



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
Prevailing Wage
PO Box 44540 • Olympia, Washington 98504-4540
360/902-5335 Fax 360/902-5300

August 1, 2012

Darryl Reber
Executive Director
Inland Empire Residential Resources
P O Box 3123
Spokane, WA 99220-3123

Re: Intent #509882, Contract #OPR-12-0221 IERR/Union Project

Dear Mr. Reber:

Thank you for your May 25, 2012, request for a formal determination for the appropriate wage classification, residential or commercial, for the referenced project and for the additional information you provided on June 5 and on July 19. Thank you for your patience in awaiting my decision.

Determinations of the prevailing rate of wage are made by the industrial statistician of the Department of Labor & Industries (L&I). *See* RCW 39.12.015. As part of this determination process I have reviewed the information provided on Intent #509882, your letter of May 25, 2012, and the following documents that you included with your letters of June 5 and July 19, 2012:

1. The City of Spokane NSP III Application;
2. HUD Letter of Wage Determination;
3. Department of Commerce (Commerce) Award Letter;
4. Commerce Funding Contract;
5. AIA contract between Inland Empire Residential Resources (IERR) and Walker Construction, General Contractor;
6. A National Development Council (NDC) draft memorandum to you, the City of Spokane, the Department of Commerce, and others from Chuck Depew dated October 9, 2011, with "NSP Procurement" as the referenced subject; and
7. A February 3, 2012 letter from Attorney Robert H. Crick, Jr. to Richard D. Campbell which discusses the referenced project and the question as to whether the project is "public work" in the competitive bidding context.

I also reviewed several communications from late 2011 I had with various members of the Department of Commerce, Mr. Paul Trautman of the City of Spokane, and Mr. Mike Wallace of Wolfe Architectural Group concerning this and/or similar projects.

Based on the fact that this project is currently under construction and you have been operating under the impression that residential and not commercial rates apply to the project, I have given your request for a determination highest priority status. I appreciate your continued responsiveness in providing me with documents and other information I've requested.

In your May 25 letter, you referred to the project as having four stories with no basement. You further described the project as follows:

Floors 2, 3, & 4 will consist of 37 individual apartments plus common areas, and each apartment will contain its own kitchen and bathroom with separately metered utilities. The first floor will consist of a common entry way, elevator access, and a small auxiliary living space available for use only by the tenants and their invitees...

You further stated:

The superstructure does include a small amount of space that will remain essentially unfinished and reserved at the completion of this Project and that may be subject to future development by IERR. However, the nature of the present Project, as indicated above, is residential and will always be such.

Based on this description, you disagree with the fact that when Walker Construction, Inc., the prime contractor for the project, submitted a Statement of Intent to Pay Prevailing Wages (Intent) to the department, we returned it with a correction notice indicating that the project requires the payment of commercial rather than residential prevailing wage rates. Your May 25 letter does not refer to or acknowledge that the project is a mixed use project, with the first floor consisting of what is described on Walker Construction's web site as two commercial suites. See <http://walkerconstructioninc.com/sprague-union-terrace/>, accessed on June 5, 2012 at 12:06:21 PM. Below is a drawing of the planned project from the same web site.



For application of state prevailing wage requirements, “residential construction” is defined in WAC 296-127-010(9) as follows:

“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.)

Essentially, there are several important aspects to the definition: (a) the structure must not exceed four stories in height, including basement, (b) the structure must be “used solely as permanent residences” and (c) certain utilities work is excluded. If the structure does not meet these criteria, residential construction rates cannot be used. Utilities construction work will require commercial (not residential) rates under state law.

The state rule that defines “residential construction,” WAC 296-127-010(9), differs from and has further requirements than the definition used by the U.S. Department of Labor (USDOL) for the federal prevailing wage law (the Davis-Bacon Act).

The federal standard states:

“Residential projects for Davis-Bacon purposes are those involving the construction, alteration, or repair of single family houses or apartment buildings of no more than four (4) stories in height. This includes all incidental items such as site work, parking areas, utilities, streets, and sidewalks.” *See* USDOL All Agency Memorandum No. 130, pg. 4.

While the federal standard may allow much more varied activity under residential rates with fewer limiting criteria than state law, a federal wage determination of “residential” would not guarantee a state determination of “residential” under chapter 39.12 RCW.

Additional information you provided in your June 5, 2012, letter and the accompanying documents confirm that the structure at issue here is a mixed use structure, not used solely as permanent residences. Based on that description, and other details I’ve referenced concerning the nature of the structure, the department correctly returned Intent #509882 for correction, requesting that the applicable rate be changed to reflect the mixed use of the building, which would require payment to workers based on commercial wage rates.

I understand that you disagree with our application of chapter 39.12 RCW, the Prevailing Wages on Public Works Act, and WAC 296-127-010(9) cited above to require payment of commercial rates construction of the structure at issue. The documents you provided also suggest you question whether the project is a “public work” that requires prevailing wage compliance. I will address each of the documents you provided regarding both the “public work” and “residential” versus “commercial” construction issues.

- City of Spokane NSP III Application – While the NSP funds originate with the federal government, the City of Spokane (with respect to NSP I and II funds) and Commerce (with respect to NSP III funds) after receiving the funds exercise

discretion and control in allocating the funds through an application and award process. This constitutes a “cost” to the City of Spokane and Commerce requiring that the project which receives the funds is subject to state prevailing wage requirements. Issues similar to this have been addressed by Washington courts and the application of state prevailing wage requirements in such situations is well-grounded in law. *See Drake v. Molvik & Olsen Electric*, 107 Wn.2d 26, 726 P.2d 1238 (1986) and *Supporters of the Center, Inc. v. Moore*, 119 Wash.App. 352, 80 P.3d 618 (2003). For example:

The source of the funding does not determine the applicability of the prevailing wage statute. We recognize the practical difficulties of the conflict between the federal funding and the consequences of the state prevailing wage law. However, that is a problem that must be resolved by the Legislature and/or Congress.

Drake at 29.

The department has been clear and consistent regarding such issues as is evident from a 2009 communication I attached to my response to Commerce on the topic in December 2011, a copy of which is attached to this determination and was provided to Mr. Trautman of the City of Spokane on December 19, 2011. That consistency is also evident from determinations posted on line, including [#0104208](#) and [#01282010](#).

- HUD Letter of Wage Determination – This letter pertains only to application of federal law and in the absence of a clear statement of preemption has no bearing on how the department applies the different and more limited state prevailing wage residential construction definition. I am aware of nothing regarding the current issue that would suggest that this is a federal preemption situation. When, as here, both federal and state prevailing wage laws apply to a project, WAC 296-127-025 provides guidance:

(1) When a public works project is subject to the provisions of the Washington state public works law, chapter [39.12](#) RCW, and the Federal Davis-Bacon and related acts, the contractor and every subcontractor on that project must pay at least the Washington state prevailing wage rates, if they are higher than the federal prevailing wage rates for the project unless specifically preempted by federal law.

(2) When the federal prevailing wage rates are higher than the Washington state prevailing wage rates, the contractor shall pay the federal rate as required by federal law.

Summarizing the requirements of WAC 296-127-025, when both state prevailing wage law and the federal Davis-Bacon and related acts apply, contractors and subcontractors must pay the higher of the state or the federal wage rates on a classification by classification basis.

HUD, in applying federal regulations, looks at whether the commercial use of a structure is only “incidental to the residential aspects of the design” from a cost and construction standpoint, and if it finds that to be the case, it characterizes the entire

project as “residential.” State prevailing wage law contains no similar provisions regarding “incidental” commercial use, but rather very specifically states that the structure must be used “solely as permanent residences” to qualify for application of the residential rate.

Relating this analysis to the current issue, the only instance in which a contractor would correctly apply the federal wage rate to be paid to workers here would be in the unlikely event that the federal residential rate was higher than the state commercial rate. Otherwise, the state prevailing wage rate will be the higher and therefore the appropriate rate to apply.

- Commerce Award Letter and Funding Contract – Regarding these items, it appears in your reference to the fact that these funds are federal HOME program funds, and not general state Housing Trust Funds, you are suggesting that HOME funds are used exclusively for residential projects, and, by virtue of that, state residential rates would apply. However, information we received from Commerce confirmed that HOME funds permit a ratio of commercial versus residential space in a building, so that the funds are allowed on and used for mixed use buildings when the ratio is within acceptable parameters. This position has no bearing on the department’s application of state prevailing wage requirements.
- AIA Contract between IERR and Walker Construction – This contract also indicates that the structure to be built is a “multi-story mixed use retail and housing project.” Nothing in the document supports a conclusion that the structure will be used “solely as permanent residences.” In discussing this item you note that the finishing or build-out of the commercial space is not part of the contract at issue and there are no prospective commercial tenants awaiting completion of the project. While these factors may be determinative for other funding sources and agency guidelines, they are not determinative under WAC 296-127-010(9). The first floor of the building includes a significant level of commercial floor space. The fact that the space *may* be finished at a later date is not a critical fact. If the project were reconfigured to exclude any commercial or retail element, application of residential rates would be appropriate, but a plain reading of WAC 296-127-010(9) dictates the conclusion that the rule anticipates that the public work to which it applies is a “structure,” not *part* of a structure. If the drafters’ intent had been otherwise, the rule certainly could have and would have referred to “that part of a structure. . .”
- National Development Council (NDC) October 9, 2011, Memorandum – Essentially it appears this draft document is intended to primarily address the procurement process. However, some of the discussion extends beyond that to state that since IERR is not a government agency it is not subject to state “public work statutes.” This is an incorrect statement of law pertaining to the “at the cost of the state of Washington or of any municipality” language of WAC 296-127-010(7)(a). Please see the discussion above in the City of Spokane NSP III Application section concerning correct application of this “cost” principle. It is beyond the scope of this determination to address the procurement process requirements.

- Robert H. Crick, Jr. February 3, 2012, letter to Richard D. Campbell – This document addresses a bid protest with respect to the referenced project. Although it is beyond the scope of this determination to address the procurement process requirements, there are some statements in the letter that relate to the characterization of the project as a “public work” for prevailing wage purposes that need to be addressed. The department has consistently – based upon WAC 296-127-010(7), RCW 39.04.010, and based upon Washington case law – interpreted “public work” for prevailing wage purposes to include work performed by a non-governmental entity when the work is funded by a grant obtained through a state agency or other municipality. Although there are situations when certain HUD funds routed through a state agency or municipality carry with them a specific federal preemption on the issue of payment of prevailing wage rates, I have been provided with no documentation that such preemption exists for this project. If you feel that this is a federal preemption situation, I would welcome the opportunity to review any documentation you may be able to provide in that regard. Please see the discussion above in the City of Spokane NSP III Application section concerning correct application of the “cost” principal that is the focus of this prevailing wage issue.

Additionally, use of the term “mixed use” is consistent in IERR’s application to receive funds through the City of Spokane, Commerce, and HUD and it is consistent with the provisions of the construction contract. Based on the foregoing factors, for purposes of application of state prevailing wage requirements, this mixed use project will not be “used solely as permanent residences.” For that reason all work on the project must be paid at commercial prevailing wage rates.

If this were a rehabilitation project, or if the building core and shell were the subject of one contract, and the interior finishing out the subject of two separate contracts, one for the apartment finishing, and one for the commercial finishing, it might be possible to allocate different classifications, for the finishing work. This would require a strict delineation of specifications, and strict preparation and monitoring of worker time and activities. However, your response to my questions about the commercial “fit-out” makes it evident that that is not the case. If I have misconstrued your comments and the contract in this regard, please let me know and we can have another look at the finishing out aspects of the project. However, this potential approach regarding the finishing elements of the project would not alter the fact that for state prevailing wage purposes, because this building is not used solely as permanent residences, construction of the building does not qualify for residential prevailing wage rates.

Please note that the issues addressed here, whether the project is “public work” for prevailing wage purposes, and whether it qualifies for residential construction rates was previously discussed between various members of Commerce, Paul Trautman (City of Spokane and East Sprague project partner), Michael Wallace (Wolfe Architectural Group), and Jim Walton and myself (L&I) concerning the subjects referenced as “IERR-The Union (Sprague and Perry Workforce Housing),” in communications that date back to October 12, 2011. Those communications put the parties on notice that the department (and Commerce) concluded that this is public work for prevailing wage purposes. As part of those

Darryl Reber
August 1, 2012
Page 7 of 7

discussions, I also asked Mr. Wallace for specific information about the use of project(s) referenced as "IERR-The Union (Sprasgue [sic] and Perry Workforce Housing)" in order to assist the parties in identifying whether residential or commercial rates would apply. However, I received no response to that message and had no basis at that time for assessing this specific project on the issue.

A copy of the email messages on the issues is attached. It is unfortunate that there were no further communications between the parties and the department that pertained to this specific project.

I believe I have sufficiently addressed the points raised in your May 25 and June 5 letters, and that I have provided you with the determination you requested. While I realize it is not the determination you may have anticipated or wanted, I believe it is a correct application of state prevailing wage law. If you have further questions, please let me know.

Sincerely,



L. Ann Selover
Industrial Statistician
Program Manager
(306) 902-5330
Sela235@Lni.wa.gov

Attachment

cc: Ernie LaPalm, Deputy Director for Field Operations
José Rodriguez, Assistant Director for Specialty Compliance
Carlos Reyes, Specialty Compliance Supervisor
Sheila Collins, Office of the Governor
Paul Trautman, Housing Program Administrator, City of Spokane
Genny Matteson, Department of Commerce

Selover, Ann (LNI)

From: Selover, Ann (LNI)
Sent: Monday, December 19, 2011 12:44 PM
To: Matteson, Genny (COM)
Cc: Lowe, Laura (COM); Mandeville, Bill (COM); Lee-Johnston, Sheila (COM); Roe, Kaaren (COM); Grigoras, Corina (COM); Aarthun, Dan (COM); Walton, James G. (LNI); Burns, Barbara; Trautman, Paul; Herman, Laura E (LNI); Christensen-Russell, Ramona (LNI); Peppin, Nathan B (LNI); Pearson, Reasa L (LNI)
Subject: CDBG/NSP Projects - Are there any exemptions for residential construction

Genny,

Thank you for your confirmation that the Department of Commerce requires the payment of the higher of state prevailing or Davis-Bacon wage rates for its CDBG/NSP projects. This position is consistent with our interpretation of the prevailing wage requirements for the utilization of such funds.

Regards,

Ann

L. Ann Selover

Industrial Statistician/Program Manager
Prevailing Wage
Department of Labor and Industries
(360) 902-5330
sela235@Lni.wa.gov

From: Matteson, Genny (COM)
Sent: Friday, December 16, 2011 11:09 AM
To: Selover, Ann (LNI)
Cc: Lowe, Laura (COM); Mandeville, Bill (COM); Lee-Johnston, Sheila (COM); Roe, Kaaren (COM); Grigoras, Corina (COM); Aarthun, Dan (COM)
Subject: RE: Are there any exemptions for residential construction

Hi Ann,

I finally got a chance to discuss the "State Prevailing Wage" requirements with my supervisor and colleagues. As a result, I want to stress that all of our NSP contracts require compliance with the State Prevailing Wage requirements. They need to pay either the Davis-Bacon wages or the State prevailing wage, whichever amount is higher.

In the General Terms and Conditions of the NSP Contract, under Section 24, it states the following:

22. PREVAILING WAGE LAWS

All contractors and subcontractors performing work on a construction project funded through this agreement shall comply with prevailing wage laws by paying the higher of state or federal prevailing wages according to:

State Prevailing Wages on Public Works, Chapter 39.12 RCW, as applicable to the Project funded by this agreement, including but not limited to the filing of the "Statement of Intent to Pay Prevailing

Wages” and “Affidavit of Wages Paid” as required by RCW 39.12.040. The Contractor shall maintain records sufficient to evidence compliance with Chapter 39.12 RCW, and shall make such records available for COMMERCE’s review upon request; or

The Davis Bacon Act, 40 U.S.C. 276a-276a-5 and related federal acts provide that all laborers and mechanics employed by contractors or subcontractors in the performance shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor.

This requirement also applies to subcontracts. The Statement of Work in each NSP contract states:

“[The local jurisdiction] will enter into a contract with the subrecipients of NSP funds. The contract will stipulate their respective roles and responsibilities. Subrecipient agreements must comply with applicable federal and state regulations. Contract provisions regarding residential construction and rehabilitation must include, but are not limited to, requirements for preparing bid documents, requesting federal and state prevailing wage rates, completing final design and construction plans, conducting a bid opening and selecting a qualified contractor.” (emphasis added)

The City of Spokane is a good example. They are fixing-up the Rose-Kly-Cecil Apartments using NSP funds. Initially they paid Davis-Bacon wages, but the State Prevailing Wage was higher. On Monday December 12, Paul Trautman from the City of Spokane left a phone message that Spokane had paid the required amounts to meet the State prevailing wage.

I don’t think that we need to meet on this issue. Not only has Spokane’s individual issue been resolved but Commerce does indeed require that all NSP funds meet the prevailing wage laws.

Please let me know if you would like to discuss this further.

Genny Matteson

Neighborhood Stabilization Program Manager
WA State Department of Commerce
(360) 725-3093
genny/matteson@commerce.wa.gov
Work Hours: M-Th 7:30am – 6:00pm

From: Selover, Ann (LNI)
Sent: Tuesday, December 06, 2011 8:45 AM
To: Matteson, Genny (COM)
Cc: Roe, Kaaren (COM); Grigoras, Corina (COM); Mandeville, Bill (COM); Lee-Johnston, Sheila (COM)
Subject: RE: Are there any exemptions for residential construction

Hello, Genny,

Let’s wait until you are able to confer with others on the CDBG issue. When there is a “cost to the state” as a result of state agency discretion in allocating federal funds, state prevailing wage requirements apply unless there is a specific statement of preemption.

We previously confirmed with HUD that CDBG funds are not funds exempt from state prevailing wage rates because of funding under The Housing Act of 1937 and 24 CFR 965.101.

Here are some other documents that may be of help to you:

<< File: HUD Housing Projects - Housing Act of 1937.pdf >> << Message: RE: CDBG June 14th in Seattle >>

Thanks.

Ann

L. Ann Selover

Industrial Statistician/Program Manager
Prevailing Wage
Department of Labor and Industries
(360) 902-5330
sela235@Lni.wa.gov

From: Matteson, Genny (COM)
Sent: Tuesday, December 06, 2011 8:12 AM
To: Selover, Ann (LNI)
Cc: Roe, Kaaren (COM); Grigoras, Corina (COM); Mandeville, Bill (COM); Lee-Johnston, Sheila (COM)
Subject: RE: Are there any exemptions for residential construction

Ann,

I think that the issue may be that these NSP funds aren't exactly state funds but are from a special allocation of federal CDBG funds and follow CDBG rules. I am not an expert in this area of CDBG, but from what I understand for housing rehab under CDBG they don't have to follow state prevailing wages. I could be wrong. All my experts on CDBG seem to be out sick right now so I can't check with them.

I will get back to you.

Genny Matteson

Neighborhood Stabilization Program Manager
WA State Department of Commerce
(360) 725-3093
genny/matteson@commerce.wa.gov

Work Hours: M-Th 7:30am – 6:00pm

From: Selover, Ann (LNI)
Sent: Monday, December 05, 2011 6:34 PM
To: Matteson, Genny (COM)
Cc: Roe, Kaaren (COM); Grigoras, Corina (COM); Mandeville, Bill (COM)
Subject: FW: Are there any exemptions for residential construction

Genny,

The discussion below pertaining to a question about prevailing wage applicability to residential construction under the NSP may be of interest to you.

Thanks.

Ann

L. Ann Selover

Industrial Statistician/Program Manager

Prevailing Wage

Department of Labor and Industries

(360) 902-5330

sela235@Lni.wa.gov

From: Soma, David (LNI)

Sent: Friday, April 17, 2009 3:20 PM

To: Mandeville, Bill (CTED)

Cc: Herman, Laura E (LNI); Selover, Ann (LNI); Peppin, Nathan B (LNI); Pearson, Reasa L (LNI); Gast, Dawn V (LNI)

Subject: Are there any exemptions for residential construction

Bill,

Good hearing from you. Appreciate the questions. Particularly when they are the easy ones. We do not often get easy ones as you can imagine.

The short answer is there are no exceptions for residential construction by anyone receiving state funds. There are no thresholds for amounts either. In other words, if there is any public money, the project is prevailed.

To be more specific, there is no minimum number of units needed to become a public work. In fact, depending on how the units are configured, the number of units may actually cause the project to be commercial and not residential construction.

This confusion often occurs because of the way HUD applies Davis-Bacon. There are some circumstances in which the federal law does not apply below a certain number of units. It is important not to confuse standards for the federal Davis-Bacon Act with the state Prevailing Wage Law, Chapter 39.12 RCW, since the two laws have many differences.

I have included WAC 296-127-010 for reference (see below). The only relevant part for you is the yellow highlighted part at the end.

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. 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. 92-01-104, § 296-127-010, filed 12/18/91, effective 1/31/92; 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. 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. 82-18-041 (Order 82-28), § 296-127-010, filed 8/27/82.]

All work, construction, alteration, repair or improvement is public work (see RCW 39.04.010 below). The other than ordinary maintenance exception was effectively removed by a court decision in [City of Spokane and Wheelabrator v DL&I](#) in which the court said the only ordinary maintenance is maintenance done by the staff of the public agency. This effectively removed ordinary maintenance as an exception to the prevailing wage law.

Therefore even if the roof might be considered ordinary maintenance, which it is not, it would not be exempted under Wheelabrator.

I hope this answers your questions. Both are work that is prevailed under 39.12 RCW and the workers must be paid the prevailed rate of wage for the correct classification for the work they are performing.

RCW 39.04.010c

Definitions.

The term state shall include the state of Washington and all departments, supervisors, commissioners and agencies thereof.

The term municipality shall include every city, county, town, district 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.

The term public work shall include 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 the provisions of RCW 39.12.020. The term 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).

The term contract shall mean a contract in writing for the execution of public work for a fixed or determinable amount duly awarded after advertisement and competitive bid. However, a contract which is awarded from a small works roster need not be advertised.

[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.]

If you have additional questions or need further assistance, please call or e mail and I will do my best to assist.

Regards,

Dave

David J. Soma
Industrial Statistician
Prevailing Wage Program Manager
360 902-5330

From: Mandeville, Bill (CTED)
Sent: Wednesday, April 15, 2009 9:37 AM
To: Soma, David (LNI)
Subject: Are there any exemptions for residential construction

David,

I am managing the State's Neighborhood Stabilization Program. I received a question regarding whether the State's prevailing wage rate applies to the following:

Residential construction of eight units or less ?

Rehab of existing residential units (i.e., replacement of roofs) ?

Could you please let me know if there are any exceptions for residential construction by public agencies receiving state funds. Thanks

F.W. Mandeville

F.W. "Bill" Mandeville, AICP
NSP Manager / Senior Planner
CTED's Local Government Division
906 Columbia Street S.W., Olympia, Washington 98504-2525
Phone: 360-725-3051 Email: billm@cted.wa.gov

Selover, Ann (LNI)

From: Trautman, Paul [PTrautman@SpokaneCity.org]
Sent: Monday, October 31, 2011 9:27 AM
To: Selover, Ann (LNI)
Cc: Burns, Barbara
Subject: RE: State Prevailing Wage not applicable to HUD funds loaned to nonprofit?
Attachments: City-Commerce NSP1 Contract.pdf; ECCO Promissory Note - Renovation.pdf; ECCO NSP Loan Agreement.pdf

Ann – I'm seeking closure to applicability of state prevailing wages to the Rose Apartments residential renovation project in Spokane. Federal stimulus Neighborhood Stabilization Program (NSP1) funds passed from HUD thru the Dept of Commerce to the City of Spokane via the attached Dept of Commerce grant agreement. Spokane provided these funds to a local nonprofit for building renovation via the attached promissory note and loan agreement.

Dept of Commerce's NSP1 grant agreement contains an all-inclusive list of regulatory requirements (including state prevailing wages) without considering applicability based on project type, funding, or use of loan agreements. I do not believe that this project meets the standard of an expense to the State of Washington. Commerce NSP1 staff has appropriately deferred to LNI for a determination of applicability. Can you help?

Paul Trautman
City of Spokane Community Development
ptrautman@spokanecity.org
509-625-6325

From: Walton, James G. (LNI) [mailto:WALJ235@LNI.WA.GOV]
Sent: Monday, October 31, 2011 8:07 AM
To: Trautman, Paul
Cc: Selover, Ann (LNI)
Subject: RE: State Prevailing Wage not applicable to HUD funds loaned to nonprofit?

Paul, Please check you contract General Terms and Conditions #24. Also, please contact Ann Selover, Industrial Statistician/Prevailing Wage Program Manager for further information on this subject. Thank You. Jim W

From: Trautman, Paul [mailto:PTrautman@SpokaneCity.org]
Sent: Friday, October 28, 2011 2:24 PM
To: Walton, James G. (LNI)
Subject: RE: State Prevailing Wage not applicable to HUD funds loaned to nonprofit?

Jim – I'm checking back on emails regarding federal stimulus funds that passed thru the Dept of Commerce to the City of Spokane via an interlocal agreement. The City loaned these federal funds to a nonprofit to renovate their apartment building. We're applying Davis-Bacon wages to the project but want to confirm that state prevailing wages don't also apply to this project.

Paul Trautman
City of Spokane Community Development
ptrautman@spokanecity.org
509-625-6325

From: Trautman, Paul
Sent: Thursday, October 13, 2011 4:30 PM
To: 'Walton, James G. (LNI)'
Subject: RE: State Prevailing Wage not applicable to HUD funds loaned to nonprofit?

Gotcha - I found the section you referred to. All parties agree that Davis-Bacon applies to the project and if state prevailing wages are applicable then contractors must pay the higher of the federal or state wage. Given that we're

lending federal funding to a nonprofit owned project I recall past practice was that state prevailing requirements were not triggered.

This City/Commerce grant agreement is a boilerplate that Commerce borrowed for this new NSP stimulus program. We reached agreement with Commerce staff that the Public Work requirement also mentioned in paragraph 24 isn't applicable. The kitchen sink was included in the City/Commerce grant agreement so we're trying to pull truly applicable sections from the big pile.

Paul Trautman
City of Spokane Community Development
ptrautman@spokanecity.org
509-625-6325

From: Walton, James G. (LNI) [mailto:WALJ235@LNI.WA.GOV]
Sent: Thursday, October 13, 2011 2:28 PM
To: Trautman, Paul
Subject: RE: State Prevailing Wage not applicable to HUD funds loaned to nonprofit?

Paul, Sorry I was unclear. I did not include the doc because you had sent it. The doc is the CTED contract # 08-F6401-019 General Terms and Conditions. It also looks like the pages are numbered whacky. Following is the relevant copy.

From: Trautman, Paul [mailto:PTrautman@SpokaneCity.org]
Sent: Thursday, October 13, 2011 1:04 PM
To: Walton, James G. (LNI)
Subject: RE: State Prevailing Wage not applicable to HUD funds loaned to nonprofit?

Sorry Jim but is there an attachment missing from your email? I need to read page 8 of which document?

Thanks for the fast response!

Paul Trautman
City of Spokane Community Development
ptrautman@spokanecity.org
509-625-6325

From: Walton, James G. (LNI) [mailto:WALJ235@LNI.WA.GOV]
Sent: Thursday, October 13, 2011 11:27 AM
To: Trautman, Paul
Subject: RE: State Prevailing Wage not applicable to HUD funds loaned to nonprofit?

Paul, please read page 8 Paragraph #24. This might answer some questions. Thank you Jim W :-)

From: Trautman, Paul [mailto:PTrautman@SpokaneCity.org]
Sent: Thursday, October 13, 2011 11:04 AM
To: Selover, Ann (LNI); Burns, Barbara
Cc: Walton, James G. (LNI)
Subject: RE: State Prevailing Wage not applicable to HUD funds loaned to nonprofit?

Barb & Ann – I've attached 2 documents in hopes of expediting a response before Ann's annual leave. I've attached the City-Commerce NSP1 contract (also provided earlier) where WA Dept of Commerce grantee NSP funds to the City of Spokane for NSP-eligible housing projects. The new attachment (ECCO NSP Loan Agreement.doc) is the contract for building renovation funding between the City and ECCO as nonprofit owner/developer.

Paul Trautman
City of Spokane Community Development

ptrautman@spokanecity.org

509-625-6325

From: Selover, Ann (LNI) [mailto:sela235@LNI.WA.GOV]
Sent: Wednesday, October 12, 2011 5:44 PM
To: Burns, Barbara
Cc: Walton, James G. (LNI); Trautman, Paul
Subject: RE: State Prevailing Wage not applicable to HUD funds loaned to nonprofit?

Barb,

Thank you for your inquiry and for your interest in prevailing wage compliance.

I performed a very cursory review of this in an effort to try to provide you some response prior to leaving for annual leave. I will be out until 10/19.

However, my brief review leads to an overriding question. Your message refers to a "loan," yet the document is a grant document. Please clarify this issue by directing me to the portion of the document that addresses this question. This is a critical aspect of my review.

Thanks.

Ann

L. Ann Selover

Acting Industrial Statistician/Program Manager
Prevailing Wage
Department of Labor and Industries
(360) 902-5330
sela235@Lni.wa.gov

From: Burns, Barbara [mailto:BBurns@SpokaneCity.org]
Sent: Wednesday, October 12, 2011 4:15 PM
To: Selover, Ann (LNI)
Cc: Walton, James G. (LNI); Trautman, Paul
Subject: FW: State Prevailing Wage not applicable to HUD funds loaned to nonprofit?

Hi Ann.

Jim Walton asked me to discuss with you the prevailing wage implications of pass through loans the City of Spokane makes. It is my understanding that each loan needs to be reviewed on a case by case basis.

Please review this loan and let us know whether or not state prevailing wages will apply.

If you need to talk with me directly, my phone # is 509-625-6225.

Thanks.

Barbara Burns

From: Trautman, Paul
Sent: Wednesday, October 12, 2011 3:53 PM
To: Burns, Barbara
Subject: State Prevailing Wage not applicable to HUD funds loaned to nonprofit?

Barb – Here's info on the NSP funded ECCO Rose Apartments renovation project. Davis-Bacon prevailing wages apply to this project. However, I wanted to confirm that Washington State prevailing wages do not apply to this project that is not a public work and will use only federal funds rather than state/local funds.

The Neighborhood Stabilization Program (NSP) is one of HUD's federal stimulus programs. HUD granted NSP funding to Washington State Dept of Commerce who made funds available to cities/counties across the state. A 2009 Interlocal Agreement (attached) between Commerce and City of Spokane (as Contractor) allocated \$1,085,281 of NSP1 funds to housing projects selected by the City of Spokane.

Spokane did an RFP for eligible housing projects and selected the ECCO Rose Apartments renovation project. This project involves the renovation of an 8-unit historic apartment building owned by the nonprofit East Central Community Organization (ECCO). Spokane executed a \$600,000 loan agreement where NSP funds were loaned to ECCO to fund apartment renovation work.

Note that the Commerce/City contract references prevailing wage laws in paragraph 24 on page 8. This paragraph appears to be boilerplate and may reflect Commerce' assumption that NSP projects would be performed on City-owned property. The prevailing wage paragraph references public works projects; however, the ECCO Rose Apartments is not a public work. Also, the paragraph reference payment of federal Davis-Bacon prevailing wages but fails to recognize that the NSP Davis-Bacon trigger is construction benefitting 8 or more units (which is applicable in this case). This paragraph appears to be boilerplate without consideration to the ultimate NSP project type and funding instrument.

Thank you and please let me know if you need any further information.
Paul

Paul Trautman
Housing Program Administrator
City of Spokane Community Development Dept.
808 W. Spokane Falls Blvd, #650, Spokane, WA 99201
ptrautman@spokanecity.org
phone: 509-625-6325 fax: 509-625-6315

Selover, Ann (LNI)

From: Selover, Ann (LNI)
Sent: Monday, December 12, 2011 8:20 AM
To: Walton, James G. (LNI); 'mwallace@wagarch.com'
Subject: RE: IERR - The Union (Sprasgue and Perry Workforce Housing)
Attachments: RE: HUD NSP1 funds through Dept of Commerce

Thanks for the additional inquiry.

We do not concur with the conclusion at this point that this is not a public work project. I have received no basis to support that conclusion. However, the residential question is another issue and we will need to know more details. Although we may need more detail, here is the basic inquiry:

1. Is the structure a single family dwelling, duplex, apartment, condominium or other residential structure?
2. Including any basement or garage, how many stories or levels does the structure have?
3. What is the facility used for? Answer "yes" or "no" to each of the following options:
 - a. Permanent residence only?
 - b. Rehabilitation house?
 - c. Transitional housing?
 - d. Common dining facility?
 - e. Treatment services?
 - f. Counseling?
 - g. Other?
4. Does each dwelling unit have its own self-contained kitchen?
5. Does each dwelling unit have its own bathroom?
6. Is there a community building or manager's office on site?
7. Is any part of the facility used by members of the public?

Once I have answers to these questions I will be in a better position to assist you on that issue.

Please see the attached communication with is the most recent information available regarding the state public works issue.

Thanks.

Ann

L. Ann Selover

Industrial Statistician/Program Manager
Prevailing Wage
Department of Labor and Industries
(360) 902-5330
sela235@Lni.wa.gov

From: Walton, James G. (LNI)
Sent: Monday, December 12, 2011 6:52 AM
To: Selover, Ann (LNI)

Cc: mwallace@wagarch.com

Subject: FW: IERR - The Union (Sprasgue and Perry Workforce Housing)

Ann, following is more info on the City of Spokane Community Development project.

Mike, Ann is the Industrial Statistician and has had much e-mail concerning this subject. Please contact her. Thank you.
Jim W :-)

From: Mike Wallace [<mailto:mwallace@wagarch.com>]

Sent: Friday, December 09, 2011 10:29 AM

To: Walton, James G. (LNI)

Cc: Trautman, Paul

Subject: IERR - The Union (Sprasgue and Perry Workforce Housing)

Good morning Jim,

I have left several voice mails with you regarding the above referenced project. Your name was provide to me by Paul Trautman with Community Development.

To give background: The project is NOT a public works job. However, it does have both State and Federal prevailing wage requirements. We have determined that the building itself only requires residential rates. However there is site work and landscaping involved. The building is 3 stories if residential over a main floor of small retail and accessory uses related to the residential component.

That said, this question has come up: Does the site/landscaping piece of the project still fall under the residential prevailing wage as it mostly serves their needs and is necessary for project function? Paul mentioned that getting L & I to respond to this would be challenging at best.

Your insights are appreciated. We are wrapping up the specification frontal documents with the intent of having this out to bid on Mobday.

Thanks Jim!

Mike



Michael Wallace, Associate Principal
AIA, LEED AP BD + C
mwallace@wagarch.com
1015 N. Calispel Suite 'B'
Spokane, WA 99201
P: 509.455.6999
F: 509.455.3933