STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
Prevailing Wage
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August 29, 2012

Josh Swanson
Labor Research and Communications
International Union of Operating Engineers, Local 302
18701 120th Avenue NE
Bothell, WA 98011-9514

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

Dear Mr. Swanson:

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 attached document, *"Prevailing Wage Determination Request and Review Process."*

Thank you for your inquiry of February 7, 2012 in which you asked about prevailing wage requirements, including the applicable scope(s) of work, in connection with the delivery and bulldozing of material excavated from a public work site at various disposal sites. Based on my review of the facts of this case and an analysis of applicable law, it is my determination that the bulldozing of material excavated from a public work site at various disposal sites as was done in this case is subject to prevailing wage requirements.

Specifically, this issue concerns the SR 520 project site in Aberdeen, Washington which is being constructed for the purpose of making pontoons that will ultimately be used on the SR 520 Bridge. The project requires removal of a substantial amount of dirt and fill from the Aberdeen site in order to construct the casting basins for the pontoons. You described the removal activity as a multi-shift (round robin) operation, and indicated the materials were delivered to at least two disposal sites for final disposition.

This determination is based upon:

- Information I received from you;
- Communications with Mr. Bob Braun, representing Grady Trucking (Grady);
- Communications with owners/operators of the sites where the excavated materials were deposited and where the referenced dozing work occurred;
- Subcontract #7826 dated November 16, 2010 between Grady Excavating, Inc. and Kiewit-General, A Joint Venture for the construction of 520 Pontoons;

- 2008 Washington State Department of Transportation (WSDOT) Standard Specifications and conversations with members of WSDOT regarding such specifications.

References to the Revised Code of Washington (RCW) and the Washington Administrative Code (WAC) are included.

"Public work" is defined as

> [A]ll 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.

See RCW 39.04.010(4).

Under WAC 296-127-018, "public work" specifically applies to "all workers, regardless of by whom employed…when they remove any materials from a public works construction site pursuant to contract requirements or specifications (e.g., excavated materials…). The same rule provides that "All travel time that relates to the work covered under subsection (2) of this section requires the payment of prevailing wages…[including] returning to the public works site to obtain another load of excavated material…" *See* WAC 296-127-018(3). There does not appear to be a dispute that the trucking work described in this regulation requires the payment of prevailing wages. However, WAC 296-127-018 addresses just several related descriptions of prevailing wage work. RCW 39.12.020 sets forth the requirement for payment of prevailing wage rates "upon *all* public works." [Emphasis added.] Other provisions of chapter 39.12 RCW state the requirement more broadly than WAC 296-127-018 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.]

According to your information, not denied by Mr. Braun, Grady transports the materials from the construction site to disposal sites then has its worker(s) use a bulldozer to push or level the dirt into or onto its final resting place after it is off-loaded from the truck. You state that while Grady pays its workers prevailing wage rates for the trucking aspect of the excavated material removal, Grady's workers also perform the bulldozer work at the disposal site and Grady informed you that it does not pay its workers prevailing wage rates for the bulldozer work.

Bob Braun, consultant for Grady, in response to my inquiry in this regard, stated that once the material is off-loaded at the disposal site any further work performed upon the material by his employees at the disposal site is not prevailed, including work to bulldoze the dirt upon the disposal site after it is off-loaded from the truck. Mr. Braun's position is that it does not matter what Grady chooses to do with the excavated material at the disposal site because the State of

Washington has no control or say over the material once it crosses what he describes as a "project boundary." He concludes: "The material is not regulated by Prevailed Wages (however the truck driver wages ONLY are prevailed by specific separate regulation related to truck drivers)." [Emphasis added by Mr. Braun.] Mr. Braun also pointed out that the disposal sites Grady utilized in connection with this project were not "exclusive" to the work under consideration.

Although concerns about "project boundary" and "exclusivity" of the disposal site may be relevant for federal (Davis-Bacon Act) analysis, I know of no Washington prevailing law or court interpretation of Washington prevailing wage law that refers to a control issue with respect to a prevailing wage "project boundary," or that would require the disposal site to be set up exclusively for the subject project for state prevailing wage requirements to apply. However, Mr. Braun felt these terms were significant because his position seems to be that WAC 296-127-018 defines the full scope of prevailing wage law that applies to removal of the excavated material from the job site. It is the Department's position however that, WAC 296-127-018 applies to just part of the prevailing wage analysis that comes into play when addressing the issues before us.

I also asked Mr. Braun about (1) specifically where the excavated material was dumped, and (2) whether the work of bulldozing the excavated material at the disposal site(s) was required by the disposal site owner(s) as part of the disposal process. He provided me with the names of four sites. In response to my second question, he responded that the work of bulldozing the excavated material at the disposal site(s) was not required by the site owner(s) as part of the disposal process. However, it was unclear to me why a contractor would grade the excavated materials at the disposal site if that was not a required part of the disposal agreement, or would in some way be beneficial to the contractor.

We researched the information Mr. Braun provided, and were able to speak with individuals at two of the sites Mr. Braun named. Both stated they were familiar with Grady and its activities at the respective sites. One, a site owner, stated that the grading and bulldozing was part of their agreement for the disposal because he [the owner] didn't want to do that work. Similarly, an individual we spoke with at a second disposal site stated that bulldozing work was generally done by the person depositing the material because it was necessary in order to for the party doing the dumping to continue depositing material at the site in an ongoing manner.

Similar to the position of Mr. Braun, in *Everett Concrete Products, Inc. v. Department of Labor & Industries*, 109 Wn.2d 819, 748 P.2d 1112 (1988), Everett argued that the fabrication of non-standard concrete tunnel liner segments off-site did not require payment of prevailing wage rates because the work did not have a "sufficient nexus to the public works project." Everett maintained that the relevant factors for determining whether such a nexus was present include the physical location of the project, the nature of the relationship between the parties performing the work, and the characteristics of the product itself, factors that courts have considered in applying federal prevailing wage law. The court, however, disagreed, citing the differences between federal and state law in this regard:

> ...[T]he 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..." 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... *See Everett*, at 826.

Everett provides further guidance regarding the issue before us in this situation because *Everett* mandates liberal construction of the "remedial" nature of Washington's prevailing wage law for its purpose of protecting employees of contractors and to preserve local wage standards. *See Everett* at 823.

Also on point is *Heller v. McClure,* 92 Wn.App. 33, 963 P.2d 923 (1988), which you referenced in your request for determination. In that case Mr. Heller, an equipment mechanic, performed maintenance and repair work on equipment owned by McClure which was used and located upon several public work sites. Although Mr. Braun indicates that decision does not support your premise, because the work Heller performed occurred *on the sites of the public works projects*, his analysis of the case omits consideration of the fact that the court found that the work was subject to prevailing wage requirements because the work "*was directly related to the prosecution of the work that McClure contracted to perform and necessary for the completion of that work.*" [Emphasis added.] The court specifically declined to consider if work performed on the equipment at Heller's shop located off the project sites was compensable at prevailing wage rates, because although that issue was pertinent to the original claim, Heller had abandoned that part of the claim prior to the court's consideration of the case. *See Heller* at 337. Thus, whether the work was performed on or off the public work site was not determinative.

In adopting the standard of looking to work that is "directly related to the completion of the contracted work and necessary for its completion," the *Heller* court concluded: "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 purpose." *See Heller* at 340.

In this case, Grady's removal of excavated material from the project site was specifically contracted for and that work, the removal and disposal of the excavated material was required in order for the contract to be completed. A review of the contract between Contractor, Kiewit-General, A Joint Venture, and Subcontractor, Grady, supports that conclusion.

The familiar meaning of "contemplated" within the contracting context is "to have in mind as possible or likely..." [*See Webster's New Riverside University Dictionary* (1988).] The contract between Grady and Kiewit-General, A Joint Venture specifically requires Grady to furnish all supervision, labor, tools, equipment, materials and supplies necessary to perform and to perform the work described as:

- Supply, trucking, and placement of aggregates on grade as needed.
- Exporting material from the job site to Subcontractor's approved dump site as well as material hauling onsite as needed.
- Subcontractor to provide all applicable permits for disposal sites and prior to processing or delivering aggregates, etc.

Included in the "Itemization of Work" section of the contract are "Haul to Waste" "Haul to Waste w/Backhaul," etc.

One would expect an experienced hauler prior to entering a contract for removal of the excavated material at issue here to have carefully calculated the process, taking into consideration not only the number of trucks necessary for the off-haul, but the timing of the process including time spent at the disposal site. Having employees and equipment available for leveling the excavated material at the disposal site in order to allow for more material to be dumped would surely have been contemplated as an integral part of the process. Given the amount of excavated material under consideration here (Grady's Subcontract #1572 referenced over 180,000 BCY) it would certainly seem reasonable, if not critical from an operational efficiency standpoint for Grady to have its employees at the dump sites to ensure a continuing flow of the work process.

Applying the "contemplated" definition above and Washington prevailing wage law principles, including case law, to the situation at hand, every instance of trucking the excavated material to a disposal site, and returning to the project site to pick up additional loads is subject to prevailing wage payment at the Truck Drivers rate of pay. Bulldozing work performed at the disposal site to finalize the disposal or haul-off efforts is not only a "likely," but a "necessary" part of the work directly related to completion of the contract. For these reasons, the bulldozing work performed by Grady employees or other subcontractors upon the excavated material at the various disposal sites is subject to prevailing wage payment at the Operating Engineers (Equipment Operators) (WAC 296-127-01354) rate of pay.

The answers provided here are based upon the specific facts before me. If those facts change or are different from as stated, the answers may differ as well.

In your request for determination you also asked whether the 401(k) plan Grady has for its employees meets the definition of "usual benefits" under prevailing wage law. If you will provide me with additional information on that issue, I will address it at another time.

I hope this information is helpful. If you have additional questions, please let me know.

Sincerely,

L. Ann Selover

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Enclosure

cc: Bob Braun, Braun Consulting Group
Dave Ziegler, Washington Department of Transportation

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

February 7, 2012

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 – Offsite Operator Work Associated with SR 520 Pontoon Project

Dear Ms. Selover:

The purpose of this letter is to request a determination for the appropriate Scope of Work performed offsite in connection with the SR 520 project.

Background

The SR 520 project in Aberdeen, Washington was designed and is being constructed for purpose of making the pontoons that will ultimately be used on the SR 520 bridge. This project required a massive undertaking in the removal of dirt and fill in order to construct the casting basins for the pontoons. While I do not have an exact yardage figure, I can say that there have been several trucks hauling materials in a multi-shift (round robin) operation to remove the materials for the construction portion of the project.

These materials were delivered to at least two locations that we are aware of. The first, is a pit (commonly referred to as the "Bailey Pit") in Elma, Washington. We understand that this pit is owned by a private company and we assume that the contractor responsible for the material removal, Grady Truckinig, has engaged in a contract for the depositing of the fill materials. The second, is a pit publicly owned by Grays Harbor County or possibly Hoquiam. I should say that I am using the term "pit" loosely in this case as it was a former outfall location for septic deposit.

Essentially, Grady has employed at least on Operator to perform the function of pushing the fill materials into either of the two pits/holes. The materials are dumped at either of the two sites and the Operator utilizes a bulldozer to push the material into the hole(s) and grade accordingly. We also understand that the Operator also performed some trucking, as time allowed.

Issue

The contractor has informed us that they paid the appropriate Truck Driver Prevailing Wage when performing these duties but was not paid Prevailing Wage for the bulldozer work. They informed us that it was their understanding that "the person 'pushing' dirt once it is off loaded at its nonexclusive resting place is not prevailed work and is not 'project work' either. Accordingly

we believe the worker has been paid fairly and properly. See Enclosed Email from Bob Braun, Consultant for Grady Trucking.

Also, and we believe further germane to the Prevailing Wage question, is that the worker was provided with a 401K plan as a form of fringe benefits. We understand that these are considerably less than the Usual Benefits required to be paid under Prevailing Wage. Further, we are unclear that if your determination is that Operator Prevailing Wages are appropriate, if these benefits would meet the definition of Usual Benefits under the statute. We are considerably unclear as to how, and if, these benefits will ever mature for the worker(s).

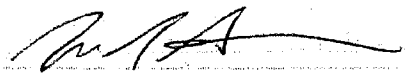
Conclusion

It is our strong belief that the appropriate Prevailing Wages for the bulldozer work should be that of Operating Engineer/Power Equipment Operator. We believe this is supported by the *Silverstreak* decision relating to incorporation as well as the *Heller v. McClure* decision relating to the standard of being "directly related to the prosecution of the work." We do not believe that a "stockpiling" argument is being made at this time so we did not include references to other cases on this topic that may be relevant. It seems to me that there has been a battery of cases over the years and we would be happy to provide you with these references if necessary. Further, and depending on your Prevailing Wage determination we believe that the appropriate Usual Benefits need to be paid to the worker.

In closing, the SR 520 project is a construction project. We believe that the only Prevailing Wage Scope of Work applicable to this work is that of Operating Engineer (WAC 296-127-01354). We are hopeful that you will agree with our interpretation and would be happy to provide any additional information that you might require in order to do so.

Please feel free to contact me at (206) 293-8350 or jswanson@iuoe302.org should you have any questions or require additional information.

Sincerely,



Josh Swanson, Labor Research and Communications
Operating Engineers Union, Local 302

Enclosures

cc: Daren Konopaski, Business Manager Operating Engineers Local 302
George Garten, Business Agent Operating Engineers Local 302
Bob Braun, Consultant for Grady