



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

Prevailing Wage
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April 4, 2013

Jeff Slothower
Lathrop, Winbauer, Harrel, Slothower & Denison L.L.P.
P O Box 1088
Ellensburg, WA 98926

Re: Request for Determination – Kittitas Reclamation District (KRD)
Your File #701146.001

Dear Mr. Slothower:

Thank you for your letter of January 25, 2013 in which, on behalf of Kittitas Reclamation District (KRD), you request a determination as to whether the KRD is subject to the payment of prevailing wages on two upcoming projects that the KRD is undertaking.

Determinations of the prevailing rate of wage are made by the Industrial Statistician of the Department of Labor & Industries (L&I). Requests for modification of such determinations are addressed pursuant to the enclosed "*Prevailing Wage Determination Request and Review Process.*"

You identify the contemplated projects as: (1) removal of certain dead and burned trees located on the KRD canal right-of-way that were burned as a result of the Taylor Bridge Fire; and (2) installation of a buried pipeline using state and federal funds. Later, you withdrew your question regarding the pipeline issue for purposes of the determination. For the reasons identified below, it is my conclusion that the tree removal and other actions connected therewith do not require prevailing wage compliance.

The definition of "public work" in RCW 39.04.010(4) applies to work performed at a cost to the state or a municipality. RCW 39.12.020 requires the payment of not less than the prevailing rate of wage to the laborers, workers, or mechanics performing public work. Generally, payment of prevailing wage rates is required for tasks performed by workers, laborers, or mechanics preparatory to or pursuant to a construction project, or to maintain structures and constructed areas, including the clearing of trees from such public access paths, roadways, walkways, and similar areas. However, the prevailing wage requirement in chapter 39.12 RCW is not activated if the "irrigation district exemption" in WAC 296-127-030 applies.

KRD is an irrigation district, organized pursuant to chapter 87.03 RCW *Kittitas Reclamation District v. Spider Staging Corp.*, 107 Wn. App. 468 (2001). It was created in anticipation of the U.S. Bureau of Reclamation constructing the Kittitas division of the Yakima Irrigation Project. *Id.* Irrigation districts are quasi-municipal or public corporations of the state of Washington. They are organized primarily for the purpose of furnishing water for agricultural or domestic use relating to lands within a district, usually through the operation of an irrigation system. AGO 1965-66, No. 37 at 2-3 citing *Beasley v. Assets Conservation Co.*, 131 Wn. 439, 443 (1924).

WAC 296-127-030, titled "Irrigation district exemption," states:

Contracts awarded by irrigation districts for the reclamation or development of waste or undeveloped lands are not covered by the prevailing wage law, pursuant to RCW 39.04.010. Any work, construction alteration, repair or improvement that is not solely for the reclamation or development of waste or undeveloped land is covered by the prevailing wage laws and therefore subject to all the laws and regulations contained in and adopted pursuant to chapter 39.12 RCW.

Following this rule, if the purpose of the described work is *solely for the reclamation or development of waste or undeveloped lands*, such work would not require prevailing wage compliance.

In looking to the nature of this project, the work, as you described it, involves a proposed Energy Unleashed Program Cost Sharing Assistance Application and Agreement between KRD and Kittitas County Conservation District (KCCD). The agreement states that the work will involve hazard tree removal of 10 trees, aerial or broadcast seeding of 10 acres, 450 square yards of mulch, and construction of 16 straw erosion structures. The agreement also describes the environmental quality benefits expected to be produced by this project: "practices are recommended to reduce the potential for soil erosion impacting life and property within and adjacent to the burn area. The benefits of the recommended practices include soil stabilization and protection of infrastructure." The KCCD website also describes the "Taylor Bridge Burn Area Restoration" project as "restoration of the burn area, with a particular emphasis on preventing soil and wind erosion. This effort may include broadcast seeding, straw bale dams, hand-falling trees across slopes to act as erosion control, lopping and scattering of burn materials and applying mulch."

Discussions between our staff and you further clarified that the trees will be removed so that district staff can safely use the maintenance road and the damaged trees will not fall into the canal, wash downstream, and cause damage to the canal's features or interrupt operation. The purpose also includes erosion control, caused by loss of vegetation due to the same fire that killed the trees.

In a determination issued on June 8, 2012 concerning prevailing wage requirements for conservation districts and reclamation/restoration projects, one of the questions raised was whether certain conservation activities were for the "reclamation or development of waste or undeveloped lands." These activities listed in RCW 89.08.010(3) include:

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...[T]he construction of terraces, terrace outlets, check-dams, desilting basins, flood water retarding structures, channel floodways, dikes, ponds, ditches, and the like; the utilization of strip cropping, contour cultivating, and contour furrowing; land irrigation; seeding and planting of waste, sloping, abandoned, or eroded lands to water-conserving and erosion-preventing plants, trees, and grasses; forestation and reforestation; rotation of crops; soil stabilizations with trees, grasses, legumes, and other thick-growing, soil-holding crops, retardation of run-off by increasing absorption of rainfall; and retirement from cultivation of steep, highly erosive areas and areas now badly gullied or otherwise eroded.

Reading the language of RCW 89.08.010(3) in conjunction with WAC 296-127-030, and understanding that the prevailing wage law is a remedial statute to be liberally interpreted in favor of worker protection [*See Everett Concrete Products, Inc. v. Department of Labor & Industries*, 109 Wn2d 819, 748 P.2d 1112 (1988) at 823] the “irrigation district exemption” is a narrow exception. Even so, the activities that you describe for the irrigation district project at issue, tree removal, seeding, mulch, and erosion control, all seem to clearly fall within the scope of “reclamation or development of waste or undeveloped lands” as discussed in the June 8, 2012 determination referenced above because these activities are related to reclamation of lands that have been damaged by fire, as opposed to those types of activities addressed in the latter part of WAC 296-127-030, “any work, construction, alteration, repair or improvement that is not solely for the reclamation or development of waste or undeveloped lands.” Thus, given the specific tasks at issue here, the activities are included within the parameters of the narrow exception of WAC 296-127-030 and do not require prevailing wage compliance.

I hope this is helpful to you. If you have further questions, please let me know.

Sincerely,



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

Enclosure

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, please 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:

José Rodriguez, Assistant Director
Department of Labor & Industries
Specialty Compliance Services
P O Box 44400
Olympia, WA 98504-4400
Rodr235@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, please 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.