



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

Prevailing Wage
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360/902-5335 Fax 360/902-5300

February 6, 2013

John M. Payne
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 4040
Seattle, WA 98104

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

Dear Mr. Payne:

Thank you for your letter of October 22, 2012, sent on behalf of your client, Grady Excavating (Grady), requesting modification of the determination I issued on August 29, 2012 regarding the referenced matter.

I appreciate the detailed discussion in your letter; however, I believe the August 29, 2012 determination is a correct determination based upon all the facts available to me, and no additional factual information has been presented that would cause me to alter that determination.

In the interests of efficiency, rather than going into great detail in addressing the arguments in your request for reconsideration and modification, I will state briefly my response to each of your major objections.

Please understand that my reference to the case of *Everett Concrete Products, Inc. v. Department of Labor & Industries*, 109 Wn.2d 819, 748 P.2d 1112 (1988), was for the purpose of illustrating the courts' approach to important differences in the interpretation and application of the Davis-Bacon Act as compared to Washington's prevailing wage law. It appeared to me necessary to address Grady's incorrect reliance upon Davis-Bacon principles as expressed by their consultant, Robert Braun, in several communications. Specifically, unlike the "typical" Davis-Bacon situation (there are situations when application of Davis-Bacon requirements extend beyond the "direct" work site), application of Washington's prevailing law in many situations extends beyond work performed "directly" upon the public work construction site. The *Everett Concrete* case is also pertinent for its discussion of the remedial nature of Washington's prevailing wage law.

The determination cites the case of *Heller v. McClure*, 92 Wn.App. 33, 963 P.2d 923 (1988) for the proposition that the site of the work is not determinative with respect to application of Washington prevailing law. The standard that should be applied according to *Heller* is whether the work is directly related to the completion of the contracted work and necessary for its completion.

I do not believe WAC 296-127-018 is dispositive of the issue before us, and disagree with your argument that my determination on this issue relies upon a "reverse logic" derived from what you reference as "*Silver Streak*," (*Silverstreak v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 154 P.3d 891 (2007)). The only reference in my determination to WAC 296-127-018 is to section (2)(c) of the rule, that specifically includes removal of materials from public works construction sites, and section (3) which addresses travel time with respect to such work. That discussion was in response to Mr. Braun's reliance on the language of the rule as part of his argument that the work at issue is not subject to prevailing wage requirements. I believe the determination effectively addresses this misplaced reliance, noting that "[o]ther provisions of chapter 39.12 RCW state the requirement more broadly than WAC 296-127-018 and require the payment of prevailing wages... [for] the whole or any part of the work contemplated by the contract."

The work to remove the materials from this public work is subject to chapter 39.12 RCW. Without the bulldozer's movement of removed materials at the disposal site, continued work to remove and dispose of those materials would not have been possible. The contract contemplated removal and disposal. A liberal interpretation of the remedial statute for its purpose of worker wage protections requires the application of prevailing wage requirements to this bulldozer work.

I hope this helps clarify the basis of the August 29, 2012 determination. The enclosed "Prevailing Wage Determination Request and Review Process" explains the process for any further review of this matter. If you have additional questions, please let me know.

Sincerely,



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

Enclosure

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

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, please 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:

José Rodriguez, Assistant Director
Department of Labor & Industries
Specialty Compliance Services
P O Box 44400
Olympia, WA 98504-4400
Rodr235@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, please 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.