



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

Prevailing Wage
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February 17, 2012

Bryan L. Thorp, PLS, 2011 President
Land Surveyor's Association of Washington
30442 227th Place SE
Black Diamond, WA 98010

Re: Land Surveyors' Association of Washington (LSAW)
Petition to Repeal WAC 296-127-01396

Dear Mr. Thorp:

Thank you for your December 21, 2011 letter to Tamara Jones, Assistant Director, Legislative and Governmental Affairs requesting the repeal of the prevailing wage scope of work description for Construction Site Surveyor, WAC 296-127-01396.

Your communication along with its supporting documents includes a number of assertions including:

- L&I included professionals under the prevailing wage law;
- Survey firms are explicitly excluded from prevailing wage requirements under Davis-Bacon (federal) and Oregon laws;
- L&I was only looking at performing work upon a public work and not at the type of service (professional service) provided;
- Survey firms do not fit into the definition of "contractor;"
- WAC 296-127-01396 is impermissibly vague and ambiguous;
- Surveyors are afforded protections from foreign professionals by state licensing statutes; and
- WAC 296-127-01396 skewed the professional business model and raises costs for public works.

Your communications detail a long list of points. For clarity and ease of reading, your major conclusions will be addressed in this letter and the longer list of issues will be addressed in the attached comment and response document.

The Application of Prevailing Wages on Public Works, Chapter 39.12 RCW, to Professionals

I will address the points you raise regarding aspects of a “professional” status and whether prevailing wage requirements apply to professionals.

First, the Washington Supreme Court has provided guidance regarding the purpose and interpretation of the state’s prevailing wage law.

RCW 39.12 is remedial and should be construed liberally. A liberal construction should carry into effect the purpose of the statute... The purpose behind Washington’s prevailing wage law can be discovered by understanding the purpose behind the federal prevailing wage law, the Davis-Bacon Act... The Davis-Bacon Act was enacted “to protect the employees of government contractors from substandard earnings and to preserve local wage standards... The employees and not the contractor or its assignee, are the beneficiaries of the Act.”

Everett Concrete Products v. Dept. of Labor & Industries, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988) (internal cites omitted).

Are Professionals Subject to Chapter 39.12 RCW?

You note that Surveyors are professional service providers regulated by chapter 18.43 RCW and these individuals must meet requirements and be registered as land surveyors under RCW 18.43.010. You state Land Surveying is a profession (not a trade) and the purpose of the prevailing wage law does not apply to professionals. You also say the prevailing wage policies for construction workers do not exist for professionals. The correct answer about the application of prevailing wage policies to a Surveyor will actually depend on what activities that professional performs on a public work.

The Washington State prevailing wage law has often been examined by the courts for details of how the law actually functions. The issue of an applicable prevailing rate of wage to specific work will look at the “type of work rather than where the work was performed or by whom it was done.” *Lockheed Shipyard v. Labor & Industries*, 56 Wn. App. 421, 429-30, 783 P. 2d 1119 (1989).

The terms “professional” and “laborer, worker, or mechanic” are not defined in the prevailing wage law. A court may resort to a dictionary definition to determine the plain and ordinary meaning of terms when they are not defined in statute. *State v. Watson*, 146 Wn.2d 947, 956, 51 P.3d 66 (2002). *Black’s Law Dictionary* Seventh Edition, West Group, St. Paul Minn., 1999, defines “worker” as “[o]ne who labors to attain an end; esp., a person employed to do work for another.” *Black’s* also has a definition for “labor which begins with “[w]ork of any type,

including mental exertion.” *Black’s* also defines a “professional” as [a] person who belongs to a learned profession or whose occupation requires a high level of training and proficiency.”

Using *Black’s* definitions, a “professional” performs work in his or her occupation and therefore is a “worker.” The next question is whether Surveyor work requires the payment of prevailing wages in certain circumstances.

The Washington State Prevailing Wage Law, Chapter 39.12 RCW Does Not Specifically Exclude Professionals

RCW 39.12.020 requires the payment of not less than the prevailing rate of wage to the laborers, workers, or mechanics upon all public works. That statute provides an exemption for “workers or other persons regularly employed by the state, or any county, municipality, or political subdivision created by its laws.” The legislature could have, but did not provide any such exclusion from prevailing wage requirements for professionals.

RCW 39.12.030 requires public contracts for “construction, reconstruction, maintenance or repair” to specify that the laborers, workers or mechanics employed be paid at least the prevailing rate of pay. When a person is employed in the performance of “the whole or any part of the work contemplated by the contract” for that “construction, reconstruction, maintenance or repair” such a person must be paid no less than the prevailing rate of pay for their trade or occupation.

The surveyor employed on a public works construction site that performs work necessary to or contemplated by the contract for public work, fits the statute’s requirements under which the worker must be paid at least the prevailing rate of wage.

The Use of Federal or Other State Laws to Interpret Washington Law

You mention that the federal Davis-Bacon Act and the Oregon State prevailing wage law do not require Surveyors to be paid the prevailing rate of wage. Details on how other laws function may be informative but would not be controlling on how Washington courts would interpret Washington’s prevailing wage law. The Washington Supreme Court has compared some requirements in the federal Davis-Bacon Act with our state law, first noting the usefulness of the similar statute:

As noted, Washington's prevailing wage law is based on the Davis-Bacon Act, 40 U.S.C. 276a. BUILDING TRADES COUN., at 44. Thus, cases and regulations interpreting that act may be relevant and persuasive to an analysis of RCW 39.12.

Everett at 824.

In *Everett Concrete*, the Washington State Supreme Court rejected an argument that prevailing wage law, chapter 39.12 RCW, should be interpreted and applied in the same way as the federal prevailing wage law (the Davis-Bacon Act) because that principle does not apply when the statutes have different wording:

ECP's argument would be persuasive if the language of RCW 39.12 was identical to that in the Davis-Bacon Act. However, a court need not adopt the construction placed on a similar statute in another state if the language of the statute in the adopting state is substantially different from the language in the original statute. 2A N. Singer 52.02. "[A] provision of the federal statute cannot be engrafted onto the state statute where the Legislature saw fit not to include such provision." *Nucleonics Alliance, Local 1-369 v. WPPSS*, 101 Wn.2d 24, 34, 677 P.2d 108 (1984).

Everett at 826.

The court discussed how the legislature chose language different from the Davis-Bacon Act for chapter 39.12 RCW and concluded it would work in a different manner than the similar federal law because of the difference in the wording:

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

Everett at 826.

Another distinction between the federal and Washington State prevailing wage laws is the use in the federal law of the two words, "laborer or mechanic" and the state law which uses three words, "laborer, worker, or mechanic," to describe the employees who benefit from the prevailing wage requirements. Knowing that a Surveyor is a "worker" makes it unnecessary to determine if the Surveyor is a "laborer or mechanic" in considering when the state prevailing wage law applies to the work of a Surveyor.

Here, given the broader language used in chapter 39.12 RCW, your reliance on how other laws with different language will function is not persuasive or controlling on how the Washington State prevailing wage law is interpreted.

Performing Work upon a Public Work

Based on case law that directs the state prevailing wage law to be liberally interpreted for its purpose of worker wage protection (See *Everett* at 823), we believe that chapter 39.12 RCW requires the payment of the prevailing rate of wage to Surveyors (workers) employed upon a public work when they perform any part of the contract for construction, reconstruction, or repair of that public work.

Based on the analysis above, it is correct for the department to look at facts that show when such worker performs at least some part of the contract for construction, reconstruction, or repair of the public work (such as with the Construction Site Surveyor) and to apply a prevailing wage requirement to the workers employed in the performance of such work.

The statute does not provide an exception for professional service as you have argued. If the architect, a design professional, came onto the public works job and began to perform part of the contract for "construction, reconstruction, maintenance or repair," the architect would be entitled to prevailing wages, where that requirement did not exist for the design work unrelated to the performance of the construction work.

The scope of work description for the Construction Site Surveyor, WAC 296-127-01396, makes this distinction. Surveying work not related to the public works construction does not have a prevailing wage requirement. See WAC 296-127-01396(2). Under the rule and consistent with the requirements in law, survey work in support of the performance of the public works construction contract (work upon the public work) does have a prevailing wage requirement.

Survey Firms as "Contractors" on a Public Work

RCW 39.12.030 includes prevailing wage requirements for work by the "contractor, subcontractor, or other person" on a public work. It is not essential to be a "contractor" for prevailing wage requirements to apply to work performed upon a public work. Further, the prevailing wage rules define "contractor" to include entities that are required to pay industrial insurance premiums as a construction company. See WAC 296-127-010(5)(a).

The attached comment and response document addresses this industrial insurance risk class question from the rule's definition of "contractor." The non-construction risk class 4901-17 that survey firms may use for work not otherwise classified is not correct for work on construction projects where the construction industrial insurance rates will apply. See comment and response # 15 in the attached document.

The Construction Site Surveyor Scope of Work Description, WAC 296-127-01396 is Not Void for Vagueness

You assert that WAC 296-127-01396 is impermissibly vague and ambiguous. We do not agree. As explained above, the statute requires that prevailing wage requirements be applied to the Construction Site Surveyor performing work upon a contract for the public work. "Rules and regulations enacted by an agency are presumed valid and will be upheld if reasonably consistent with the statutes they implement." *See Brannon v. L&I*, 104 Wash.2d 55, 60, 700 P.2d 1139 (1985).

"In a constitutional challenge a statute is presumed constitutional unless its unconstitutionality appears beyond a reasonable doubt." *Seattle v. Shepherd*, 93 Wn.2d 861, 865, 613 P.2d 1158 (1980).

Finding a way to misread a law or regulation is not sufficient to invalidate the standard. "An Act that is sufficiently definite may overcome a void for vagueness challenge." *See American Legion Post # 149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 614; 192 P.3d 306 (2008).

Rather the courts will look to the ways in which the regulation does work:

In a facial challenge, as here, we look to the face of the enactment to determine whether any conviction based thereon could be upheld. *Shepherd*, at 865 [613 P.2d 1158]. A statute is not facially vague if it is susceptible to a constitutional interpretation. *State v. Miller*, 103 Wn.2d 792, 794, 698 P.2d 554 (1985). The burden of proving impermissible vagueness is on the party challenging the statute's constitutionality. *Shepherd*, at 865 [613 P.2d 1158]. Impossible standards of specificity are not required. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 465, 722 P.2d 808 (1986).

State v. Aver, 109 Wash.2d 303, 306-07, 745 P.2d 479 (1987).

After much study and careful consideration, we believe the correct application of the statute is to distinguish between survey work on a public works construction contract that does require prevailing wages for the Construction Site Surveyor and work unrelated to such public works construction that does not require prevailing wages.

Protection from Foreign Professionals

You argue that Professional Surveyors are already protected from foreign professionals under state licensing law. This argument is tangential to one of the stated purposes of prevailing wage laws noted in case law discussing the federal Davis-Bacon Act "a purpose of the Davis-Bacon Act was to provide protection to local craftsmen who were losing work because contractors engaged in the practice of recruiting labor from distant cheap labor areas." *See Everett* at 824.

Your argument is a policy argument that might be considered when drafting a legislative document but it is not an actual analysis of what Washington's prevailing wage law, chapter 39.12 RCW, requires. Such an argument cannot negate the statute. Even as a policy argument about what the law should be, the argument is weakened by the very licensing law you rely upon which provides for licensing individuals who already hold similar licenses with foreign jurisdictions. *See* RCW 18.43.100, Registration of out-of-state applicants.

Even if the department found this assertion compelling, we would not be able to ignore the actual requirements in the prevailing wage law.

Business Models Affected by Prevailing Wage Requirements

You say that WAC 296-127-01396 skewed the professional business model and raises costs for public works. You may have some examples that relate to this policy issue. However, no matter how compelling the department might find a particular policy argument, we must follow the law's requirements and not what we think the law ought to be in any given situation. Here, we have been careful to conform to the requirements in chapter 39.12 RCW.

Conclusion

Although we understand your position and considerable analysis on the prevailing wage requirements of WAC 296-127-01396 for certain Surveyor work when part of the performance of a public works contract, we believe the rule is valid and its application of prevailing wages upon a public work when it is part of the performance of a public works contract is consistent with and required by Washington state prevailing wage law.

Thank you for the opportunity to respond to your concerns.

Sincerely,



L. Ann Selover
Industrial Statistician
Program Manager

Enclosure

cc: Tamara Jones, Assistant Director
for Legislative and Governmental Affairs