

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Dept. of Labor
and Industries

WAGE DETERMINATION APPEAL;
TOWN OF FRAMINGHAM; CONTRACT FOR
LANDSCAPE MAINTENANCE SERVICES AT
THE FORMER CUSHING HOSPITAL.

PETITIONER: TOM LANDRY ON BEHALF
OF THE TOWN OF FRAMINGHAM.

Appearance for Petitioner:

1. Tom Landry :
Acting Chief
Procurement Officer
Purchasing Department
Town of Framingham
150 Concord Street
Room 127
Framingham, MA 01701

Appearances for Union (Laborers):

2. Richard Fairbrothers, Esq.
Counsel
Joseph P. Pavone, Jr.
Field Representative
Mass. Laborers' District
Council of the Laborers'
International Union of
North America, AFL-CIO
7 Laborers' Way
Hopkington, MA 01748

Appearance for Department of
Labor and Industries:

1. Robert J. Prezioso
Director of Statistics
Department of Labor
and Industries

DECISION OF DEPARTMENT OF LABOR AND INDUSTRIES

Pursuant to Mass. Gen. Laws ch. 149, § 27A, the undersigned,
as designee of the Commissioner of the Department of Labor and

Industries ("DLI"), conducted a hearing on July 19, 1995 at DLI's offices at 100 Cambridge Street, Room 1107, Boston, MA. The subject of the hearing concerned an appeal brought by Tom Landry on behalf of the Town of Framingham (the "Town") contesting a wage determination made by DLI concerning a bid proposal for landscape maintenance services to be performed at a property owned by the Town (the "Project").

The Town asserts that the Project does not constitute "public works" for purposes of Massachusetts's prevailing wage laws. The Town argues that, therefore, DLI exceeded its statutory authority by issuing a prevailing wage schedule for the Project which includes a wage rate for the job classification of "landscaper."

STATEMENT OF THE FACTS

In early June 1995, the Town advertised an invitation for bids for landscape maintenance services to be performed at the former Cushing Hospital, a property recently acquired by the Town. The vast majority of the Town's landscape maintenance work had been performed in-house by the Town's Park and Recreation Department. However, the 50 acre Cushing Hospital property is too large for the Park and Recreation Department to effectively maintain itself, so the Town decided to hire a private landscaping contractor to perform the work.

Included among the bid documents which were made available to prospective bidders were specifications for the project (the "Specifications"). Section 1 of the Specifications entitled

"Scope of Services," sets forth the activities that the successful bidder will be required to perform: 1) cut the grass; 2) remove fallen leaves from the grounds; 3) trim the grass along fences, trees, buildings, poles, and other structures; and 4) trim and remove saplings along fences, poles, and buildings.

On June 22, 1995, the Town filed with DLI an appeal, pursuant to Mass. Gen. Laws ch. 149, § 27A, contesting DLI's determination that the landscape maintenance work at issue is subject to Massachusetts's prevailing wage requirements.

ANALYSIS

Mass. Gen. Laws ch. 149, § 26 requires the Commissioner of DLI to set hourly wage rates which must be paid to "mechanics and apprentices, teamsters, chauffeurs and laborers" who are employed "in the construction of public works." As the Supreme Judicial Court noted in Construction Industries of Massachusetts v. Commissioner of Labor and Industries, 406 Mass. 162, 167 (1989), based on the language of the statute, the Commissioner has authority to issue wage rates for a particular project only if the following two requirements are met: 1) that the workers hired for the project are "mechanics, apprentices, teamsters, chauffeurs, or laborers" and 2) that the workers are employed "in the construction of public works."

The Town does not dispute that employees who perform landscape maintenance work are "laborers" for purposes of the statute. Instead, the Town argues that the work in question, as outlined in the Specifications, is not the "construction of

public works" and is therefore not subject to the statute's prevailing wage requirements. I agree.

The Massachusetts prevailing wage law, Mass. Gen. Laws ch. 149, § 26 through 27H, does not contain an explicit definition of "public works construction." However, § 27D does provide some guidance on this issue:

Wherever used in sections twenty-six to twenty-seven C, inclusive, the words "construction" and "constructed" as applied to public buildings and public works shall include additions to and alterations of public buildings and public works, the installation of resilient flooring in, and the painting of, public buildings and public works; certain work done preliminary to the construction of public works, namely, soil explorations, test borings and demolition of structures incidental to site clearance and right of way clearance; and the demolition of any building or other structure ordered by a public authority for the preservation of public health or public safety.

Landscape maintenance is not mentioned among the list of activities in § 27D which the legislature delineated as constituting public works construction. Moreover, the primary activities to be performed under the Town's landscape services contract will be mowing and trimming grass and removing fallen leaves from the grounds. These activities can hardly be considered an "addition or alteration" to a public building or public work, as specified in § 27D.¹

The only specific reference to maintenance work contained in the Commonwealth's prevailing wage law is found in ch. 149,

¹In contrast, the grading of soil and the installation of trees, shrubs, grass, and other plants on publicly owned grounds may be considered an alteration of a public works for purposes of the statute. However, these landscaping activities do not appear to be included in the scope of the work for the Project.

§ 27H, which states that the prevailing wage rate must be paid to employees performing cleaning and maintenance on public facilities. Unlike § 26, there is no requirement in § 27H that ~~the employees in question be engaged in the construction of~~ public works in order for the prevailing wage requirements to be applicable. However, § 27H, by its terms, is limited to contracts entered into or given by the Commonwealth.² Since the Town is not an agency of the Commonwealth, § 27H is inapplicable to the Project.

²Mass. Gen. Laws ch. 149, § 27H states, in relevant part:

No agreement or contract providing for the cleaning and maintenance of public buildings or space rented by the commonwealth shall be entered into or given by the commonwealth unless said contract or agreement contains a stipulation requiring prescribed rates of wages, as determined by the commissioner, to be paid to the employees of the maintenance or cleaning contractor. . . .

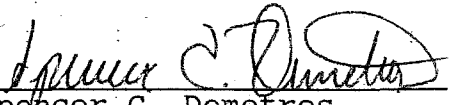
CONCLUSION

For the foregoing reasons, the employees who will be hired to perform the landscape maintenance services as outlined in the Specifications will not be engaged "in the construction of public works." Therefore, the initial determination made by DLI that the work in question is subject to the Commonwealth's prevailing wage requirements is hereby reversed and the wage schedule issued for the Project shall be deemed null and void.

Dated: July 25, 1995

DEPT. OF LABOR AND INDUSTRIES

By:



Spencer C. Demetros

General Counsel

Dept. of Labor and Industries