nonstandard items are covered under RCW 39.12.

ECP does not attack the validity of WAC 296-127-020, but challenges the application of the rule to ECP's manufacture of tunnel liners. The ALJ did not specifically refer to WAC 296-127-020 in applying the prevailing wage law to ECP, basing his holding instead on his determination that ECP was a

subcontractor rather than a materialman. However, in reaching this conclusion, the ALJ noted:

> We discern then that the requirements of RCW 39.12 that the 'prevailing rate of wage' be paid to laborers, workmen or mechanics upon all public works of the state, or any county, municipality or political subdivision, is applicable to labor performed in an off the job site prefabrication by employees of the prime contractor or subcontractor provided that the prefabricated product is produced especially for the particular public works project and not merely as a standard item for sale on the general market.

(Italics ours.) The ALJ stated that "[t]he evidence in this case clearly indicates that although the process of manufacturing the items was unique, nonetheless the tunnel liners were produced to specifications provided by the prime contractor and used specifically on the tunnel project."

In determining that ECP was involved in the manufacture of a nonstandard item, the ALJ was making a finding of fact, rather than a conclusion of law. As such, his determination may be overturned only if it is clearly erroneous. Franklin Cy. Sheriff's Office v. Sellers, 97 Wn.2d 317, 324, 646 P.2d 113 (1982). A finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Sellers, at 324 (quoting Ancheta v. Daly, 77 Wn.2d 255, 259-60, 461 P.2d 531 (1969). In this case, the tunnel liners were made to measurement specifications provided by Atkinson specifically for the Mt. Baker Tunnel Project. ALJ's finding that the tunnel liners manufactured by ECP were nonstandard items was not clearly erroneous.

IV

RCW 39.12.020 provides that prevailing wages must be paid to workers "upon all public works." This language must be construed to require application of the prevailing wage requirement

to off-site manufacturers, when they are producing nonstandard items specifically for a public works project. In this way the use of cheap labor from distant areas is avoided and the purpose of RCW 39.12 is not circumvented. Here ECP's manufacture of tunnel liners for the Mt. Baker Ridge Tunnel Public Works Project constituted the manufacture of nonstandard items for a public works project. The ALJ correctly held that ECP was required to pay employees who manufactured the tunnel liners prevailing wages in accordance with the requirements of RCW 39.12.

We affirm his decision.

Callow, J.

WE CONCUR:

Casey, C. J.

Brachtenbach, J.

Dolliver, J.

Dore, J.

Anderson, J.

Goodloe, J.

Durham, J.

Prevailing Wage Determination Request and Review Process

RCW 39.12.015 is the basis for requesting a determination, since it provides:

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

If you disagree with a determination the industrial statistician provides, WAC 296-127-060(3) provides for a review process:

> (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.
>
> (a) For purpose of this section, the term "party in interest" is considered to include, without limitation:
>
> (i) Any contractor, or an association representing a contractor, who is likely to seek or to work under a contract containing a particular wage determination, or any worker, laborer or mechanic, or any council of unions or any labor organization which represents a laborer or mechanic who is likely to be employed or to seek employment under a contract containing a particular wage determination, and
>
> (ii) Any public agency concerned with the administration of a proposed contract or a contract containing a particular wage determination issued pursuant to chapter 39.12 RCW.
>
> (b) For good cause shown, the director may permit any party in interest to intervene or otherwise participate in any proceeding held by the director. A petition to intervene or otherwise participate shall be in writing, and shall state with precision and particularity:
>
> (i) The petitioner's relationship to the matters involved in the proceedings, and
>
> (ii) The nature of the presentation which he would make. Copies of the petition shall be served on all parties or interested persons known to be participating in the proceeding, who may respond to the petition. Appropriate service shall be made of any response.

If you choose to utilize this review process, you must submit your request within 30 days of the date of the applicable industrial statistician's determination or response to your request for modification or other change. Include with your request any additional information you consider relevant to the review.

Direct requests for determinations, and for modification of determinations via email or letter to the prevailing wage industrial statistician:

Jim P. Christensen
Industrial Statistician/Program Manger
Department of Labor & Industries
Prevailing Wage
P O Box 44540
Olympia, WA 98504-4540
Jim.Christensen@Lni.wa.gov

Direct requests via email or letter seeking reconsideration (redetermination) by the assistant director to:

Elizabeth Smith, Assistant Director
Department of Labor & Industries
Fraud Prevention and Labor Standards
P O Box 44278
Olympia, WA 98504-4278
Elizabeth.Smith@Lni.wa.gov

Direct petitions for arbitration to:
Joel Sacks, Director
Department of Labor & Industries
P O Box 44001
Olympia, WA 98504-4001

If you choose to utilize this arbitration process, you must submit your request within 30 days of the date of the applicable assistant director's decision on reconsideration (redetermination). Submit an original and two copies of your request for arbitration to the Director personally, or by mail. The physical address for the Director is 7273 Linderson Way, SW, Tumwater, WA 98501.

WAC 296-127-061 also contains the following provisions regarding petitions for arbitration:

In addition, copies of the petition shall be served personally or by mail upon each of the following:

(a) The public agency or agencies involved,

(b) The industrial statistician, and

(c) Any other person (or the authorized representatives of such person) known to be interested in the subject matter of the petition.

(2) The director shall under no circumstances request any administering agency to postpone any contract performance because of the filing of a petition. This is a matter which must be resolved directly with the administering agency by the petitioner or other party in interest.

(3) A petition for arbitration of a wage determination shall:

(a) Be in writing and signed by the petitioner or his counsel (or other authorized representative), and

(b) Identify clearly the wage determination, location of project or projects in question, and the agency concerned, and

(c) State that the petitioner has requested reconsideration of the wage determination in question and describe briefly the action taken in response to the request, and

(d) Contain a short and plain statement of the grounds for review, and

(e) Be accompanied by supporting data, views, or arguments, and

(f) Be accompanied by a filing fee of $75.00. Fees shall be made payable to the department of labor and industries.

WAC 296-127-060

Director of department of labor and industries to arbitrate disputes—General provisions.

(1) The contract executed between a public authority and the successful bidder or contractor and all of his subcontractors shall contain a provision that in case any dispute arises as to what are the prevailing rates of wages for a specific trade, craft or occupation and such dispute cannot be adjusted by the parties in interest, including labor and management representatives, the matter shall be referred for arbitration to the director, and his decision shall be final, conclusive, and binding on all parties involved in the dispute.

(2) In exercising his authority to hear and decide disputes the director shall consider among other things, timeliness, the nature of the relief sought, matters of undue hardship or injustice, or public interest. A "timely" request for arbitration is one received within thirty days after the contract has been awarded.

(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.

(a) For purpose of this section, the term "party in interest" is considered to include, without limitation:

(i) Any contractor, or an association representing a contractor, who is likely to seek or to work under a contract containing a particular wage determination, or any worker, laborer or mechanic, or any council of unions or any labor organization which represents a laborer or mechanic who is likely to be employed or to seek employment under a contract containing a particular wage determination, and

(ii) Any public agency concerned with the administration of a proposed contract or a contract containing a particular wage determination issued pursuant to chapter 39.12 RCW.

(b) For good cause shown, the director may permit any party in interest to intervene or otherwise participate in any proceeding held by the director. A petition to intervene or otherwise participate shall be in writing, and shall state with precision and particularity:

(i) The petitioner's relationship to the matters involved in the proceedings, and

(ii) The nature of the presentation which he would make. Copies of the petition shall be served on all parties or interested persons known to be participating in the proceeding, who may respond to the petition. Appropriate service shall be made of any response.

[Statutory Authority: RCW 39.12.015, 39.12.060 and House Bill 795, 1982 1st ex.s. c 38. WSR 82-18-041 (Order 82-28), § 296-127-060, filed 8/27/82.]

WAC 296-127-01354

Operating engineers (equipment operators).

For the purpose of the Washington state public works law, chapter 39.12 RCW, operating engineers operate, repair and maintain all types of self-propelled mechanically, electrically, electronically, hydraulic, automatic or remote controlled equipment on construction projects.

The work includes, but is not limited to, the following types of construction and equipment:

(1) Type of construction.

(a) Heavy and highway.

• Roads, streets, highways, grading and paving, excavation of earth and rock, viaducts, bridges, abutments, retaining walls, alleys, sidewalks, guard rails, fences, parkways, parking areas, athletic fields, railroads, airport grading, surfacing and drainage, pile driving, water supply, water development, reclamation, irrigation, drainage and flood control projects, water mains, pipe lines, sanitation and sewer projects, all common ditches, dams, aqueducts, canals, reservoirs, intakes, channels, levees, dikes, revetments, jetties, quarrying of breakwater or riprap stone, foundations pile driving piers, docks, locks, river and harbor projects, breakwaters, dredging, channel-cutoffs, duct lines, subways, shafts, tunnels, drilling, soil testing, clearing and grubbing, land leveling, quarrying, demolition and site clearing, tramways, soil stabilization, landscaping, beautification projects, hoisting or related work done by helicopters.

• Oil or gas refineries, nuclear power plants, industrial complexes and incidental structures.

• It shall also include any work relating to off-shore drilling and pipe lines.

(b) Building.

• Construction, erection, alteration, repair, modification, demolition, addition or improvement, in whole or in part, of any building structure.

• It shall include the installation, operation, maintenance and repair of equipment, and other facilities used in connection with the performance of such building construction.

(c) Material supply. Operations such as quarries, sand and gravel plants, screening plants, asphalt plants, ready-mix concrete or batch plants and prestressed concrete plants (excluding established plants) that are established at the job site.

(2) Type of equipment.

(a) Self-propelled.

• Asphalt machines, backhoes, blades, boring equipment, brooms, chippers, compactors, compressors, concrete saws, cranes, derricks, dozers, drilling equipment, hoists, lifts, loaders, motor graders, pavement breakers, paving machines, pumps, rollers, scrapers, screeds, shovels, tractors, and trenchers.

(b) Stationary.

• Asphalt plants, concrete batch plants, crushing plants, and screening plants.

[Statutory Authority: Chapter 39.12 RCW, RCW 43.22.270 and 43.22.051. WSR 00-15-077, § 296-127-01354, filed 7/19/00, effective 7/19/00.]

RCW 39.12.020

Prevailing rate to be paid on public works and under public building service maintenance contracts—Posting of statement of intent—Exception.

The hourly wages to be paid to laborers, workers, or mechanics, upon all public works and under all public building service maintenance contracts of the state or any county, municipality or political subdivision created by its laws, 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. For a contract in excess of ten thousand dollars, a contractor required to pay the prevailing rate of wage shall post in a location readily visible to workers at the job site: PROVIDED, That on road construction, sewer line, pipeline, transmission line, street, or alley improvement projects for which no field office is needed or established, a contractor may post the prevailing rate of wage statement at the contractor's local office, gravel crushing, concrete, or asphalt batch plant as long as the contractor provides a copy of the wage statement to any employee on request:

(1) A copy of a statement of intent to pay prevailing wages approved by the industrial statistician of the department of labor and industries under RCW 39.12.040; and

(2) The address and telephone number of the industrial statistician of the department of labor and industries where a complaint or inquiry concerning prevailing wages may be made.

This chapter shall not apply to workers or other persons regularly employed by the state, or any county, municipality, or political subdivision created by its laws.

[2007 c 169 § 1; 1989 c 12 § 7; 1982 c 130 § 1; 1981 c 46 § 1; 1967 ex.s. c 14 § 1; 1945 c 63 § 1; Rem. Supp. 1945 § 10322-20.]

RCW 39.12.015

Industrial statistician to make determinations of prevailing rate.

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

[1965 ex.s. c 133 § 2.]

WAC 296-127-010

Definitions for chapter 296-127 WAC.

(1) "Department" means the department of labor and industries.

(2) "Director" means the director of the department or his or her duly authorized deputy or representative.

(3) "Industrial statistician" means the industrial statistician of the department's employment standards, apprenticeship, and crime victims (ESAC) division.

(4) "Assistant director" means the assistant director of the employment standards, apprenticeship, and crime victims (ESAC) division or his or her duly authorized deputy or representative.

(5) "Contractor" means:

(a) The prime contractor, and each and every subcontractor, required to be registered under chapter 18.27 RCW and/or licensed under chapter 19.28 RCW, that performs any work on a public works project site, and/or is required to pay industrial insurance premiums as a construction company.

(b) Employers engaged in shipbuilding and ship repair, building service maintenance, and any fabricator or manufacturer that produces nonstandard items specifically for a public works project.

(c) Employers that contract with contractors or subcontractors for the purpose of the production and/or delivery of materials pursuant to the terms of WAC 296-127-018.

(6) The term municipality shall include every city, county, town, district, political subdivision, or other public agency thereof which is authorized by law to require the execution of public work, except drainage districts, diking districts, diking and drainage improvement districts, drainage improvement districts, diking improvement districts, consolidated diking and drainage improvement districts, consolidated drainage improvement districts, consolidated diking improvement districts, irrigation districts, or any such other districts as shall from time to time be authorized by law for the reclamation or development of waste or undeveloped lands.

(7)(a) The term "public work" shall include:

(i) 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. The source of the funding shall not determine the applicability of the statute, and may include, but is not limited to, such sources as those payments made through contracts with insurance companies on behalf of the insured state or municipality;

(ii) All work, construction, alteration, enlargement, improvement, repair, and/or demolition which, by law, constitutes a lien or charge on any property of the state or of a municipality;

(iii) All work, construction, alteration, repair, or improvement, other than ordinary maintenance that the state or a municipality causes to be performed by a private party through a contract to rent, lease, or purchase at least fifty percent of the project by one or more state agencies or municipalities, pursuant to RCW 39.04.260;

(iv) Maintenance, except ordinary maintenance as defined by (b)(iii) of this subsection, when performed by contract. Maintenance is defined as keeping existing facilities in good usable, operational condition;

(v) Janitorial and building service maintenance as defined by WAC 296-127-023, when performed by contract, on public buildings and/or assets; and

(vi) The fabrication and/or manufacture of nonstandard items produced by contract specifically for a public works project as defined by (a)(i) through (v) of this subsection.

(b) The term "public work" shall not include:

(i) Work, construction, alteration, enlargement, improvement, repair, demolition, and/or maintenance for which no wage or salary compensation is paid, consistent with the requirements of RCW 35.21.278;

(ii) The construction, alteration, repair, or improvement of any municipal street railway system;

(iii) Ordinary maintenance which is defined as work not performed by contract and that is performed on a regularly scheduled basis (e.g., daily, weekly, monthly, seasonally, semiannually, but not less frequently than once per year), to service, check, or replace items that are not broken; or work not performed by contract that is not regularly scheduled but is required to maintain the asset so that repair does not become necessary.

(8) "Contract" means a contract, purchase order, or any other legal agreement in writing for public work to be performed for a fixed or determinable amount, which is duly awarded after advertisement and competitive bid. A contract that is awarded from a small works roster, or under the emergency provisions of state law, need not be advertised.

(9) "Residential construction" means construction, alteration, repair, improvement, or maintenance of single family dwellings, duplexes, apartments, condominiums, and other residential structures not to exceed four stories in height, including basement, when used solely as permanent residences. It does not include the utilities construction (water and sewer lines), or work on streets, or work on other structures (e.g., for recreation and business.)

[Statutory Authority: RCW 39.12.070. WSR 94-01-100, § 296-127-010, filed 12/16/93, effective 1/16/94. Statutory Authority: Chapters 39.04 and 39.12 RCW and RCW 43.22.270. WSR 92-01-104, § 296-127-010, filed 12/18/91, effective 1/31/92; WSR 88-22-046 (Order 88-22), § 296-127-010, filed 10/31/88. Statutory Authority: RCW 39.12.050, 39.12.065, 43.22.270 and 51.04.020. WSR 86-03-063 (Order 85-28), § 296-127-010, filed 1/17/86. Statutory Authority: RCW 39.12.015, 39.12.060 and HB 795, 1982 1st ex.s. c 38. WSR 82-18-041 (Order 82-28), § 296-127-010, filed 8/27/82.]

RCW 39.12.030

Contract specifications must state minimum hourly rate—Stipulation for payment—Residential and commercial construction work.

(1) The specifications for every contract for the construction, reconstruction, maintenance or repair of any public work to which the state or any county, municipality, or political subdivision created by its laws is a party, shall contain a provision stating the hourly minimum rate of wage, not less than the prevailing rate of wage, which may be paid 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, and the contract shall contain a stipulation that such laborers, workers, or mechanics shall be paid not less than such specified hourly minimum rate of wage. If the awarding agency determines that the work contracted for meets the definition of residential construction, the contract must include that information.

(2) If the hourly minimum rate of wage stated in the contract specifies residential construction rates and it is later determined that the work performed is commercial and subject to commercial construction rates, the state, county, municipality, or political subdivision that entered into the contract must pay the difference between the residential rate stated and the actual commercial rate to the contractor, subcontractor, or other person doing or contracting to do the whole or any part of the work under the contract.

[2009 c 62 § 1; 1989 c 12 § 9; 1945 c 63 § 2; Rem. Supp. 1945 § 10322-21.]

WAC 296-127-018

Coverage and exemptions of workers involved in the production and delivery of gravel, concrete, asphalt, or similar materials.

(1) The materials covered under this section include but are not limited to: Sand, gravel, crushed rock, concrete, asphalt, or other similar materials.

(2) All workers, regardless of by whom employed, are subject to the provisions of chapter 39.12 RCW when they perform any or all of the following functions:

(a) They deliver or discharge any of the above-listed materials to a public works project site:

(i) At one or more point(s) directly upon the location where the material will be incorporated into the project; or

(ii) At multiple points at the project; or

(iii) Adjacent to the location and coordinated with the incorporation of those materials.

(b) They wait at or near a public works project site to perform any tasks subject to this section of the rule.

(c) They remove any materials from a public works construction site pursuant to contract requirements or specifications (e.g., excavated materials, materials from demolished structures, clean-up materials, etc.).

(d) They work in a materials production facility (e.g., batch plant, borrow pit, rock quarry, etc.,) which is established for a public works project for the specific, but not necessarily exclusive, purpose of supplying materials for the project.

(e) They deliver concrete to a public works site regardless of the method of incorporation.

(f) They assist or participate in the incorporation of any materials into the public works project.

(3) All travel time that relates to the work covered under subsection (2) of this section requires the payment of prevailing wages. Travel time includes time spent waiting to load, loading, transporting, waiting to unload, and delivering materials. Travel time would include all time spent in travel in support of a public works project whether the vehicle is empty or full. For example, travel time spent returning to a supply source to obtain another load of material for use on a public works site or returning to the public works site to obtain another load of excavated material is time spent in travel that is subject to prevailing wage. Travel to a supply source, including travel from a public works site, to obtain materials for use on a private project would not be travel subject to the prevailing wage.

(4) Workers are not subject to the provisions of chapter 39.12 RCW when they deliver materials to a stockpile.

(a) A "stockpile" is defined as materials delivered to a pile located away from the site of incorporation such that the stockpiled materials must be physically moved from the stockpile and transported to another location on the project site in order to be incorporated into the project.

(b) A stockpile does not include any of the functions described in subsection (2)(a) through (f) of this section; nor does a stockpile include materials delivered or distributed to multiple locations upon the project site; nor does a stockpile include materials dumped at the place of incorporation, or adjacent to the location and coordinated with the incorporation.

(5) The applicable prevailing wage rate shall be determined by the locality in which the work is performed. Workers subject to subsection (2)(d) of this section, who produce such

materials at an offsite facility shall be paid the applicable prevailing wage rates for the county in which the offsite facility is located. Workers subject to subsection (2) of this section, who deliver such materials to a public works project site shall be paid the applicable prevailing wage rates for the county in which the public works project is located.

[Statutory Authority: Chapter 39.12 RCW, RCW 43.22.051 and 43.22.270. WSR 08-24-101, § 296-127-018, filed 12/2/08, effective 1/2/09. Statutory Authority: Chapters 39.04 and 39.12 RCW and RCW 43.22.270. WSR 92-01-104 and 92-08-101, § 296-127-018, filed 12/18/91 and 4/1/92, effective 8/31/92.]

RCW 4.24.115

Validity of agreement to indemnify against liability for negligence relative to construction, alteration, improvement, etc., of structure or improvement attached to real estate or relative to a motor carrier transportation contract.

(1) A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith, a contract or agreement for architectural, landscape architectural, engineering, or land surveying services, or a motor carrier transportation contract, purporting to indemnify, including the duty and cost to defend, against liability for damages arising out of such services or out of bodily injury to persons or damage to property:

(a) Caused by or resulting from the sole negligence of the indemnitee, his or her agents or employees is against public policy and is void and unenforceable;

(b) Caused by or resulting from the concurrent negligence of (i) the indemnitee or the indemnitee's agents or employees, and (ii) the indemnitor or the indemnitor's agents or employees, is valid and enforceable only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefor, and may waive the indemnitor's immunity under industrial insurance, Title 51 RCW, only if the agreement specifically and expressly provides therefor and the waiver was mutually negotiated by the parties. This subsection applies to agreements entered into after June 11, 1986.

(2) As used in this section, a "motor carrier transportation contract" means a contract, agreement, or understanding covering: (a) The transportation of property for compensation or hire by the motor carrier; (b) entrance on property by the motor carrier for the purpose of loading, unloading, or transporting property for compensation or hire; or (c) a service incidental to activity described in (a) or (b) of this subsection, including, but not limited to, storage of property, moving equipment or trailers, loading or unloading, or monitoring loading or unloading. "Motor carrier transportation contract" shall not include agreements providing for the interchange, use, or possession of intermodal chassis, containers, or other intermodal equipment.

[2012 c 160 § 1; 2011 c 336 § 95; 2010 c 120 § 1; 1986 c 305 § 601; 1967 ex.s. c 46 § 2.]

NOTES:

Preamble—Report to legislature—Severability—1986 c 305: See notes following RCW 4.16.160.