

Kelley, Lisa (LNI)

From: Kelley, Lisa (LNI)
Sent: Tuesday, April 12, 2016 1:31 PM
To: 'Lindsay Taft'
Subject: RE: Determination Request for Pacific Pile & Marine

Hello Lindsay-thank you for following up. Unless we hear from you otherwise, this correspondence will serve as a withdrawal of your request, and we will close our file.

Best regards,

Lisa D Kelley
Labor Standards Policy Advisor
Employment Standards & Fraud Prevention
Washington State Department of Labor & Industries
(360) 902-5334
Kelp235@lni.wa.gov

From: Lindsay Taft [<mailto:ltaft@ac-lawyers.com>]
Sent: Tuesday, April 12, 2016 1:22 PM
To: Kelley, Lisa (LNI); Bosshard, Leeann J (LNI)
Subject: RE: Determination Request for Pacific Pile & Marine

Ms. Kelley,

Thank you for the email. Since the last correspondence with Lni, PPM received a follow up determination from WSDOT that resolved the issue. Accordingly, PPM would like to withdraw the request for a Lni determination. Please let me know if you need anything else to complete this withdrawal.

Thank you in advance,

Lindsay K. Taft | AHLERS & CRESSMAN PLLC
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From: Kelley, Lisa (LNI) [<mailto:kelp235@LNI.WA.GOV>]
Sent: Friday, April 08, 2016 11:10 AM
To: Lindsay Taft; Bosshard, Leeann J (LNI)
Subject: Determination Request for Pacific Pile & Marine

Good morning Lindsay- I have been asked to take a look at your determination request and have read through your initial letter. I would appreciate a bit more background information. In your letter dated October 5, 2015 you refer to WSDOT's determination, to PPM's trucking subcontractor, and the hiring of the "trucking contractor". I assume from the further context of the letter that there is only one trucking subcontractor, Washington State Trucking, but want to make certain.

In order to further review your determination request, can you please provide the following:

- A copy of WSDOT's determination referred to in the letter;
- Any written agreement outlining the scope of work done by the trucking company for PPM;
- Clarification about what company or companies are doing the trucking;
- Clarify the term "designated transfer facility"-do you mean a facility regulated under WAC 173-303?
- Clarify what materials were hauled by the trucking company for PPM.

I appreciate your attention to this request. Thanks in advance-

Lisa D Kelley
Labor Standards Policy Advisor
Employment Standards & Fraud Prevention
Washington State Department of Labor & Industries
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RECEIVED

OCT 09 2015

Prevailing Wage Section

15-118-D

Lindsay K. Taft
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October 5, 2015

VIA EMAIL & CERTIFIED MAIL

Jim Christensen
Industrial Statistician/Program Manager
Department of Labor & Industries
Prevailing Wage
PO Box 44540
Olympia, WA 98504
Jim.Christensen@Lni.wa.gov

Re: **Project Name: Washington State Ferries Mukilteo Ferry Terminal (Phase 1)
Tank Farm Pier Demolition and Dredging – Contract #00-8691
Prime Contractor: Pacific Pile & Marine, LP
Pacific Pile & Marine, LP's Request for Determination**

Dear Mr. Christiansen:

In accordance with RCW 39.12.015, this letter constitutes Pacific Pile & Marine, LP's ("PPM") request for determination with respect to certain prevailing wages requirements.

1. Background

PPM is the general contractor on the Washington State Ferries Mukilteo Ferry Terminal (Phase 1) Tank Farm Pier Demolition and Dredging project (the "Project"). PPM's work involves demolition of the tank farm pier, dredging, traffic control, and other work in preparation for construction of the new ferry terminal in Mukilteo.

With respect to PPM's work on the Project, PPM is utilizing a trucking subcontractor to haul excess materials from PPM's yard (not the Project site) to various recycling plants or disposal sites. Notably, the trucking subcontractor is not working "upon" the public works site and is **not** hauling materials *from* the public works site. Further, this trucking contractor is also hauling other materials from other projects. Accordingly, it is PPM's position that, pursuant to RCW 39.12 and the related WAC regulations, prevailing wage payment is not required. In response, WSDOT stated, without providing specific support, that pursuant to a purported "but for" argument (*but for* the public works project the firm would not have been hired), that PPM must submit a Request to Sublet form and pay the trucking contractor prevailing wages. WSDOT's argument, however, is contrary to the prevailing wage regulations and not supported by relevant caselaw. Thus, PPM disputes WSDOT's reasoning and is requesting a determination from Lni.

2. Prevailing Wage Requirement

The Washington Prevailing Wage Act provides in part: “The hourly wages to be paid to laborers, workers, or mechanics, upon all public works ... shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality within the state where such labor is performed.” RCW 39.12.020. Although caselaw has found that some workers performing work away/off the public works site may still be entitled to payment of prevailing wage, this delineation is based upon the WAC regulations that govern the scope of prevailing wage activities (WAC Chapter 296). For trucking contractors hauling various materials, WAC 296-127-018 dictates the conditions that must be met before prevailing wages must be paid. For example, in *Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.*, 112 Wash. App. 291, 304, 49 P.3d 135, 142 (2002), the Court held that the trucking contractor was performing the scope of work included in WAC 296-127-018, and, in turn the payment of prevailing wage was triggered. In contrast, in *Silverstreak, Inc. v. Washington State Dep't of Labor & Indus.*, 159 Wash. 2d 868, 881, 154 P.3d 891, 899 (2007), the Court held that the trucking subcontractors did not fall within the scope of work included in WAC 296-127-018 and, therefore, were not entitled to the payment of prevailing wage.

After *Silverstreak*, WAC 296-127-018 was amended so that it now provides as follows:

(2) All workers, regardless of by whom employed, are subject to the provisions of chapter 39.12 RCW when they perform any or all of the following functions:

(a) They **deliver or discharge any of the above-listed materials to a public works project site:**

(i) At one or more point(s) directly upon the location where the material will be incorporated into the project; or

(ii) At multiple points at the project; or

(iii) Adjacent to the location and coordinated with the incorporation of those materials.

(b) They wait at or near a public works project site to perform any tasks subject to this section of the rule.

(c) They **remove any materials from a public works construction site** pursuant to contract requirements or specifications (e.g., excavated materials, materials from demolished structures, clean-up materials, etc.).

(d) They work in a materials production facility (e.g., batch plant, borrow pit, rock quarry, etc.) which is established for a public works project for the specific, but not necessarily exclusive, purpose of supplying materials for the project.

(e) They deliver concrete to a public works site regardless of the method of incorporation.

(f) They assist or participate in the incorporation of any materials into the public works project.

(emphasis added). It is a well-established rule in Washington that “each word of a statute is to be accorded meaning.” *State ex rel. Schillberg v. Barnett*, 79 Wn.2d 578, 584, 488 P.2d 255

(1971). Further, “absent ambiguity or a statutory definition, [courts] give the words in a statute their common and ordinary meaning.” *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). “Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency.” *Agrilink Foods, Inc. v. Dep’t of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005) (emphasis added).

Here, the only two potentially applicable provisions are provisions (a) or (c) for the work at issue, the trucking subcontractor, is **neither** delivering materials to a public works site **nor** removing demolition debris “*from* a public works construction site.” Rather, the trucking subcontractor is merely hauling materials from PPM’s yard to various disposal sites. Notably, as PPM’s yard is a designated transfer facility, this trucking contractor has also been engaged to haul other materials unrelated to the project at issue (private project work, concrete barged from Alaska, etc.). Accordingly, contrary to the position of WSDOT and rather more similar to the situation in *Silverstreak*, the trucking contractor’s work does not fall within the scope of the plain, unambiguous language of WAC 296-127-018. Further, contrary to WSDOT’s “but for” argument, as PPM’s yard is a designated transfer facility and this contractor (and others) have been hired to haul other materials unrelated to the Project, the Project was not the sole reason the contractor was hired. Thus, RCW 39.12, and the payment of prevailing wages, is not triggered. PPM requests confirmation from LnI as to this determination.

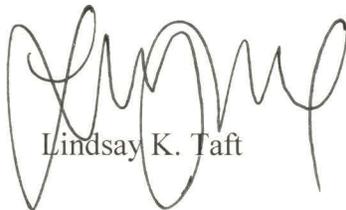
3. Conclusion

In sum, WAC 296-127-018 provides the conditions that must be met to trigger prevailing wage for the hauling of materials and other items. These conditions explicitly provide that prevailing wage payment is only triggered if the trucking contractor “deliver[s] or discharge[s] any of the above-listed materials **to a public works project site**,” which the trucking contractor is not doing, or “remove any materials **from a public works construction site**,” which, again, the trucking contractor is not doing. Instead, the trucking contractor is hauling excess material located at PPM’s yard. Thus, there is no basis to assert the payment of prevailing wages.

Thank you for your consideration of the matter. We look forward to its resolution.

Very truly yours,

AHLERS & CRESSMAN PLLC



Lindsay K. Taft

LKT: rmg
cc: Pacific Pile & Marine, LP