



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

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

February 25, 2015

Jaime M. Saez, PE, Principal
Saez Consulting Engineers, Inc.
748 Winslow Way E
Bainbridge Island, WA 98110

Re: Request for Clarification/Reconsideration of the August 7, 2013 Determination on Construction Site Surveyors Work on SR 99 Deep Bore Project in Seattle.

Dear Mr. Saez:

Thank you for your September 15, 2014 letter in which you requested clarification and reconsideration of Ann Selover's August 7, 2013 determination of the prevailing wage requirements for the installation and operation of certain monitoring instruments on the SR 99 Deep Bore Project. You wrote to me following our September 4, 2014 meeting.

I understand that although Ms. Selover's letter addressed work on the SR 99 Deep Bore Project, on which your company participated, you would like clarification for other recent and ongoing projects, including the Sound Transit N125 TBM Tunnels (UW to Maple Leaf Portal) project. Currently, we have two open investigations which arise from complaints filed by the International Union of Operating Engineers against Saez Consulting Engineers, Inc. (SCE) on June 4, 2014.

Materials reviewed for this reconsideration include, but are not limited to:

- Your September 15, 2014 letter to me;
- An instruction to bidders document from Sound Transit;
- The August 7, 2013 determination by former Industrial Statistician, Ann Selover regarding "Construction Site Surveyors Work on SR 99 Deep Bore Project in Seattle";
- Excerpts from a Soldata document on the Northgate Link Extension, Manual Monitoring Work;
- An August 2014 memorandum by JCM Northlink, LLC titled "Surveyor utilization on the Sound Transit N125 Northgate Link Tunnel Project";
- An October 17, 2014 letter from Josh Swanson, IUOE Local 302 to me;
- Your December 4, 2014 follow-up letter to me;
- Statements of Intent to Pay Prevailing Wages on Sound Transit contract # RTA/LR 0001-13;
- Chapter 39.12 RCW and chapter 296-127 WAC; and

- Case law including but not limited to:
 - *Everett Concrete Products v. L&I*, 109 Wn.2d 819 (1988),
 - *Lockheed Shipyard v. L&I*, 56 Wn. App. 421 (1989), and
 - *Heller v. McClure & Sons, Inc.*, 92 Wn. App. 333 1998).

Work process reviewed

Based on my review of these materials, I understand that the work in question on each of these projects is of the same type and nature as the work addressed in the August 7, 2013 determination. As Ms. Selover described, this work involved “the assessment and monitoring of the buildings and other structures that could potentially be damaged during execution of this tunnel boring project.” She continued:

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.

The August 7, 2014 memo by JCM Northlink LLC regarding the N125 project provides a consistent description. According to that memo:

SCE’s tasks include the establishment of monuments on land, structures and utilities to determine the topographical thereof and to provide accurate records thereof utilizing Land Surveyors working under the direction of a Licensed Professional Land Surveyor. SCE’s tasks further include successively measuring those monuments to confirm that the topographical delineations have not changed. SCE employs approximately 3 land surveyors who perform these tasks. SCE has further contracted with other firms who performed some of the tasks including in their contract scope, such as pot-hole excavation for locating utilities.

The contract specifications are quoted in the JCM Northlink memo to refer to this work as “specifications for furnishing, installing, maintaining, monitoring and decommissioning instrumentation which monitors earth and structure movements, groundwater levels, and structural loads during the Work.”

Analysis

It does not appear that the basic description of the work is at issue. In your letter, you specifically ask me to review the last three paragraphs of Ms. Selover’s letter on page 3 of 4. This section of the determination analyzes the applicable legal standard and how it applies to the facts which are described earlier in the letter. In particular, Ms. Selover addresses the suggestion of the project manager, Chris Dixon, that this work is exempt because it is “overseen by an independent licensed professional land surveyor.” In your letter, you similarly note that your staff is “working under professional supervisions (by a professional land surveyor and a professional engineer)” as specified by the project specifications. You likewise note that the project’s documents require an independent engineering company to provide professional supervision by a professional land surveyor and a professional licensed engineer.

Your letter also notes other factors which you believe to support the position that SCE’s employees are not covered by prevailing wage requirements. These include your statements that SCE is not a contractor, that its work is outside the construction project limits, and that it does not take direction from contractors or provide direction in construction activity.

Coverage under prevailing wage law, chapter 39.12 RCW

Although I have considered each of the points that you raise in your letter in detail, it is my determination that Ms. Selover’s determination dated August 7, 2013 is correct in concluding that the described work of installing and operating monitoring equipment for purposes of assessing the impact of an ongoing public works construction project is covered by prevailing wage requirements. The language of RCW 39.12.020 and of RCW 39.12.030 are applicable to this work based on the nature of the duties performed and the fact that the work is being performed pursuant to a public works contract.

Notably, SCE need not be a licensed contractor for prevailing wage law to apply. RCW 39.12.030 provides that these specifications would apply to a “contractor, subcontractor, or other person...” (Emphasis added). Moreover, the work need not be performed on the primary site of construction. See *Everett* at 826. Work contemplated by the contract for public work, although outside the construction fence, will still be subject to the prevailing wage requirements of chapter 39.12 RCW.

The August 7 determination noted that there is an important distinction between certain technical work which will be exempt from prevailing wage requirements and manual labor which will be covered by prevailing wage requirements. This statement also holds true, and work in an office setting in which data may be received and evaluated would not be covered by prevailing wage requirements.

Scope of work for Construction site surveyor, WAC 296-127-01396

Most of the comments that you raise appear to be directed toward the scope of work for Construction site surveyor, WAC 296-127-01396.

As Ms. Selover noted initially, it is important to recognize that the question of which scope to apply is not an initial question of whether prevailing wage law applies. The applicability of prevailing wage law is based on an interpretation of the prevailing wage statute, and particularly RCW 39.12.020 and RCW 39.12.030. If work is covered, as I have assessed above that this work is, then one must assess *which* prevailing wage classification applies. Here, if the scope of work for construction site surveyors did not apply, then the question would be of which other scope of work to apply.

The type and nature of the work is used to ascertain which scope of work description is applicable to the particular prevailing wage work. *Lockheed* at 429-430. The August 7, 2013 determination found the type and nature of this work to monitor the regional effect of tunneling was of the same type and nature of work as that of the Construction Site Surveyor, WAC 296-127-01396. The determination noted that other scopes of work may also have been applicable to some of the described work in her letter.

It is also my determination that predominantly this work will be performed under the rate for Construction site surveyors, WAC 296-127-01396. This includes the described work involved with installing, maintaining, monitoring and decommissioning monitoring instrumentation. As Ms. Selover notes, this work falls within the meaning of the scope's section (1):

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.

Your letter focuses on certain phrases in this passage to suggest that they do not apply. For instance, you suggest that your firm does not work on the construction site. However, it is clear that this work monitors the direct physical impact of a construction project, and the covered work occurs on site, e.g., to install the measurement devices at the site where measurements are needed. This meets the language of the scope of work description. Individuals who only receive data at a remote office location are an example of individuals who would not be considered to be on the site of the project. Second, you state that your firm does not take direction from contractors or provide direction in any construction activity. However, you

acknowledge that SCE has contracted with Soldata Inc. to do this work, and Soldata Inc. is a subcontractor to JCM Northlink LLC, the prime contractor on the project. This distinguishes SCE from surveying work that may be performed directly for an awarding agency independent of a construction project, and may not be covered by this scope of work or by prevailing wage requirements.

Certain documents that I have reviewed confirm that this work bears a direct connection to construction activity. According to the Sound Transit Instructions to Bidders, provided with JCM Northlink's memorandum, "The contractor will be responsible for the cost of building damage repairs up to the stated deductible for each occurrence or event. The Bidder is referred to sections 00 72 00-6.04 B, and to the structures and utilities identified in sections 00 73 00-6.04, 31 09 00-1.11.B and 31 71 19-3.02.C of the specification." I have also located and reviewed the cited specifications, particularly Section 31 09 00 relating to "GEOTECHNICAL INSTRUMENTATION AND MONITORING OF EARTHWORK." Under section 3.06 C 4, this document defines procedures to be implemented by the winning contractor when "instrumentation data indicates measurements that exceed the action levels." In addition to specifications that the contractor notify the Resident Engineer, these specifications include items that suggest direct coordination between the monitoring work and the construction work performed by the prime contractor. These include item a. 3): "Implement procedures in order to limit further movement and protect affected facility." Under item b. 4), the contractor must perform leak tests and "coordinate testing and leak repairs with the utility owner." Sections D. and E. also show detailed provisions regarding utility and pavement replacement levels depending on the readings. For example, Section E 1. calls for the winning contractor to "[r]eplace WSDOT-owned pavements in-kind after major construction activities are complete at the following locations if instrumentation data or post-construction surveys indicate that more than 0.5 inches of settlement has occurred or in which cracks, breaks and popouts develop." Other similar specifications for construction activities which rely on the monitoring work are likewise provided. These materials support the finding that this work is performed in support of construction crews, consistent with WAC 296-127-01396.

As I believe you appreciate, if work is described in paragraph (1) of the scope of work for Construction site surveyor, WAC 296-127-01396, then paragraph (2) does not apply. As section (2) states, it addresses only surveying services "not within the description in subsection (1) of this section." Accordingly, the requirements in regard to registration under chapter 18.43 RCW are not relevant to the analysis in this case.

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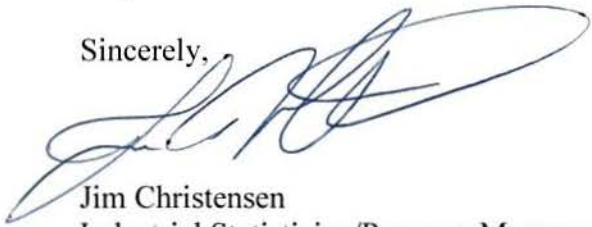
Jaime M. Saez
02/25/2015

Conclusion

The August 7, 2013 determination applied the Construction Site Surveyor rates of wage (WAC 296-127-01296) to work of this type and nature to monitor the regional effect of tunneling. I affirm the previous scope of work direction that this work to monitor the regional effect of tunneling, as described, is properly paid at the prevailing rate of pay for the Construction Site Surveyor, WAC 296-127-01396.

I appreciate the opportunity to study and respond to your questions. I hope this information is helpful. If I can be of further assistance, please let me know.

Sincerely,



Jim Christensen
Industrial Statistician/Program Manager
(360) 902-5330
Jim.Christensen@Lni.wa.gov

Enclosures

(Oct. 17, 2014 Swanson letter to Jim, August 7, 2013 determination letter)

cc: Liz Smith, Assistant Director, FPLS
Tammy Fellin, Legislative Director
Daren Konopaski, Business Manager, IUOE Local302
Marge Newgent, Field Representative, IUOE Local302
Josh Swanson, Labor and Research Communications, IUOE Local302

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.

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

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
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- (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 296-127-01396
Construction site surveyor.

For the purpose of the Washington state public works law, chapter 39.12 RCW, 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.

(1) 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.

(2) 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.

[Statutory Authority: Chapter 39.12 RCW and RCW 43.22.270. 08-23-082, § 296-127-01396, filed 11/18/08, effective 1/1/09.]



International Union of Operating Engineers

LOCAL 302 • Washington and Alaska • AFL-CIO

Daren Konopaski, *Business Manager & General Vice President*

October 17, 2014

Via Certified Mail

Jim P. Christensen, Industrial Statistician and Prevailing Wage Program Manager
Prevailing Wage Section
Washington State Department of Labor and Industries
Post Office Box
Olympia, Washington 98504

RECEIVED

OCT 23 2014

Prevailing Wage Section

Dear Mr. Christensen:

The purpose of this letter to rebut and respond to a request from Saez Consulting Engineers, Inc. (SCE) to reconsider former Industrial Statistician, Anne Selover's determination dated August 7, 2013 relating to Construction Site Survey work.

The Construction Site Surveyor Scope of Work (WAC 296-127-01396), specifically subsection (1) provides that:

"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."

Unfortunately subsection (2) confuses the issue in its attempt to clarify and qualify coverage. This subsection essentially does not exclude the work provided in subsection (1), but rather it qualifies that work **other** than that specified in subsection (1) is not covered if it is "required by specification, contract or state law to be performed under the direct supervision of individuals registered under chapter 18.43 RCW. Thus, this work clearly falls within the scope of subsection (1) and is therefore covered under Chapter 296-127 WAC and Chapters 39.12 and 39.04 RCW.

This letter intends to respond point-by-point to the information provided by Mr. Saez.

"[W]e are NOT a contractor nor are we providing 'construction surveying' on this project..."

This is patently false. As you will see from the enclosed Intent to Pay Prevailing Wages, SCE is a subcontractor working for Soldata who in turn is contracting work from the prime contractor (JCM Joint Venture) on this project. The services that you are providing are not "professional services for manual monitoring," but rather the work is construction site survey work directly in support of this particular project.

"Our work is located outside of the construction project limits (outside the construction fence)"

All of the monitoring points that are utilized are within the zone of influence for this job and the "monitoring" work would not have been necessary were it not for the construction of the project.

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

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

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



“We do not take direction from the contractor(s) nor do we provide direction in any construction activity.”

Again, please see the enclosed Intent to Pay Prevailing Wages filing. The work performed by SCE and Soldata would not have been necessary were it not for the actual construction of the project. As to lack of direct contractor involvement, that is a misnomer. If SCE’s monitoring points were to alarm to an incident I am sure that every affected party on the site of the work would be alerted. Also, JCM is directly involved with the grievance process and has been at the table throughout the duration of our attempts to resolve this matter.

It is also important to note that the original plans for the N125 project, Volume 1 Page 178-219 show all points needed to be monitored as part of the construction. There were some cosmetic amendments to the contract that did not affect the fact that this work was part of the construction work of the project.

“Our QC work is also checked using the same field methodology as ours by another professional engineering firm, CH2M Hill, who also reports to Sound Transit.”

CH2M has their own separate, non-construction quality control contract. Were SCE to have received their contract from CH2M Hill the issue and argument would be different. This is not separate from a construction QC contract. SCE’s contract is directly related to and necessary for the prosecution of the construction work on this contract.

“The installation of monitoring devices is provided by Bravo Environmental Inc. and one of our IUOE 302 dispatched field personnel...”

While we appreciate the fact that you dispatched a craft person to do the work for the affixing of the monitoring points that only supports the fact that regardless of the classification of worker assigned to do the work is construction work and covered under the Public Works and Prevailing Wage laws. Their decision to dispatch craft personnel to do the work supports the fact that this work is covered and should be paid the appropriate prevailing wages. This is further supported by the fact that we understand that Soldata signed agreements and was dispatched craft personnel for the installation of monitoring points.

“We want to re-emphasize [sic] we are NOT contractors, for we are not bonded nor certified as such. We are a certified engineering and surveying professional services firm providing supervision as part of the QC monitoring program for this project...”

Again, we have addressed the “QC” issue above, and regardless of bonding or certification status the work is construction work that is directly related to the prosecution of this public works project. Several types of work in the public works realm do not require bonding or certification.

This work is not a specific topographic survey. If that were the case, the same would be true for construction staking. The definition of topographic survey in Black’s Law Dictionary is that it is a survey process for determining a property’s elevation above sea level.

“WAC 296-127-01396 therefore should exclude this work from prevailing wage under chapter [18.43] RCW. However in the event that a classification is made for monitoring work outside of the construction zone by LNI other than ‘construction site surveyor’, what would that work classification be? It could fall under laborer, roofer, painter, etc.”

This work is not outside of the construction zone of influence. This work is directly related to the construction work and, as mentioned above, any evidence of the trigger levels will directly impact the

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construction process. Their main purpose is to detect movement for public safety within the zone of influence of the construction site. Also, construction site survey is not applicable toward land surveyor licensure under RCW 14.43. As to the appropriate classification of work, that is entirely dependent on what the work is, and this work is public work executed at the cost of the state and subject to prevailing wages.

“A hypothetical question to illustrate our point: Is every person that drives a large truck....required to be paid prevailing wage under the ‘Power Equipment Operator’...”

While we fail to understand the point of this question the obvious answer is no. The activities on a public work project define the appropriate classification of prevailing wages to be paid to the worker. Truck driving off the site of the work could very well be work paid at the Operating Engineer or Teamster prevailing wages.

“We have also copied you earlier with excerpts...Appendix 1 the statement is made that our professional services do not fall in the prevailing wage category...”

We assume that it would have to be JCM Joint Venture or Soldata in the enclosed Article 1.08 of the specifications 002100 “Prevailing Wages” (see enclosed). This contract is subject to chapters 39.12 and 49.28 RCW. Under this contract, no claim for additional compensation will be allowed that is based upon a lack of knowledge or error in interpretation of any such requirements by the contractor.

It was further clarified in Clarification No. 10: “Does union jurisdiction or L&I classification determine wage rate?” Answer: “This question requests a legal determination regarding state prevailing wage laws and/or labor issues. Bidders are encouraged to seek independent legal advice to the extent necessary to appropriately price the work.”

Please feel free to contact me at (206) 293-8350 if you should have any questions.

Sincerely,



Josh Swanson
Political and Communications Representative

cc: Daren Konopaski, Business Manager
Marge Newgent, PLA Representative

Enclosures



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

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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:

Josh Swanson
August 7, 2013
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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*
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Determination Request – Construction Site Surveyor on Deep Bore Project

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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