



STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES

Prevailing Wage  
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January 30, 2017

Miriam Israel Moses  
REBOUND  
2800 First Avenue  
Suite 216  
Seattle, WA 98121

**RE: Request for Determination - Applicability of Prevailing Wage Requirements to Work Performed on the Metropolitan Tract Properties Managed Under the October 30, 2014 Management Agreement**

Dear Ms. Moses:

Thank you for your March 21, 2016 request for a determination by the Industrial Statistician about whether chapters 39.04 and 39.12 RCW apply to work performed on Seattle's Metropolitan Tract ("Tract"), which is owned and managed by the University of Washington. The discussion that follows provides general observations about the Tract, the October 30, 2014 Management Agreement under which many Tract properties are managed, and the prevailing wages laws. After receiving your request, I asked the University of Washington to provide relevant management agreements and respond to your request and I also asked for additional input from Rebound based on the University's response. I have considered the University's July 1, 2016 response and Rebound's July 25, 2015 reply in my analysis below.

As you know, determinations of the prevailing rate of wage issued under authority in RCW 39.12.015 are fact-specific. Your letter does not point to a project with a specific fact set. Without a specific fact set presented, a more thorough and specific determination of coverage under RCW 39.12 cannot be provided. This letter considers only those parts of the Tract that are managed under the October 30, 2014 Management Agreement. Because the Department does not enforce other public works statutes that may be implicated by RCW 39.04, I also confine my letter to the question of whether prevailing wage laws apply to the Tract rather than whether other public works statutes are implicated.

### The Metropolitan Tract

The Tract is comprised of 11 contiguous acres (six blocks) of real property in downtown Seattle bounded by Seneca and Union streets between Third and Sixth avenues. Arthur Denny and two other families donated most of the land to the University in 1861. Notable buildings within the Tract include Rainier Tower and Rainier Square, the Olympic Fairmont Hotel, the Cobb Building, the Skinner Building, and the IBM Building, among others.

The University of Washington owns the Tract. The University has broad authority to enter into agreements to lease the land up to 80 years. RCW 28B.20.382(2). Net proceeds from the lease of the Tract are deposited into the University of Washington facilities bond retirement account, a “nonappropriated local fund to be used exclusively for the purpose of erecting, altering, maintaining, equipping, or furnishing buildings at the University of Washington.” RCW 28B.20.382(3). Funds that exceed that which is necessary for the bond retirement account can be used for other University projects. *Id.*; see also RCW 43.79.080 (“There shall be in the state treasury a fund known and designated as the “University of Washington building account.”). While the Tract has a variety of commercial uses involving numerous businesses and other tenants and operating costs of the University are not paid from Tract income, significant contributions from the Tract have been paid into both the bond retirement account and the University of Washington building account and then appropriated by the Legislature for improvements on core University facilities. Accordingly, the Tract is ultimately managed for a public and educational purpose.

Recently, a ground lease executed in 1953 came to a close. In that lease document and addenda, Unico (formerly University Properties, Inc.) leased most of the Tract which the University regarded as a private venture. The lease explained the University’s vision that Tract properties would be maintained as a center of store and office buildings of the first class in the City of Seattle. The lease also explained that Unico would improve and modernize existing Tract properties and would also accomplish capital improvements including the construction of new buildings (the iconic Rainier Tower was among these capital projects). The lease contained mechanisms, including and especially the “New Building Fund,” which would help to ensure that Unico would accomplish these goals. The lease ended in October 2014. Today, Tract properties are managed under a new Management Agreement between the University and Unico.

Under the new Management Agreement, the relationship between Unico and the University has changed. Unico is not a lessee of any Tract properties. Rather, Unico’s role is that of “property manager” of most Tract properties (The Olympic Fairmont Hotel for example is managed separately under another lease). The University’s role is no longer that of lessor. The University appears to manage Tract properties more directly now, with Unico’s administrative help and expertise.

In Article 6, Section 6.04, The Management Agreement specifies that:

All obligations or expenses incurred by Manager (Unico) hereunder in operating and managing the Managed Property, as specifically permitted hereunder, shall be at the expense of the University, except as otherwise provided in this Agreement....

That same section goes on to say that: "...All funds in all Trust Accounts shall at all times be the property of the University..." The Agreement creates such trust accounts as the Operating Account and the Reserve Account. The Operating Account appears to be the main account, while the Reserve Account appears to be for specific purposes including Capital Expenditures. These trust accounts, according to the Agreement, appear to be the property of the University. Expenses paid from these accounts appear to be at the expense of the University and, it seems, Tract improvements are now being accomplished at the cost of the University.

#### The Prevailing Wage Laws That Apply to the University of Washington

The Washington Prevailing Wages on Public Works Act is designed to avoid payment of substandard wages to workers and to prevent depression of local wage rates. *Everett Concrete Prod., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988). RCW 39.12.020 requires prevailing wages on "all public works and under all public building service maintenance contracts of the state or any county, municipality or political subdivision[.]" RCW 39.12 does not define "public work." RCW 39.04.010 defines "public work," specifying the following dual criteria: 1) the labor must fall within the activities of "all work, construction, alteration, repair, or improvement other than ordinary maintenance;" and, 2) the work must be executed "at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein." See also WAC 296-127-010(7)(a). Prevailing wages are therefore required for alterations or improvements done at the cost of the public, even when those projects are administered by a private party. *Supporters of the Center, Inc. v. Moore*, 119 Wn. App. 352, 357, 80 P.3d 618 (2003). A statute applies RCW 39.12 requirements to projects of Evergreen State College and "any regional or state university" when there is "the cost" to the state college for "building construction, renovation, remodeling, or demolition." See RCW 28B.10.350(1), (2).

#### How Prevailing Wage Laws Applies to the Metropolitan Tract

Three significant Washington cases provide guidance based on the cost language in RCW 39.04.010 and lead me to the conclusion that prevailing wage laws apply to work performed on properties managed under the new Management Agreement at a "cost to" the University when the funds come from the University accounts described in the Agreement. It also informs my analysis that chapter 39.12 RCW is remedial legislation, which must be liberally construed to effect its purpose - to protect local craftsmen from substandard wages and to preserve local wage standards. *Everett Concrete*, 109 Wn.2d at 823. Exceptions to remedial statutes protecting employee rights must also be narrowly confined. See *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 684-85, 267 P.3d 383 (2011) (citing *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees*, 130 Wn.2d 401, 407, 924 P.2d 13 (1996)).

First, in *Drake v. Molvik & Olsen Electric, Inc.*, the Supreme Court held that the "cost of the state or any municipality" language of RCW 39.04.010 was satisfied even when a project was funded entirely by the federal government. 107 Wn.2d 26, 29, 726 P.2d 1238 (1986). It states a public work exists if the project is at the cost of the *state* or any *municipality*. Yet, the *Drake* Court held: "[t]he source of funding does not determine the applicability of the prevailing wage statute." *Id.* Although the court does not state so explicitly, given the facts of *Drake*, it can be inferred that once funds are received by a state entity, the funds lose their "federal" character and become state public funds. See *id.* at 27-28.

*Drake* supports the similar inference that once the University receives the rents from tenants under the Agreement, the rents are public funds because they lose their “private” character and they belong to the University.

Second, in *City of Spokane v. Dep’t of Labor & Indus.*, 100 Wn. App. 805, 812, 998 P.2d 913 (2000) (“*Wheelevator*”), the court determined that persons performing repair and other work during an annual maintenance shutdown of a solid waste processing plant must be paid at prevailing wages. Although the facility was operated by a private company under contract, it was owned by the City, paid for with public funds, and operated to benefit the public. Two components of the *Wheelevator* decision in particular inform the analysis here. The *Wheelevator* court took an inclusive view of public funds. Rather than funds collected from taxes and appropriated by the City, the funds that the Court considered public funds for the purposes of its analysis were customers’ fees. *Id.* at 808. This analysis shows that funds need not be appropriated directly from tax revenue to be public in nature. Applying *Wheelevator* to the properties managed under the new Management Agreement, when the University receives the lease payments, the nature of the funds change from private to public. In its July 1, 2016 letter, the University asserts that the Tract is “entirely self-funded” and is not a cost to the state because “all of the funds used to pay for tenant improvements . . . come from revenue generated by the lease payments made by Tract tenants.” July 1, 2016 Letter at 2. But this fact does not change the character of the funds. Ultimately under the agreement the funds belong to the University and the fact that they are used to fund improvements means that it is “a cost” to the University of Washington. RCW 39.04.010; RCW 28B.10.350.

The *Wheelevator* court also held this repair work was “executed at the cost of” the City even though the private company had control over the performance of maintenance. 100 Wn. App. at 812. It also confirmed that the definition of “public work” does not require the government entity’s direct involvement in the work performed, it requires only that the work be “executed at the cost of” the governmental entity. *See id.* at 814-15. The fact that *Wheelevator* had “exclusive authority to select and control the employees or contractors to perform the work” and pay them “without the City’s involvement” also did not persuade the court that the project was private work. *Id.* at 808-09. Even if the University is not involved in the bidding process or directing the work, under *Wheelevator*, the control of the work itself does not preclude a finding that prevailing wages apply.

Finally, In *Supporters of the Center*, the court determined that a non-profit corporation’s construction of a performing arts center required payment of prevailing wages. In reaching its determination, the court looked to the government entity’s contribution of the construction funds, the site of land as owned by and leased from a municipality, the eventual transfer of ownership in 30 to 50 years to the municipality, and the operation of and access to the facility requiring use of a municipal lobby, restrooms, elevators, parking lot, and plaza. 119 Wn. App. at 359-60 (“we look to the source of the funding and the character of the project in deciding whether it is executed at the cost if the State.”). The court also recognized that the public entity’s involvement also showed the public character of the project: “In addition to the substantial taxpayer money used to fund the project, SOC and CTED entered into a Capital Contract specifying that as part of the project SOC must build a performing arts center. This contract and the City’s detailed involvement in the construction (and running of) the Center reveal the public nature of the project.” *Id.* at 360. The fact the project was undertaken by a separate non-profit entity did not affect application of the Prevailing Wage Act.

Despite its reiteration of the “executed at the cost of the state” language, the court cited as a justification for application of prevailing wages the fact that the performing arts center would serve an important public purpose and benefit city residents. *Id.* Although this proposition is dicta, because the labor must still be executed at the “cost of the state” and the benefit to the public is not an element of proof in RCW 39.04.010 or in RCW 39.12.020, this analysis suggests that courts may take into consideration such factors as a “tie-breaker.” The University suggests that the Tract “is managed by the University in accordance with state law as a purely commercial, revenue generating asset.” July 1, 2016 Letter at 1. But the underlying purpose of the property—to earn income to support the public purpose of higher education by contributing to building funds for other University properties—remains a public purpose.

The final point raised by the University is that Legislature has provided broad authority within chapters 28B.10 and 28B.20 RCW for the UW Board of Regents to operate and manage Tract properties. I do not disagree. The University went on to say “that applying general statutory public works requirements to projects there would be inconsistent with the provisions of the more specific statutes.” July 1, 2016 Letter at 2. But none of the statutory provisions in chapters 28B.10 or 28B.20 RCW conflict with chapters 39.04 or 39.12 RCW.

#### Other Considerations

We have learned from the University that prevailing wages are required by contract on Tract improvements. We do not know how “prevailing wages” are defined in those contract documents, or what documents can be obtained and reviewed or audited to ensure proper payment. We do know that Statements of Intent to Pay Prevailing Wages and Affidavits of Wages Paid have not been filed on Tract projects. Those documents are required to be filed on projects falling under chapter 39.12 RCW, and certified payroll records may also be requested.

One final note on the scope of this letter: there are various types of improvement projects completed on the Tract property, and for a variety purposes. One could argue that all Tract improvements have a public purpose, since they are accomplished for purpose of maximizing University income and holdings. However, certain Tract improvements are accomplished for tenants’ purposes, and perhaps at tenants’ costs. If tenants’ payments for Tract alterations are not deposited into University accounts, I am unsure whether the courts would, or would not, find that those alterations are executed at the cost of the state. If tenants’ payments for Tract alterations are deposited into University accounts, then under *Drake*, those alterations would likely be considered by courts to be executed at the University’s cost.

#### Conclusion

I make the following observations:

- Chapter 39.12 RCW applies to projects that are a “cost to” the University under chapter 39.04 RCW and RCW 28B.10.350
- The Metropolitan Tract is owned by the University and is managed to accomplish public purposes;
- Tract improvements are funded through trust accounts created under the new Management Agreement;

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- Trust account funds are property of the University and are established for the sole benefit of the University;
- Prevailing wage is remedial and must be liberally construed and exceptions to it are narrowly construed; and,
- There is no specific exclusion from prevailing wage for Tract projects.

Given these findings, from my perspective it seems clear that chapter 39.12 RCW applies to improvements made to Metropolitan Tract properties whenever such work is executed at a cost to the University. What remains unclear to me is whether chapter 39.12 RCW applies to all Tract improvements. Whether or not a particular project is subject to chapter 39.12 RCW will likely depend on the specific facts of that project.

I appreciate this opportunity to provide information about how chapter 39.12 RCW applies to Tract improvement projects made under the current Management Agreement with Unico. Please do not hesitate to contact me with any questions or concerns about the foregoing, or for any other prevailing wage reason.

Please don't hesitate to contact me If you have any questions or need additional information.

Sincerely,



Jim P. Christensen  
Industrial Statistician/Program Manager  
Prevailing Wage

cc: Tom Schappacher

Attachments

**RCW 39.12.015**

**Industrial statistician to make determinations of prevailing rate.**

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

[ 1965 ex.s. c 133 § 2.]

**RCW 28B.20.382****University tract—Conditions for sale, lease, or lease renewal—Inspection of records—Deposit of proceeds—University of Washington facilities bond retirement account.**

(1) Until authorized by statute of the legislature, the board of regents of the university, with respect to the university tract, shall not sell the land or any part thereof or any improvement thereon, or lease the land or any part thereof or any improvement thereon or renew or extend any lease thereof for a term of more than eighty years. Any sale of the land or any part thereof or any improvement thereon, or any lease or renewal or extension of any lease of the land or any part thereof or any improvement thereon for a term of more than eighty years made or attempted to be made by the board of regents shall be null and void until the same has been approved or ratified and confirmed by legislative act.

(2) The board of regents shall have power from time to time to lease the land, or any part thereof or any improvement thereon for a term of not more than eighty years. Any and all records, books, accounts, and agreements of any lessee or sublessee under this section, pertaining to compliance with the terms and conditions of such lease or sublease, shall be open to inspection by the board of regents, the ways and means committee of the senate, the appropriations committee of the house of representatives, and the joint legislative audit and review committee or any successor committees. It is not intended that unrelated records, books, accounts, and agreements of lessees, sublessees, or related companies be open to such inspection. The board of regents shall make a full, detailed report of all leases and transactions pertaining to the land or any part thereof or any improvement thereon to the joint legislative audit and review committee, including one copy to the staff of the committee, during odd-numbered years.

(3) The net proceeds from the sale or lease of land in the university tract, or any part thereof or any improvement thereon, shall be deposited into the University of Washington facilities bond retirement account hereby established outside the state treasury as a nonappropriated local fund to be used exclusively for the purpose of erecting, altering, maintaining, equipping, or furnishing buildings at the University of Washington. The board of regents shall transfer from the University of Washington facilities bond retirement account to the University of Washington building account under RCW 43.79.080 any funds in excess of amounts reasonably necessary for payment of debt service in combination with other nonappropriated local funds related to capital projects for which debt service is required under section 4, chapter 380, Laws of 1999.

[ 1999 c 346 § 3; 1998 c 245 § 17; 1996 c 288 § 27; 1987 c 505 § 13; 1980 c 87 § 10; 1977 ex.s. c 365 § 1; 1974 ex.s. c 174 § 1.]

**NOTES:**

**Purpose—Construction—Effective date—1999 c 346:** See notes following RCW 28B.20.381.



**RCW 39.12.020**

**Prevailing rate to be paid on public works and under public building service maintenance contracts—Posting of statement of intent—Exception.**

The hourly wages to be paid to laborers, workers, or mechanics, upon all public works and under all public building service maintenance contracts of the state or any county, municipality or political subdivision created by its laws, 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. For a contract in excess of ten thousand dollars, a contractor required to pay the prevailing rate of wage shall post in a location readily visible to workers at the job site:

PROVIDED, That on road construction, sewer line, pipeline, transmission line, street, or alley improvement projects for which no field office is needed or established, a contractor may post the prevailing rate of wage statement at the contractor's local office, gravel crushing, concrete, or asphalt batch plant as long as the contractor provides a copy of the wage statement to any employee on request:

(1) A copy of a statement of intent to pay prevailing wages approved by the industrial statistician of the department of labor and industries under RCW 39.12.040; and

(2) The address and telephone number of the industrial statistician of the department of labor and industries where a complaint or inquiry concerning prevailing wages may be made.

This chapter shall not apply to workers or other persons regularly employed by the state, or any county, municipality, or political subdivision created by its laws.

[ 2007 c 169 § 1; 1989 c 12 § 7; 1982 c 130 § 1; 1981 c 46 § 1; 1967 ex.s. c 14 § 1; 1945 c 63 § 1; Rem. Supp. 1945 § 10322-20.]

**WAC 296-127-010****Definitions for chapter 296-127 WAC.**

- (1) "Department" means the department of labor and industries.
- (2) "Director" means the director of the department or his or her duly authorized deputy or representative.
- (3) "Industrial statistician" means the industrial statistician of the department's employment standards, apprenticeship, and crime victims (ESAC) division.
- (4) "Assistant director" means the assistant director of the employment standards, apprenticeship, and crime victims (ESAC) division or his or her duly authorized deputy or representative.
- (5) "Contractor" means:
  - (a) The prime contractor, and each and every subcontractor, required to be registered under chapter 18.27 RCW and/or licensed under chapter 19.28 RCW, that performs any work on a public works project site, and/or is required to pay industrial insurance premiums as a construction company.
  - (b) Employers engaged in shipbuilding and ship repair, building service maintenance, and any fabricator or manufacturer that produces nonstandard items specifically for a public works project.
  - (c) Employers that contract with contractors or subcontractors for the purpose of the production and/or delivery of materials pursuant to the terms of WAC 296-127-018.
- (6) The term municipality shall include every city, county, town, district, political subdivision, or other public agency thereof which is authorized by law to require the execution of public work, except drainage districts, diking districts, diking and drainage improvement districts, drainage improvement districts, diking improvement districts, consolidated diking and drainage improvement districts, consolidated drainage improvement districts, consolidated diking improvement districts, irrigation districts, or any such other districts as shall from time to time be authorized by law for the reclamation or development of waste or undeveloped lands.
- (7)(a) The term "public work" shall include:
  - (i) All work, construction, alteration, enlargement, improvement, repair, and/or demolition that is executed by contract, purchase order, or any other legal agreement and that is executed at the cost of the state of Washington or of any municipality. The source of the funding shall not determine the applicability of the statute, and may include, but is not limited to, such sources as those payments made through contracts with insurance companies on behalf of the insured state or municipality;
  - (ii) All work, construction, alteration, enlargement, improvement, repair, and/or demolition which, by law, constitutes a lien or charge on any property of the state or of a municipality;
  - (iii) All work, construction, alteration, repair, or improvement, other than ordinary maintenance that the state or a municipality causes to be performed by a private party through a contract to rent, lease, or purchase at least fifty percent of the project by one or more state agencies or municipalities, pursuant to RCW 39.04.260;
  - (iv) Maintenance, except ordinary maintenance as defined by (b)(iii) of this subsection, when performed by contract. Maintenance is defined as keeping existing facilities in good usable, operational condition;
  - (v) Janitorial and building service maintenance as defined by WAC 296-127-023, when performed by contract, on public buildings and/or assets; and

(vi) The fabrication and/or manufacture of nonstandard items produced by contract specifically for a public works project as defined by (a)(i) through (v) of this subsection.

(b) The term "public work" shall not include:

(i) Work, construction, alteration, enlargement, improvement, repair, demolition, and/or maintenance for which no wage or salary compensation is paid, consistent with the requirements of RCW 35.21.278;

(ii) The construction, alteration, repair, or improvement of any municipal street railway system;

(iii) Ordinary maintenance which is defined as work not performed by contract and that is performed on a regularly scheduled basis (e.g., daily, weekly, monthly, seasonally, semiannually, but not less frequently than once per year), to service, check, or replace items that are not broken; or work not performed by contract that is not regularly scheduled but is required to maintain the asset so that repair does not become necessary.

(8) "Contract" means a contract, purchase order, or any other legal agreement in writing for public work to be performed for a fixed or determinable amount, which is duly awarded after advertisement and competitive bid. A contract that is awarded from a small works roster, or under the emergency provisions of state law, need not be advertised.

(9) "Residential construction" means construction, alteration, repair, improvement, or maintenance of single family dwellings, duplexes, apartments, condominiums, and other residential structures not to exceed four stories in height, including basement, when used solely as permanent residences. It does not include the utilities construction (water and sewer lines), or work on streets, or work on other structures (e.g., for recreation and business.)

[Statutory Authority: RCW 39.12.070. WSR 94-01-100, § 296-127-010, filed 12/16/93, effective 1/16/94. Statutory Authority: Chapters 39.04 and 39.12 RCW and RCW 43.22.270. WSR 92-01-104, § 296-127-010, filed 12/18/91, effective 1/31/92; WSR 88-22-046 (Order 88-22), § 296-127-010, filed 10/31/88. Statutory Authority: RCW 39.12.050, 39.12.065, 43.22.270 and 51.04.020. WSR 86-03-063 (Order 85-28), § 296-127-010, filed 1/17/86. Statutory Authority: RCW 39.12.015, 39.12.060 and HB 795, 1982 1st ex.s. c 38. WSR 82-18-041 (Order 82-28), § 296-127-010, filed 8/27/82.]

**RCW 28B.10.350****Construction work, remodeling, or demolition—Public bid—Exemption—Waiver—Prevailing rate of wage—Universities and The Evergreen State College.**

(1) When the cost to The Evergreen State College or any regional or state university of any building, construction, renovation, remodeling, or demolition, other than maintenance or repairs, will equal or exceed the sum of ninety thousand dollars, or forty-five thousand dollars if the work involves one trade or craft area, complete plans and specifications for the work shall be prepared, the work shall be put out for public bid, and the contract shall be awarded to the responsible bidder who submits the lowest responsive bid.

(2) Any building, construction, renovation, remodeling, or demolition project that exceeds the dollar amounts in subsection (1) of this section is subject to the provisions of chapter 39.12 RCW.

(3) The Evergreen State College or any regional or state university may require a project to be put to public bid even when it is not required to do so under subsection (1) of this section. Any project publicly bid under this subsection is subject to the provisions of chapter 39.12 RCW.

(4) Where the estimated cost of any building, construction, renovation, remodeling, or demolition is less than ninety thousand dollars or the contract is awarded by the small works roster procedure authorized in RCW 39.04.155, the publication requirements of RCW 39.04.020 do not apply.

(5) In the event of any emergency when the public interest or property of The Evergreen State College or a regional or state university would suffer material injury or damage by delay, the president of such college or university may declare the existence of an emergency and, reciting the facts constituting the same, may waive the requirements of this section with reference to any contract in order to correct the condition causing the emergency. For the purposes of this section, "emergency" means a condition likely to result in immediate physical injury to persons or to property of the college or university in the absence of prompt remedial action or a condition which immediately impairs the institution's ability to perform its educational obligations.

(6) This section does not apply when a contract is awarded by the small works roster procedure authorized in RCW 39.04.155 or under any other procedure authorized for an institution of higher education.

[ 2009 c 229 § 2; 2007 c 495 § 1; 2001 c 38 § 1; 2000 c 138 § 202; 1993 c 379 § 109; 1985 c 152 § 1; 1979 ex.s. c 12 § 1; 1977 ex.s. c 169 § 14; 1971 ex.s. c 258 § 1.]

**NOTES:**

**Purpose—Part headings not law—2000 c 138:** See notes following RCW 39.04.155.

**Intent—Severability—Effective date—1993 c 379:** See notes following RCW 28B.10.029.

**Severability—1979 ex.s. c 12:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [ 1979 ex.s. c 12 § 3.]

**Severability—Nomenclature—Savings—1977 ex.s. c 169:** See notes following RCW 28B.10.016.

**Severability—1971 ex.s. c 258:** "If any provision of this 1971 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [ 1971 ex.s. c 258 § 3.]

*Subcontractors to be identified by bidder, when: RCW 39.30.060.*

**RCW 39.04.010****Definitions.**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Award" means the formal decision by the state or municipality notifying a responsible bidder with the lowest responsive bid of the state's or municipality's acceptance of the bid and intent to enter into a contract with the bidder.

(2) "Contract" means a contract in writing for the execution of public work for a fixed or determinable amount duly awarded after advertisement and competitive bid, or a contract awarded under the small works roster process in RCW 39.04.155.

(3) "Municipality" means every city, county, town, port district, district, or other public agency authorized by law to require the execution of public work, except drainage districts, diking districts, diking and drainage improvement districts, drainage improvement districts, diking improvement districts, consolidated diking and drainage improvement districts, consolidated drainage improvement districts, consolidated diking improvement districts, irrigation districts, or other districts authorized by law for the reclamation or development of waste or undeveloped lands.

(4) "Public work" means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein. All public works, including maintenance when performed by contract shall comply with chapter 39.12 RCW. "Public work" does not include work, construction, alteration, repair, or improvement performed under contracts entered into under RCW 36.102.060(4) or under development agreements entered into under RCW 36.102.060(7) or leases entered into under RCW 36.102.060(8).

(5) "Responsible bidder" means a contractor who meets the criteria in RCW 39.04.350.

(6) "State" means the state of Washington and all departments, supervisors, commissioners, and agencies of the state.

[ 2008 c 130 § 16; 2007 c 133 § 1; 2000 c 138 § 102; 1997 c 220 § 402 (Referendum Bill No. 48, approved June 17, 1997); 1993 c 174 § 1; 1989 c 363 § 5; 1986 c 282 § 1; 1982 c 98 § 1; 1977 ex.s. c 177 § 1; 1923 c 183 § 1; RRS § 10322-1.]

**NOTES:**

**Purpose—Part headings not law—2000 c 138:** See notes following RCW 39.04.155.

**Referendum—Other legislation limited—Legislators' personal intent not indicated—Reimbursements for election—Voters' pamphlet, election requirements—1997 c 220:** See RCW 36.102.800 through 36.102.803.

*Municipalities—Energy audits and efficiency: RCW 43.19.691.*

## Prevailing Wage Determination Request and Review Process

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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:

Jim P. Christensen  
Industrial Statistician/Program Manger  
Department of Labor & Industries  
Prevailing Wage  
P O Box 44540  
Olympia, WA 98504-4540  
[Jim.Christensen@Lni.wa.gov](mailto:Jim.Christensen@Lni.wa.gov)

## Prevailing Wage Determination Request and Review Process

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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](mailto: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.



**Miriam Israel Moses**  
Executive Director

**Board Officers**  
Steve Hurley  
President

Todd Mitchell  
Vice President

Stanton Bonnell  
Secretary

Dale Cannon  
Treasurer

**Compliance  
Investigators**

David Ciprut - Lead  
(206) 441-0455

Mario Silva  
(509) 768-8088

# REBOUND

A BUILDING TRADES ORGANIZATION

ALWAYS STRONG, ALWAYS GROWING

March 21, 2016

Mr. Jim Christensen  
Industrial Statistician and Prevailing Wage Program Manager  
Department of Labor and Industries  
P. O. Box 44540  
Olympia, WA 98504-4540

Dear Mr. Christensen:

This letter constitutes a formal request for a determination of coverage under the WA State Public Works statute, 39.12 RCW under the definition of public work established in RCW 39.04.010(4), for all work performed on the Seattle's Metropolitan Tract. The Metropolitan Tract takes up approximately 11 acres of downtown Seattle. The real estate is wholly owned by the University of Washington.

The specific buildings to which this request applies are as follows:

1. Financial Center
2. IBM Building
3. Puget Sound Plaza
4. Skinner Building
5. Cobb Building
6. Rainier Tower
7. Olympic Garage
8. Garage next to Puget Sound Plaza and Cobb Building

These buildings are managed under a lease agreement between Unico and the University of WA [UW.] There will be no request for a determination of coverage of the Olympic Fairmont Hotel at this time, and a separate request for coverage of the upcoming Rainier Square project will follow under separate cover.

**Governing Statute:**

RCW 39.04.010(4) defines "Public work" as follows:

"Public work" means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein.

The statute further mandates that:

All public works, including maintenance when performed by contract shall comply with chapter 39.12 RCW.

We believe that "all work" at the above listed locations, fully meets both criteria established for coverage.

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2800 First Avenue, Suite 216; Seattle, WA 98121  
E-mail: REBOUND@REBOUND.ORG

WEB SITE  
<http://www.rebound.org>

Tel: 1-800 244-9178 or (206) 441-0455  
Fax: (206) 443-6914 or 1-866-754-4500

**Authority of the Industrial Statistician to make determinations of coverage under 39.04 RCW.**

The Industrial Statistician, on behalf of the Director of the Department of Labor and Industries, has full authority for making determinations of coverage under public works law. Such determinations can only be made by applying the criteria set forth in RCW 39.04.

In *Everett Concrete Products, Inc. v. Dept. of Labor & Industries*, 109 Wn.2d 819, 748 P.2d 1112 (1988), the WA State Supreme Court recapped the course of events leading to the department's determination of coverage under 39.12 RCW for the offsite custom fabrication of non-standard items by Everett Concrete Products [ECP] by describing the course of events that led up to the resulting conclusion as follows:

In May 1984, general counsel for the Washington and Northern Idaho Council of the Laborers' International Union of North America wrote to the Department of Labor and Industries and asked whether the prevailing wage law applied to ECP's manufacture of tunnel liners for the Mt. Baker project. In response to this inquiry, Labor and Industries sent an industrial statistician to inspect ECP's facility in Everett and the tunnel site in Seattle. After conferring with his superiors, the statistician determined that the prevailing wage law did apply to ECP. [emphases added.]

Neither ECP nor the Supreme Court questioned the authority of the Industrial Statistician or the department as a whole, to make such determinations. Rather, the Court dealt exclusively with the validity of the conclusion reached by the department. Likewise, in *Drake v. Molvik & Olsen Electric, Inc.*, 107 Wn.2d 26, 726 P.2d 1238 (1986), the Supreme Court established that work performed by the Seattle Housing Authority [SHA] was within the scope of the prevailing wage statute.

The Court's primary ruling involved the matter of whether the source of funding was a governing factor in determining coverage under the law. Again, neither the Court nor the parties raised the question of whether the utilization 39.04 RCW by the department, through its industrial statistician, exceeded the department's proper jurisdiction.

In fact, absent the application of RCW 39.04.010(4), there would be no clear definition of when RCW 39.12 RCW would ever apply. Therefore, the agency charged with the administration of 39.12 RCW, must, by definition, be the agency that determines when and how the law will be administered.

This plain, harmonious reading of both statutes makes it clear that L&I, through its industrial statistician, who is charged with the establishment of the prevailing wages [RCW 39.12.015] that must be paid to workers on public work under RCW 39.12.020, is the individual to whom these requested determinations of coverage are properly directed, as well as any requests for reconsiderations under WAC 296-127-060(3) that must be made prior to requesting arbitration.

Just as disputes of wages may include questions of computation or wage applicability by scope, disputes of wages may also arise when prevailing wages are not paid at all on projects that would be covered under the statute. This mandates determinations by the Industrial Statistician of coverage under 39.04 RCW. Otherwise, the Industrial Statistician would be completely unable to dispatch his/her responsibility to establish (or not establish) applicable prevailing wage rates.

## General Principals

The Court set out the applicable standard for coverage under the Prevailing Wage Act in Everett Concrete Products, 109 Wn. 2d at 825:

[1] To determine the scope of Washington's prevailing wage law, we look first to the relevant statutory language. Service Employees, Local 6 v. Superintendent of Pub. Instruction, 104 Wn.2d 344, 348, 705 P.2d 776 (1985). If a statute is unambiguous, its meaning must be derived from its language alone. Stewart Carpet Serv. v. Contractors Bonding & Ins. Co., 105 Wn.2d 353, 358, 715 P.2d 115 (1986). If the statute is ambiguous, resort may be had to other sources to determine its meaning. PUD 1 v. WPPSS, 104 Wn.2d 353, 369, 705 P.2d 1195, 713 P.2d 1009 (1985).

In this case the statutory language of 39.04 RCW sets forth straight-forward, broad criteria for coverage and, once it is determined that a given project is covered, compliance with 39.12 RCW is mandatory.

The Court's decision in Drake v. Molvik & Olsen Electric, Inc., 107 Wn.2d 26, 726 P.2d 1238 (1986), is instructive. There, the Supreme Court established that work performed by the Seattle Housing Authority [SHA] was within the scope of the prevailing wage statute, setting forth the following criteria for review:

[1] The first issue is whether the SHA is within the scope of the prevailing wages statute. There is no doubt that a housing authority entity is within the statutory scope of the statutory scheme. RCW 39.04.010, dealing with public works, is so inclusive as to include every governmental body. [emphasis added]

However, the triggering condition of the statute is that a public work exists only if the work is at "the cost of the state [or other covered entity] or which is by law a lien or charge on any property therein". RCW 39.04.010. [emphasis added.]

The Court's primary ruling involved the matter of whether the source of funding was a governing factor in determining coverage under the law, it clearly wrote within the decision that it was not, and that there can be no question that RCW 39.04 010 is the triggering statute for the application of 39.12 RCW.

### **The Metropolitan Tract:**

All work performed on the Metropolitan Tract, other than at the Olympic/Fairmont Hotel, is fully executed at the cost of the state – which means it is executed utilizing public funds and, since the University of Washington is an agency of the state, there is, by definition, a lien or charge on its property. The entirety of the Metropolitan Tract, as a wholly owned property of the state, meets both criteria of 39.04.010(4). The question then is whether the UW lease with Unico to manage the tract properties (except the Olympic/Fairmont) sets the Tract properties apart from any other public works projects.

In *City of Spokane v. Department of Labor and Industries*, 100 Wn. App. 805, 998 P.2d 913 (2000), the court cited the case of *Lycoming County Nursing Home Ass'n, Inc. v. Pennsylvania Dep't of Labor & Indus.*, 156 Pa.280, 627 A.2d 238 (1993), finding it to be persuasive on the question of whether a public entity needed to be directly involved in a project for that project to be considered a public work. As the court explained:

Lycoming County created a private, non-profit association to construct and operate a nursing home. The County leased the land to the association, loaned it \$500,000 to cover start-up costs, and issued bonds with the express purpose of lending the money to the association for construction and operation of the nursing home.

Ruling that the project was subject to Pennsylvania's prevailing wage law, the court rejected the association's argument “that because the [a]ssociation actually paid for and contracted for the project, the public nature of the project was destroyed, taking it out of the realm of “ ‘public work.’ ” ”

Here, the City contracted directly with Wheelabrator to construct, operate and maintain the City-owned waste-to-energy facility. This arrangement is similar to the county-nursing home contractual arrangement in Lycoming.

The Lycoming court noted that a Pennsylvania “public work,” requiring the payment of prevailing wages, is defined as construction, reconstruction, demolition, alteration and/or repair work other than maintenance work, done under contract and paid for in whole or in part out of the funds of a public body where the estimated cost of the total project is in excess of twenty-five thousand dollars.

The court reasoned that:

[t]he definition for “public work” does not require that a “public body” must be directly involved with the project; only that the project must be paid for in whole or in part with public funds.

The evidence here demonstrates that public funds paid for the project, thus, creating a “public work.”627 A.2d at 242 (emphasis added). Similarly, Washington’s statutory definition of “public work” does not mandate the City’s direct involvement in the AMS work performed by Wheelabrator. RCW 39.04.010. Rather, it requires only that the work be “executed at the cost of” the City. That requirement is met here. In essence, the City finances the work at the SWDP; how efficiently Wheelabrator operates the facility determines its profit margin [emphasis added].

### **The Unico Lease:**

The UW’s lease with Unico is a contract that establishes the terms of Unico’s involvement in the Tract properties. The involvement includes all of those elements defined in RCW 39.04.010(4). The following reviews the financial arrangement between the UW and Unico, and appends selected pages from their lease agreement that support the conclusion that all work on the above named buildings falls under the definition of prevailing wage which, therefore, triggers the application of 39.12 RCW.

Prior to November 1, 2014, there were questions regarding the application of prevailing wage law to the work performed on the Tract Structures, even though that work was performed at the cost of the state. The UW took the position that, because the Unico lease required Unico to engage in specific construction projects, the public funds deposited in UW trust accounts were actually a security device to ensure compliance with the terms of the lease. Even if this were a valid argument – and we do not believe that it was - the current lease, effective November 1, 2014 contains no such language. Rather, it makes very clear that the UW is in control of Unico and its work on the Tract structures.

Under the current lease (effective November 1, 2014), the Metropolitan Tract properties are managed by Unico Properties LLC pursuant to a Management Agreement between the Board of Regents of the University of Washington and Unico. The Management Agreement contains certain key elements with respect to funding and control, that clearly fall under definition of public work.

First, the Management Agreement clearly establishes that the cost of “all work” performed on the Metropolitan Tract buildings managed by Unico is, in fact, performed at the cost of the University. In this regard, Section 6.04(a) states in express language:

All obligations or expenses incurred by Manager hereunder in operating and managing the Managed Property, as specifically permitted hereunder, shall be at the expense of the University, except as otherwise specifically provided in this Agreement.

Second, the Management Agreement further establishes that any work, including construction, alteration, repair, improvement, etc., will be paid from a trust account that is the property of the University. As set forth in Section 6.04(b):

Manager [Unico] shall establish, in the name of the University (and not of the Manager), [sic] and for the University's sole benefit and account, trust accounts as described in this Agreement or such other accounts as the University may otherwise elect (collectively, "Trust Accounts") for the operation of the Managed Property at such institutions or banks of the University's choosing. All funds in all Trust Accounts shall at all times be the property of the University....

Third, under Section 6.04(c) the Management Agreement requires the parties to establish an operating account

...for the ongoing operation of the Managed Property, into which all funds advanced to the Managed Property by the University or otherwise derived from the operation of the Managed Property shall be deposited, including all Rents, revenues and other income, and from which the payment of all costs and expenses authorized herein shall be made.

Additionally, a reserve account is further required for the purpose of "capital expenditures" under Section 6.04(d). Along with all other expenditures, these must be approved by the UW.

These Sections, are not contradicted anywhere in the Lease Agreement, and they clearly show that the University of Washington does, in fact, incur the entire cost of any construction, alteration, repair, improvement, etc., that is deemed necessary and is so approved, at any of the Buildings that are subject to the terms of the Lease Agreement. Under the current agreement, the UW has full control and authority over all work that is performed on the Tract buildings.

According to 39.04 RCW and 39.12 RCW all of this work is subject to prevailing wage law. The fact that the work may be contracted and awarded by a private entity [Unico] on behalf of the UW, which approves both the work and the expenses, does not exempt any of the UW projects in and on the properties managed by Unico from the requirements of the prevailing wage law.

The full lease is available upon request; however, for your convenience, specific pages containing the noted Sections have been appended to this letter. These provide a short overview of the financial and management relationship between the University of Washington and Unico.

### **Conclusion:**

Based on prior court precedent, the current leasing arrangement between Unico and the UW, and the application of RCW 39.04.010(4) to the work performed on the Metropolitan Tract, we request a formal determination that all work on the buildings noted supra, be established as public work by your office, and subject to all of the requirements of 39.12.RCW.

Respectfully Submitted



Miriam Israel Moses  
Executive Director

cc: REBOUND Board of Directors  
Dale Cannon, Business Manager, Laborers Local 242  
Dale Bright, Political Director, Laborers Local 242  
Jermaine Smiley, Laborers District Council  
Earl Smith, Laborers District Council  
Monty Anderson, Executive Secretary, Seattle/KC Building Trades Council  
Kristina Detwiler, Attorney at Law