



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

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

April 16, 2013

Martha Lantz, Deputy City Attorney
City of Tacoma
747 Market Street, Room 1120
Tacoma, WA 98402

Re: Tacoma Fire Department Fast Attack Fireboat – New Construction

Dear Ms. Lantz:

Thank you for your April 11, 2013 email to Suchi Sharma regarding the question of whether prevailing wages must be paid for work to construct a new, custom-built “fast attack fireboat” for the City of Tacoma Fire Department. You ask whether the Department of Labor & Industries (L&I) considers this work to be a “public work” and note the “public work” status could affect how you put together bid requirements. Ms. Sharma asked me to promptly provide a determination addressing your questions, which you indicated were a matter of some urgency.

The work to construct the custom-built fifty-foot “fast attack” fireboat will have a requirement to pay at least the prevailing rate of wage under chapter [39.12 RCW](#).

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 attached document, “*Prevailing Wage Determination Request and Review Process*.”

We have encountered some situations that are “public work” for purposes of chapter [39.12 RCW](#) and may very well not be “public work” for purposes of the public agency’s procurement process. Of course, we can address the prevailing wage part of such situations, but defer to others’ expertise on the proper method of procurement. The bid law specialists at the State Auditor’s Office (SAO) have such expertise.

The work you describe to custom build, to City of Tacoma specifications, a new fifty-foot marine vessel that will serve as a "fast attack fireboat" will be executed at a cost to the City of Tacoma. Those facts meet the prevailing wage law definition of "public work" in WAC [296-127-010](#) (7)(a)(i). We know that for many years prevailing wages have been required for construction of vessels for the Washington State Ferry system. If this were a standard item for sale on the general market rather than being custom built to your specifications, such facts could affect my answer.

The Washington Supreme Court considered the off-site fabrication of non-standard items for a public work and, applied a state prevailing wage requirement to off-site fabrication or manufacture of non-standard items made specifically for a public work. In doing so, the court observed that the state law was broader than the federal Davis-Bacon Act, See *Everett Concrete Products, Inc.*, 109 Wn.2d. 819, 826 (1988). The same case tells us the prevailing wage law is a remedial act to be liberally interpreted for its purpose of protecting worker wages. *Everett* at 823.

There is federal funding for this fireboat. You noted that the federal Davis-Bacon Act did not apply to building an item that is personal (not real) property. This factor also illustrates one of several instances in which Washington's prevailing wage law is broader than federal law. Additionally, the source of funding would not be determinative for application of the state prevailing wage law, even if the entire project were funded with federal dollars. See *Drake v. Molvik and Olsen Electric*, 107 Wn.2d 26, 29 (1986).

Of some note is the language of RCW [39.12.030](#) which addresses public agency contracts for "construction, reconstruction, maintenance or repair." That statute provides that such contracts must include a provision stating the required prevailing rate of wage. Although the legislature could have drafted the statute to exclude construction of marine vessels or limited prevailing wages to only *building* construction, they did not. Your contract to build the fireboat is a contract for "construction, reconstruction, maintenance or repair" as those words are used in RCW [39.12.030](#) and meets the definition of "public work" in WAC [296-127-010](#) (7)(a)(i). RCW [39.12.020](#) requires payment of at least the prevailing rate of wage on such public works.

You mentioned in your communications on this issue that MRSC had suggested to you that this project may not require prevailing wage compliance. I understand from discussions with John Carpita of MRSC that the statement to you in that regard was based on his perception that the department might treat this situation similar to how it has dealt in the past with coverage questions regarding publicly owned motor vehicles. It is correct that historically, as a matter of practice, the department has not required prevailing wage compliance for modification or delivery of publicly owned motor vehicles such as fire engines and school buses. However, that is not the question before us. This determination is limited to the question of construction of the custom-built vessel you describe. It does not address modification or mere delivery of a publicly owned motor vehicle, nor does it address whether a custom-built fire truck or similar vehicle would require prevailing wage compliance.

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You also had a question about the correct trade and occupation classification(s) for this work to construct the fire boat. This work is of the type, nature, and character of work that would utilize the Shipbuilding and Ship Repair prevailing wage rates of pay for work performed within the State of Washington. You are correct that there is not an adopted rule for a scope of work description for Shipbuilding and Ship Repair. There are wages published in that category. If you think there are any activities that would properly be categorized at one of the construction trades prevailing rates instead of the Shipbuilding and Ship repair rates, please let me know. I would be happy to consider your thoughts and questions.

This determination is based upon the specific facts you've provided. If the facts vary or are different from as stated, the answer may also differ.

I hope this information is helpful. If you have additional questions, please let me know.

Sincerely,



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

Enclosure

cc: Suchi Sharma, L&I Counsel for Executive Policy

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.

From: [Lantz, Martha \(Legal\)](#)
To: [Sharma, Suchi \(LNI\)](#); [Selover, Ann \(LNI\)](#)
Cc: [Krienke, Richelle](#)
Subject: RE: Prevailing Wage Question
Date: Monday, April 15, 2013 5:19:08 PM

Thank you both for looking into this. Tacoma is planning to publish its RFP tomorrow as the time frame is becoming increasingly tight to avoid risking the federal funds. We are going to publish the RFP as an equipment purchase governed by a supply contract, but our standard terms and conditions for supply contracts do include a statement that prevailing wages are to be paid if supplier is notified by City that prevailing wages apply.

We heard back from MRSC their opinion that this is an equipment purchase and prevailing wages would not apply.

Ann, please let me or our senior buyer Richelle Krienke (cc'd here) know if you have questions or would like to see any of the solicitation materials.

Thank you again,

Martha P. Lantz
Deputy City Attorney, City of Tacoma
(253) 591-5633 (Tacoma Municipal Bldg)
(253) 396-3372 (Tacoma Public Utilities Wednesdays)
mlantz@ci.tacoma.wa.us

From: Sharma, Suchi (LNI) [<mailto:shav235@lni.wa.gov>]
Sent: Monday, April 15, 2013 3:50 PM
To: Selover, Ann (LNI)
Cc: Lantz, Martha (Legal)
Subject: FW: Prevailing Wage Question

Hello Ann:

As we discussed, please issue a determination that addresses the question(s) below. I appreciate you taking the extra time to make this a priority – I know how busy you are.

Martha: Ann is the Prevailing Wage Program Manager. She will issue a determination in the next few days.

Thank you!

Suchi Sharma
Counsel for Executive Policy
Department of Labor and Industries
(360) 902-6744

From: Lantz, Martha (Legal) [<mailto:mlantz@ci.tacoma.wa.us>]
Sent: Thursday, April 11, 2013 11:29 AM
To: Sharma, Suchi (LNI)
Subject: Prevailing Wage Question

Hi Suchi,

I have a work related question for you. We are doing an RFP for a "fast attack fireboat" which is to be custom produced to City of Tacoma's specifications (see attached vessel specifications). The City's RFP will more generally describe the project as follows:

The City of Tacoma Fire Department has issued this Request for Proposals (RFP) to obtain proposals from qualified and experienced boat builders with the expertise to construct one (1) NFPA Class III All Hazard Rapid Response Vessel (AHRRV) for the City of Tacoma Fire Department (TFD). This vessel is intended to provide increased emergency response capability and port protection, which includes but is not limited to chemical, biological, radiological, nuclear, and explosive (CBRNE) response activities, heavy firefighting suppression, emergency medical services, specialty team support, detection, prevention, electronics, navigation, communications, command platform and other heavy support equipment.

We have an opinion from Laura Herman at L&I that this project is "shipbuilding" and subject to 39.12. See attached text file. She references shipbuilding and ship repair rates. But I have not been able to locate a definition of shipbuilding (except in the WISHA regs) nor do I see a scope of work for shipbuilding or ship repair.

Ms. Herman's note is also not clear whether L&I believes the work is public work (RCW 39.040.010 : "work, construction, alteration, repair or improvement"), or the work is subject to prevailing wage for some other reason (e.g. a service contract or prevailing wage is required by some other authority). Assuming for the moment that prevailing wage is, indeed, required, it makes a difference as to how we put together the bid requirements as to whether this is public work or prevailing wage is required for some other reason.

The City posed a follow up question to Ms. Herman seeking her opinion as to whether this is public work or work subject to prevailing wage for some other reason. However, she advised that we check with the state auditor or MRSC to get an opinion on that question. We posed the question to MRSC, but haven't heard back from them.

As a point of reference federal Davis Bacon does not apply as the federal rules specifically state that this type of project is contract for the production of personal property (a vessel), which is outside the definition of construction, and not subject to the federal prevailing wage laws.

I am not certain it is subject to state prevailing wage, either. As the federal rules recognize, it is

really a contract to produce something that becomes the personal property of the City.

I would like to confirm that L&I is, indeed, of the opinion that production this type of vessel is public work subject to prevailing wage and all the attendant requirements of a public works contract, or if L&I is of the opinion it is subject to prevailing wage for some reason different than the fact that it is public work under RCW 34.04.010. If the project is outside the definition of public work but prevailing wage applies for some other reason, we need to know the reason so that we can put the appropriate solicitation documents together.

My intent in sending this to you is not to second guess or go over Ms. Herman's head, however, I do think the situation is perhaps different than she understood, and I also think that L&I (not the auditor or MRSC) is the correct entity to provide an opinion. And I will be candid, I am personally quite doubtful that this is public work per RCW 39.040.010, so if prevailing wage does apply it would have to be for some other reason, and I don't know what reason that would be.

Can you direct me to the right place to get our questions answered? There is some urgency as we have been working on this for several months and the federal funding is incumbent upon us getting the solicitation/RFP issued very soon.

Thank you for your professional assistance, feel free to call me if you have questions. I hope your new assignment is going well.

Martha P. Lantz

Deputy City Attorney City of Tacoma

(253) 591-5633 (Tacoma Municipal Building, Monday, Tue, Thur and Fri)

(253) 396-3372 (Tacoma Public Utilities Building, Wednesday)