



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

Prevailing Wage
PO Box 44540 • Olympia, Washington 98504-4540
360/902-5335 Fax 360/902-5300

August 7, 2013

Josh Swanson
Labor Research and Communications
International Union of Operating Engineers Local 302
18702 120th Avenue North East
Bothell, Washington 98011-9514

Re: Construction Site Surveyors Work on SR 99 Deep Bore Project in Seattle

Dear Mr. Swanson:

Thank you for your May 15, 2013 letter in which you requested a determination of whether work performed to enable monitoring of the regional effect of tunneling for the SR 99 Deep Bore Project requires prevailing wage compliance.

This is a determination of the Industrial Statistician regarding coverage of the referenced work under Washington's prevailing wage laws and is made pursuant to RCW [39.12.015](#). See the enclosed document, "*Prevailing Wage Determination Request and Review Process*."

In considering this request, in addition to your May 15 letter, my review included consideration of a number of documents from the Washington State Department of Transportation (WSDOT) SR 99 Tunnel Project website, www.alaskanwayviaduct.org and comments Seattle Tunnel Partners (STP) Project Manager Chris Dixon provided in response to your letter.

Prevailing wages are required to be paid to workers, laborers and mechanics on all public works, according to RCW [39.12.020](#) which states, in part:

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...

Public works is broadly defined in RCW [39.04.010](#), which states, in part:

..."Public work" means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein. All public works, including maintenance when performed by contract shall comply with chapter [39.12](#) RCW...

The deep bore tunneling project is a public works project administered by WSDOT. STP was chosen as the prime contractor and the work of that project is underway. The public works construction contract between WSDOT and STP includes a wide range of activities, all of which are construction related. Among those activities is the assessment and monitoring of the buildings and other structures that could potentially be damaged during execution of this tunnel boring project. According to WSDOT websites, monitoring devices will include more than 700 instruments installed at or below grade in streets and sidewalks above the tunnel path. At least some of these monitoring devices will be installed between 2 and 300 feet underground. Additionally, nearly 200 buildings will be outfitted with monitoring devices. Automated survey machines will be installed on building exteriors and will continuously scan monitoring points installed on other nearby buildings. Tilt meters will be installed on interior walls, typically in basements. Liquid level sensors will be installed in similar locations, presumably for similar purposes. Crack gauges will be installed onto existing cracks in buildings to see if those cracks widen.

Automated survey machines and corresponding monitoring points, tilt meters and liquid level sensors will be installed using bolts and brackets. Installation of those bolts and brackets will require drilling. Crack gauges will be attached to buildings using epoxy. Installation of underground monitoring instruments will require drilling, as will installation of instruments in streets and sidewalks. Many of the monitoring devices will need to be realigned throughout the project.

In *Heller v. McClure & Sons, Inc.*, 92 Wn. App. 333, 340 (1998) in considering work that did not become part of the final project but was performed in relation to that public works project, the court stated that:

...[T]hose 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...a construction surveyor performs work...covered by the prevailing wage act, notwithstanding the fact that the survey work is not incorporated into the project itself...

All of the tasks described are necessary for the completion of the work. The monitoring of the potential settlement of earth and downtown structures will involve certain technical work which is exempt from prevailing wages, and manual labor which is not exempt.

Electronically receiving and processing of data from monitoring devices which does not include manual labor will be outside the parameters of work that requires the payment of prevailing wage rates. Software installation work will be similarly exempt. Computer technology workers also fall outside the “workers, laborers and mechanics” class of workers who are entitled to prevailing wages.

On the other hand, the installation of monitoring devices and the manual adjustment and removal of the devices will require the payment of prevailing wages. This work, including minor incidental drilling, bolting and epoxy fastening associated with the setting of devices and monitoring points, is properly classified as Construction Site Surveyor for prevailing wage purposes, as described in [WAC 296-127-01396](#). Surveying skills will also be needed on an ongoing basis to re-check, adjust, maintain and otherwise ensure that monitoring devices remain in proper position; this, too, requires payment at prevailing wage rates. Placement and/or finishing of concrete will be required, and, depending on the specifics of the tasks associated with that effort, prevailing wages such as that of Laborers, [WAC 296-127-01344](#) Cement Masons, [WAC 296-127-01315](#) and Iron Workers, [WAC 296-127-01339](#) will be required. Drilling that requires the use of a drilling rig, such as the placement of monitoring devices underground, is properly classified under Power Equipment Operators as described within [WAC 296-127-01354](#).

Project Manager Chris Dixon posits in a June 18, 2013 communication on the issue that the subject work is not covered under the Construction Site Surveyor scope of work, and he seems to infer that none of the work performed by surveyors is subject to prevailing wage because of surveyors' "high degree of experience, knowledge and understanding which goes well beyond that required for a Construction Site Surveyor." There is nothing inherent in the status, experience, or knowledge of the specific workers performing the tasks under consideration here which would exempt them from prevailing wage requirements. Rather, the inquiry must address the specific tasks that such individuals perform. Please see the determination [07292011](#) and rule proposal decision [04302012](#) posted at: <http://www.lni.wa.gov/TradesLicensing/PrevWage/Policies/default.asp>, which address the same reliance upon status of the worker that Mr. Dixon suggests is central to the issues at hand.

Mr. Dixon also seems to suggest that the monitoring work is somehow exempt from prevailing wage requirements because it is "overseen by an independent licensed professional land surveyor." This contention appears to be based upon a misinterpretation of subsection (2) of [WAC 296-127-01396](#) which states:

The construction site surveyor scope of work does not include surveying services not within the description in subsection (1) of this section that are required by specification or contract or state law to be performed under the direct supervision of individuals registered under chapter 18.43 RCW.

Subsection (2) does not operate to exclude the work from prevailing wage requirements. As you will note, that subsection refers to "surveying services NOT within the description in subsection (1)" [emphasis added] as outside the scope. Much of the work at issue here, however, IS within the description of subsection (1), within the scope, and thus not excluded from the prevailing wage requirements by operation of subsection (2) of the rule. Here's the language in subsection (1) of the rule that is determinative:

The work of the construction site surveyor includes, *but is not limited to*:
Survey work performed after the contract is awarded and during the actual construction in direct support of construction crews when the worker is in the employ of and working under the direction of a construction contractor to survey check points of location and grade on a construction site using a variety of measurement tools, instruments and procedures. [Emphasis added.]

Importantly, the language of the scope of work descriptions is helpful for ascertaining which prevailing wage trade and occupation classification to use but is not the authority for determining if prevailing wages are, in fact, required. The statute and case law are useful for that question. RCW 39.12.020 provides a prevailing wage requirement for "laborers, workers, or mechanics" performing work "upon all public works..." Case law has found this is a broad requirement and guides us that the prevailing wage law is a remedial law to be liberally interpreted for its purpose of protecting worker wages. See *Everett Concrete Products v. L&I*, 109 Wn.2d 819, 823-24 (1988).

This determination is based upon the specific facts identified above. If the facts are different from as described or change, the answer may also differ.

I hope this information is helpful. If I can be of further assistance, please let me know.

Sincerely,



L. Ann Selover
Industrial Statistician/Program Manager
(360) 902-5330
Ann.Selover@Lni.wa.gov

Enclosures

cc: Chris Dixon, Project Manager, STP-JV
Daren Konopaski, Business Manager, Operating Engineers Local 302
Marge Newgent, Field Representative
Lee Newgent, King County Building Trades



International Union of Operating Engineers LOCAL 302 • Washington and Alaska • AFL-CIO Daren Konopaski, *Business Manager & General Vice President*

May 15, 2013

Ann Selover, Industrial Statistician
Prevailing Wage Program Manager
Department of Labor and Industries
Post Office Box 44540
Olympia, Washington, 98504-4540

RE: Prevailing Wage Determination – Construction Site Surveyors on Deep Bore

Dear Ms. Selover:

The purpose of this letter is to request a determination for surveyor work that is being performed on the SR 99 – Deep Bore project in Seattle.

Just to be clear, this work is being performed under a Project Labor Agreement (PLA). While we believe the issue of prevailing wage coverage is clear, we are also mindful about some recent discussions with your office with respect to Prevailing Wage Program involvement on PLA projects. We are not expecting that your decision be one of jurisdiction, knowing that is not the state's role; however, it is our belief that the appropriate prevailing wages should be paid for the work in question.

Contractors & Work Being Performed:

Currently, the Seattle Tunnel Partners (STP) is contracting with three primary surveying subcontractors: Soldata, Saez Consulting Engineers, Inc., and KPG. These subcontractors are performing construction site survey work at the site of the Deep Bore cut, which we understand that they agree is clearly covered work under prevailing wage. However, the areas of disagreement of the work relates to the above ground and monitoring work being done off the main site of the work.

We are aware that there are several hundred monitoring points for this project. The contractors have argued that, at least some of this work, is monitored remotely via a computer. This is not the work that we are questioning. Rather, we are concerned with the manual structural monitoring an approximate number of points (350 points) and the near surface settlement points (100 points) that they are claiming is not work covered under the surveyor scope of work or the prevailing wage law.

The claim that all of the monitoring of the approximately 450 points is not covered either because of location (off the main dig site) is not applicable. The monitoring of this work is not always done remotely or on the main dig site, these points have to be installed, moved, adjusted, and reviewed regularly to ensure that the location points are accurate and measuring devices are functioning properly, sending the correct information.

Kyle Brees, *Financial Secretary* • Sean Jeffries, *President* • Robert Peterson, *Vice President*

18701 120th Avenue NE • Bothell, Washington 98011-9514

Telephone: (425) 806-0302 • Toll-free: 1-800-521-8882 • Fax: (425) 806-0030

Washington Branches: Bellingham • Silverdale • Ellensburg Alaska Branches: Anchorage • Fairbanks • Juneau



Determination Request – Construction Site Surveyor on Deep Bore Project

May 15, 2013

Page 2

We liken this work to that of an instrument person that is required to take multiple different readings on any given construction project to ensure the work is done correctly and to specification.

Construction Site Surveyor Scope of Work:

We believe that the appropriate Scope of Work for the work in question is Construction Site Surveyor (WAC 296-127-01396). This Scope of Work clearly identifies that “construction site surveyors perform survey work which requires the use or utilization of transits, tripod mounted levels, lasers, electrotape and other electronic measuring devices or theodolites to establish a location, an elevation or grade, distances, and other measurements..” In addition, this work is being performed post contract award date as the regulation requires, and is “[I]s in direct support of construction crews...using a variety of measurement tools, instruments, and procedures.”

We believe that were it not for the development and construction of this project these construction site surveyors would not be on the project. STP and Tudor Pierini are in direct control and ultimately responsible for the success of this project. In order to complete this project, the construction site survey aspect is a critical and necessary component being performed by “workers, laborers, and mechanics” pursuant to Chapter 39.04 and 39.12 RCW. That being said, the workers performing the construction site surveyor work should be paid at the appropriate prevailing wages and Statements of Intent and Affidavit of Wages must be filed.

Conclusion

We believe that the construction site surveyor work is clearly public work and subject to the appropriate prevailing wages. We do not agree with the contractors’ assertion that this work is something other than construction site surveyor. As stated above, regardless of the PLA coverage, the workers performing this work should be paid the appropriate prevailing wages and Intents and Affidavits and other prevailing wage administrative requirements (i.e. Certified Payrolls) should be adhered to. Also, it is important to note that this work would not have been included in this project were it not necessary and in direct support to the actual construction work associated with this project.

We appreciate your review and consideration of this matter and please let me know if you have any additional questions or if we can provide any other information that might be necessary to aid in your ultimate determination for this work. I can be reached at (206) 293-8350.

Sincerely,



Josh Swanson, Labor Research and Communications

cc: Daren Konopaski, Business Manager Operating Engineers Local 302
Marge Newgent, Field Representative
Lee Newgent, King County Building Trades

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:

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

Prevailing Wage Determination Request and Review Process

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.