



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

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

October 31, 2014

Matthew W. Lynch
Sebris Busto James
14205 SE 36th Street, Suite 325
Bellevue, WA 98006

Re: Determination Request – Total Grounds Management – For the appropriate wage rate for work performed for the Briarwood Elementary School project.

Mr. Lynch:

Thank you for your letter dated February 10, 2014 in which you requested a determination on behalf of your client, Total Grounds Management, of the appropriate wage rates for work performed for the Briarwood Elementary School project in Issaquah, Washington. Your question related in particular to landscape construction work involving equipment that is less than 90 horsepower. The request arises out of an investigation and findings submitted to your company by industrial relations agent Shawn Dove. Thank you for your patience as I have looked into this matter.

Industrial Statistician determinations are made pursuant to RCW 39.12.015 and requests for their modification are provided for in WAC 296-127-060(3). See the enclosed document, "*Prevailing Wage Determination Request and Review Process*." Copies of the RCWs and WACs referenced in this letter are also enclosed. The answer below is based on the facts presented. If the facts are different, the answer could be different.

In preparing this response to your request, I reviewed a number of materials including, but not limited to:

- Your letter dated February 10, 2014 requesting this determination
- Manufacturers' specifications and marketing literature for several kinds of equipment including the loader, backhoe and excavators used on this project and mentioned later in this letter
- Shawn Dove's October 31, 2013 letter to Chris Clarke of Total Grounds Management, Inc.
- Various industry and research publications including Dictionary of Occupational Titles – US Department of Labor and Means Illustrated Construction Dictionary – RS Means Company, Inc.
- WAC 296-127-01346, scope of work description for Landscape Construction

Work reviewed

In your letter dated March 26, 2013 to Shawn Dove you provide a general description of the work performed by your company on the above named project. As you describe, “TGM laborers on the Briarwood project install irrigation lines, move and lay down bark, soil and sod, and plant trees and shrubs.” You note the use of “hedge trimmers, a small backhoe and a mini-excavator, each using no more than 90 horsepower.”

Below are the four pieces of power equipment that our investigator, Shawn Dove, found were in use by TGM’s employees on this project. TGM owns the two Kubotas, and the backhoe and excavator were rented from United Rental for this project. Images and manufacturing specifications are enclosed.

- Kubota R520S Loader (43.8-46 horsepower; operating weight 8980 lbs)
- Kubota KX121-3S 6-in-1 Blade Compact Excavator (39-40.5 horsepower; operating weight 9790 lbs)
- Case 580M Loader Backhoe (76-80 horsepower; operating weight 13359 lbs)
- Takeuchi TB250 Compact Excavator (38-39.7 horsepower; operating weight 10,650-10,950 lbs)

Each of these pieces of equipment is motorized and self-propelled with a seat for the operator within a canopy or fully enclosed cab.

In your letter dated February 10, 2014 you describe the work with the mini-excavator to involve trenching for irrigation lines and the work with the loader to involve the moving of soil or bark mulch. In his October 31, 2013 letter, Mr. Dove acknowledges that the work relates solely to the beautification of a plot of land and is not preparatory to any non-landscaping construction work. He also acknowledges that the wage rates for Power Equipment Operator, WAC 296-127-01354 are not correct for this project.

Applicable scopes

To define the work that may be performed under the prevailing wage rates that the department publishes, the department relies on scope of work descriptions that have been published under WAC 296-127-013. For this work it appears to be clear that the scope of work for Landscape Construction, WAC 296-127-01346, applies. The Landscape Construction scope of work description refers specifically to: “...the beautification of a plot of land by changing its natural features through the addition or modification of lawns, trees, bushes, etc.” It goes on to list specific tasks for which those (Landscape Construction) wage rates may be paid, along with certain work that is expressly excluded. One bullet point that is listed as expressly excluded is “[T]he use of power equipment with more than ninety horsepower.”

In King County, where the work was performed, the department has published wage rates for three, and only three, job classifications under the Landscape Construction scope of work. These are Irrigation or Lawn Sprinkler Installers, Landscape Equipment Operators Or Truck Drivers, and Landscaping or Planting Laborers. The question you raise in your letter is which of these job classifications applies to the work using the above described equipment.

Analysis

Based on the above work description and the applicable scope of work, it is my assessment that the applicable rate under WAC 296-127-01346, Landscape Construction, is the rate for Landscape Equipment Operators Or Truck Drivers. I base this assessment primarily on the language of the scope of work description, the plain meaning of the job classification titles, and common industry knowledge.

As noted above, there appears to be no question that the scope of work for Landscape Construction applies. The work fits the general description in the scope of work of “beautification of a plot of land by changing its natural features through addition or modification of lawns, trees, bushes, etc.” A limitation on the scope of work notes that power equipment over 90 horsepower may not be classified under Landscape Construction. On this basis, the department has recognized that operating power equipment under 90 horsepower may be included under the scope where such work fits the scope’s other limitations. Falling between 38 and 80 horsepower, the equipment at issue here is clearly within the horsepower limit set out in the scope of work.

Having established that the operation of power equipment under 90 horsepower may be performed under the scope of work, the question arises of which of the three available job classifications applies. For operating each of the four pieces of equipment at issue here, the job classification for Landscape Equipment Operators Or Truck Drivers is applicable. The equipment at issue, which is all self-propelled, operated by seat within a covered compartment, multiple tons in weight, and at minimum 38 horsepower, is clearly power equipment. Moreover, by setting a line in WAC 296-127-01346 specifically at power equipment which is not more than 90 horsepower, the scope of work provides guidance to the type of equipment that may be used under a job classification that covers Landscape Equipment Operators Or Truck Drivers. The job classification title referring to Landscape Equipment Operators and Truck Drivers provides guidance as to the type of work that is included under the classification – generally, work to drive trucks with one rear axle and work to operate self-propelled construction machinery within the constraints of the Landscape Construction scope of work.

Finally, it is my understanding of the construction industry that construction “equipment” is commonly distinguished from construction “tools” by size. Hand-held tools are commonly referred to as “tools.” Equipment that is operated via levers and/or a steering wheel, by an operator who is seated, is commonly regarded as work requiring an equipment operator.

In your letter, you contend that the classification for Irrigation or Lawn Sprinkler Installers is the applicable job classification because the purpose of the work with the above equipment was ultimately to install irrigation systems. However, a more specific and direct description of the work is that it involves operating power equipment. In assessing which job classification applies to specific work it is our general practice to apply the job classification that covers the work most specifically and directly.

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Your letter also asks about certain additional tools and equipment including “a ½ horsepower roto-tiller, a 5 horsepower fence post auger, a 25 horsepower Dingo, a 40 horsepower Bobcat, or a 48 horsepower back hoe.” Based on the above analysis, it is possible to provide some guidance on the hypotheticals you have listed. For a handheld roto-tiller or fencepost auger, the rate for Landscape Equipment Operators Or Truck Drivers would not be applicable; in such case the rate would be that for Irrigation or Lawn Sprinkler Installers or Landscaping or Planting Laborers, depending on the specific task being performed. Use of a walk-behind Dingo likewise need not be paid at the rate for Landscape Equipment Operators Or Truck Drivers. Operation of a 40 horsepower Bobcat or a 48 horsepower backhoe would require the rate for Landscape Equipment Operators or Truck Drivers.

Thank you for this opportunity to provide information about the proper job classification of workers on public Landscape Construction projects. I hope this letter of determination under RCW 39.12.015 serves to resolve your questions on the Briarwood project and also your future public landscaping projects. In the event that another dispute arises regarding proper classification of workers on public works projects, please do not hesitate to contact my staff by calling.

Sincerely,

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

Enclosures

cc: Chris Clarke, Total Grounds Management
Shawn Dove, Industrial Relations Agent

SEBRIS BUSTO JAMES
a professional service corporation

Matthew W. Lynch
mlynch@sebrusbusto.com

(425) 450-3387

February 10, 2014

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Sent via Electronic and U.S. Mail

Mr. Jim P. Christensen
Prevailing Wage Program Manager/Industrial Statistician
Washington Department of Labor and Industries
P.O. Box 44540
Olympia, Washington 98504-4540
jim.christensen@lni.wa.gov

Re: Request for Determination—Total Grounds Management, Inc.

Dear Mr. Christensen:

The purpose of this letter is to request a determination under RCW 39.12.015 regarding the proper scope of work and prevailing wage rate for Total Grounds Management (TGM) employees who operate equipment of less than 90 horsepower on a landscape construction project at Briarwood Elementary School in Issaquah, Washington.

We are requesting a determination because there is a fundamental ambiguity in WAC 296-127-01346 dealing with the Landscape Construction scope of work. Permit me to summarize our concerns, which we explain in more detail below. Though the WAC states that powered equipment that exceeds 90 horsepower is not included within the Landscape Construction scope of work, the WAC does not specify what size or type of powered equipment is included within this provision. We are left with uncertainty regarding, for example, whether, a ½ horsepower roto-tiller, a 5 horsepower fence post auger, a 25 horsepower Dingo, a 40 horsepower Bobcat, or a 48 horsepower back hoe, are considered “landscape construction” equipment, and at what rate. The WAC code for Operating Engineers, WAC 296-127-01354, lists what equipment is applicable to that scope of work. There is no black-and-white description for what constitutes a “Landscape Equipment Operator.” This is wrong and turns WAC 296-127-01346—Landscape Construction on its head.

TGM employees on the Briarwood project install irrigation and sprinkler lines, move and lay down bark, soil and sod, and plant trees and shrubs. These employees use hedge trimmers, a small loader and a mini-excavator, each using no more than 90 horsepower, to perform these

tasks. The mini-excavator is used to trench irrigation lines. The loader is used to move soil or bark mulch. The purpose of this work is to beautify the plot of land at Briarwood.

TGM maintains that WAC 296-127-01346—Landscape Construction, describes the scope of work for this project. WAC 296-127-01346(2) includes the operation of equipment of less than 90 horsepower within the landscape construction scope of work. TGM's landscape construction is not preparatory to any non-landscape construction work. In other words, the work is intended to beautify the land, *i.e.*, it is directly related to the construction and maintenance of lawns, yards, gardens or other landscape surfaces. *See DeAngelo Brothers Incorporated*, April 30, 2004. It is not intended to prepare the ground for construction.

Because employees use this equipment to install irrigation lines and to move bark and mulch, it is the nature of that work that requires the Irrigation or Lawn Sprinkler Installer job classification and prevailing wage. This is consistent with the express scope of WAC 296-127-01346, prior determination letters, and court cases. Under WAC 296-127-01346, "landscape construction involves the beautification of a plot of land by changing its natural features through the addition or modification of lawns, trees, bushes, etc." Furthermore, in *Northwest Fair Contractors Association*, April 7, 2005, the Department reiterated the established criteria for making this determination:

The purpose of the activity establishes the appropriate scope of work to be used. For instance, if the primary purpose of the activity is for the beautification of a plot of land (*e.g.*, planting grass or shrubbery) then the Landscape Construction classification would apply. If, however, the primary purpose of the activity is not beautification of a plot of land (*e.g.*, the construction of a parking lot utilizing grass pavers), then the appropriate classification would generally be Laborer or Operating Engineer depending on the actual equipment used and work being performed.

Because the work is intended to beautify the land, *i.e.*, it is directly related to the construction and maintenance of lawns, yards, gardens or other landscape surfaces, and is not intended to prepare the ground for construction, the scope of work falls under WAC 296-127-10346 and no other. *DeAngelo Brothers Incorporated, supra.*

Mr. Shawn Dove, Industrial Relations Agent 2, has audited this work and informed TGM that the proper job classification for work using small self-propelled equipment is Landscape Equipment Operator. He acknowledges that Landscape Construction is the proper scope of work, but he relies on WAC 296-127-01354—Operating Engineers (Equipment Operator), to support his position that Landscape Equipment Operator is the appropriate classification. That regulation, however, is limited to the use of equipment on "construction projects" defined as "Heavy and highway" or "Building." TGM's work on Briarwood, on the other hand, "involves the beautification of a plot of land by changing its natural features through the addition or modification of lawns, trees, bushes, etc." and is not preparatory to Building or Highway/Heavy construction. TGM believes it is inappropriate and arbitrary for Mr. Dove to rely on an Operating Engineers scope of work to set a prevailing wage for work performed under the Landscape Construction scope of work. In fact, there is no description of Landscape Equipment

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Operator found anywhere in the regulations. Because the TGM work at Briarwood is directly involved with the installation of sprinkler or irrigation systems, the Landscape Construction Irrigation or Lawn Sprinkler Installer classification and rate are the correct rates to apply for TGM's work that uses this equipment.

We are enclosing several communications between the parties related to this issue to assist you in your determination. Please feel free to contact me if you need additional information. Thank you for your consideration.

Sincerely,

SEBRIS BUSTO JAMES



Matthew W. Lynch

MWL/alj

cc: Chris Clarke, TGM (e-mail)
Shawn K. Dove, L&I (e-mail)
Laura Herman, L&I (e-mail)