



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

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

September 12, 2013

Lindsay K. Taft
Ahlers & Cressman PLLC
999 Third Avenue, Suite 3800
Seattle, WA 98104

Re: Calculation of Prevailing Wage Overtime Requirements on Joint Federal-State Projects

Dear Ms. Taft:

Thank you for your June 18, 2013 letter relating to the interplay of state and federal prevailing wage requirements on the public works project known as MARYHILL ROAD VIC TO WOOD CR BR –BST for the Washington State Department of Transportation. In your letter you question the results of an audit performed by Labor & Industries (L&I) Industrial Relations Agent, Robert Koshman, in which Mr. Koshman concluded that Construction Ahead owes its workers \$3,581.52 in prevailing wages.

This is a determination of the Industrial Statistician regarding application of Washington's prevailing wage requirements to the audit at issue and is made pursuant to RCW [39.12.015](#). See the attached document, "*Prevailing Wage Determination Request and Review Process*."

The unpaid wages Mr. Koshman found owing are the result of a deficiency he found in the payment of overtime requirements for the work performed on the referenced project. I understand it is your belief that on this project Washington's overtime requirements do not need to be met because this is a joint federal-state project and only federal wage requirements should apply. WAC [296-127-025](#) specifically addresses the applicability of joint federal-state standards:

(1) When a public works project is subject to the provisions of the Washington state public works law, chapter [39.12](#) RCW, and the Federal Davis-Bacon and related acts, the contractor and every subcontractor on that project must pay at least the Washington state prevailing wage rates, if they are higher than the federal prevailing wage rates *for the project* unless specifically preempted by federal law.

(2) When the federal prevailing wage rates are higher than the Washington state prevailing wage rates, the contractor shall pay the federal rate as required by federal law.

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See WAC [296-127-025](#) (emphasis added).

Essentially, as I understand your approach to the issue, it is that you suggest the use of the phrase “for the project” in the rule means that if the federal non-overtime rate is higher than the state non-overtime rate, for a project, then state overtime requirements need not be met or calculated. However, that approach seems to not take into consideration all elements of what constitutes the prevailing wage in the state of Washington.

Pursuant to RCW [39.12.010\(1\)](#), the prevailing rate of wage has three components: the “rate of hourly wage, usual benefits, and overtime.” Accordingly, overtime requirements are part and parcel of the prevailing wage, such that if state overtime requirements result in a total rate which exceeds the federal prevailing wage, due to its lack of corresponding overtime requirements, then the Washington rate is in fact higher. When the three components of the prevailing wage are recognized, it is clear that WAC [296-127-025](#) does not operate to preclude the applicability of state overtime requirements based on a comparison of only one component of the prevailing wage rate.

Additionally, the language of WAC [296-127-025](#) does not, in any event, suggest or state that there are circumstances when the state prevailing wage requirements need not be met or calculated. Indeed, Washington’s overtime requirements derive from statute, not from WAC [296-127-025](#), and the rule is not written so as to create an exception. See RCW [39.12.010\(1\)](#) and see chapter [49.28](#) RCW.

Please also note that the same points apply to the language quoted from the Prevailing Wage Law Guide, where the phrase “classification by classification” does not imply that the overtime or usual benefits components of the prevailing wage can be disregarded. In its introduction, the booklet clarifies that its “Plain Language Description” chapter language is informal and readers are encouraged to contact the prevailing wage program with questions.

I hope the information I've provided is helpful in clarifying the relationship between state and federal prevailing wage rates when it comes to the issue of state overtime requirements. If you have further questions or concerns, please let me know.

Sincerely,



L. Ann Selover
Industrial Statistician/Program Manager
Ann.Selover@Lni.wa.gov
(902) 902-5338

Attachments

cc: Elizabeth Smith, L&I Assistant Director for Fraud Prevention and Labor Standards
Robert G. Koshman, L&I Industrial Relations Agent

Prevailing Wage Determination Request and Review Process

RCW 39.12.015 is the basis for requesting a determination, since it provides:

All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.

If you disagree with a determination the industrial statistician provides, WAC 296-127-060(3) provides for a review process:

(3) Any party in interest who is seeking a modification or other change in a wage determination under RCW [39.12.015](#), and who has requested the industrial statistician to make such modification or other change and the request has been denied, after appropriate reconsideration by the assistant director shall have a right to petition for arbitration of the determination.

(a) For purpose of this section, the term "party in interest" is considered to include, without limitation:

(i) Any contractor, or an association representing a contractor, who is likely to seek or to work under a contract containing a particular wage determination, or any worker, laborer or mechanic, or any council of unions or any labor organization which represents a laborer or mechanic who is likely to be employed or to seek employment under a contract containing a particular wage determination, and

(ii) Any public agency concerned with the administration of a proposed contract or a contract containing a particular wage determination issued pursuant to chapter [39.12](#) RCW.

(b) For good cause shown, the director may permit any party in interest to intervene or otherwise participate in any proceeding held by the director. A petition to intervene or otherwise participate shall be in writing, and shall state with precision and particularity:

(i) The petitioner's relationship to the matters involved in the proceedings, and

(ii) The nature of the presentation which he would make. Copies of the petition shall be served on all parties or interested persons known to be participating in the proceeding, who may respond to the petition. Appropriate service shall be made of any response.

If you choose to utilize this review process, you must submit your request within 30 days of the date of the applicable industrial statistician's determination or response to your request for modification or other change. Include with your request any additional information you consider relevant to the review.

Direct requests for determinations, and for modification of determinations via email or letter to the prevailing wage industrial statistician:

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

Prevailing Wage Determination Request and Review Process

Direct requests via email or letter seeking reconsideration (redetermination) by the assistant director to:

Elizabeth Smith, Assistant Director
Department of Labor & Industries
Fraud Prevention and Labor Standards
P O Box 44278
Olympia, WA 98504-4278
Elizabeth.Smith@Lni.wa.gov

Direct petitions for arbitration to:

Joel Sacks, Director
Department of Labor & Industries
P O Box 44001
Olympia, WA 98504-4001

If you choose to utilize this arbitration process, you must submit your request within 30 days of the date of the applicable assistant director's decision on reconsideration (redetermination). Submit an original and two copies of your request for arbitration to the Director personally, or by mail. The physical address for the Director is 7273 Linderson Way, SW, Tumwater, WA 98501.

WAC 296-127-061 also contains the following provisions regarding petitions for arbitration:

In addition, copies of the petition shall be served personally or by mail upon each of the following:

- (a) The public agency or agencies involved,
 - (b) The industrial statistician, and
 - (c) Any other person (or the authorized representatives of such person) known to be interested in the subject matter of the petition.
- (2) The director shall under no circumstances request any administering agency to postpone any contract performance because of the filing of a petition. This is a matter which must be resolved directly with the administering agency by the petitioner or other party in interest.
- (3) A petition for arbitration of a wage determination shall:
- (a) Be in writing and signed by the petitioner or his counsel (or other authorized representative), and
 - (b) Identify clearly the wage determination, location of project or projects in question, and the agency concerned, and
 - (c) State that the petitioner has requested reconsideration of the wage determination in question and describe briefly the action taken in response to the request, and
 - (d) Contain a short and plain statement of the grounds for review, and
 - (e) Be accompanied by supporting data, views, or arguments, and
 - (f) Be accompanied by a filing fee of \$75.00. Fees shall be made payable to the department of labor and industries.