



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
DEPARTMENT OF LABOR STANDARDS

CHARLES D. BAKER
GOVERNOR

KARYN E. POLITO
LIEUTENANT GOVERNOR

RONALD L. WALKER, II
SECRETARY

WILLIAM D. MCKINNEY
DIRECTOR

December 22, 2015

Opinion Letter

PW 2015-12.22.15

Re: Construction of Athletic Facility for Charter School

Dear XXXXXX,

This letter is written in response to your request for an opinion from the Department of Labor Standards regarding the applicability of the Prevailing Wage Law, G.L. c. 149, §§ 26 & 27 to the private construction of a multi-purpose athletic facility on privately owned property which will be leased to a charter school.

By its terms, the Prevailing Wage Law only applies to "construction of public works by the commonwealth, or by a county, town, authority or district"¹ Determining whether a project is governed by the statute requires a simple three-pronged inquiry:

- 1.) Is the project "construction"?
- 2.) Is the Project "public works"? and,
- 3.) Is the project being undertaken by a "public entity"?²

The Prevailing Wage Law is triggered when all three questions are answered in the affirmative and more often than not, the answers are obvious and straight forward.

"Construction" is defined by statute. G.L. c. 149, § 27D.³ The proposed building of a multipurpose athletic facility in this instance is obviously "construction".

¹ M.G.L. c. 149, § 26

² The Prevailing Wage Law only applies to construction of public works done by the commonwealth, or by a county, town, authority or district as well as their contractors and subcontractors (herein referred to in the aggregate as "public entities")

³ Section 27D. 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 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.

The prevailing wage statute does not define “public works” yet the term can be reasonably interpreted using the definitions provided in the dictionary and by looking to how the federal government defines the work covered by the federal version of the Prevailing Wage Law known as the Davis-Bacon Act (“DBA”).⁴ Although the outside parameter of an interpreted “public works” definition may blend from black-and-white to grey, at the core, the term covers the construction, alteration, or maintenance of public buildings, monuments and infrastructure intended for public use or enjoyment. According to the Massachusetts Appeals Court, “The core concept of ‘public works’, in Massachusetts and elsewhere, is commonly expressed as involving the creation of public improvements having a nexus to land, such as a building, road, sewerage or waterworks facility, bridge, or park.” Perlera v. Vining Disposal Service, Inc., 47 Mass. App. Ct. 491 (1999).⁵ The building of, or addition to, a public school is unquestionably “public works”; and, a charter school is a public school.⁶ Thus, the construction of the proposed multiuse athletic facility on private land, to be leased and used by a charter school, is “public works”. However, the DLS analysis cannot end without answering the third jurisdictional question as not all construction of public works is governed by G.L. c. 149, § 27; rather, only public works constructed by *public entities* are required to adhere to prevailing wage standards.

Massachusetts enacted its first Prevailing Wage Law way back in 1914, but it was based on a rationale that still applies today: that is, that the government should use *its substantial buying power* to enhance the welfare of workers and their families, encourage a highly skilled workforce to build and maintain the state’s infrastructure, and promote competition among bidders for public projects based on skill and efficiency not on lowering workers’ wages simply to cut costs. But, the prevailing wage law rightfully does not assume that private individuals or companies have the same *buying power* as the government, nor does it impose on private builders the requirement that they pay prevailing wages even though they may construct “public works”.⁷ Before DLS can determine the applicability of G.L. c. 149, §§ 26 & 27 it has to determine whether the project is being constructed by a *public* rather than a *private* entity.

Though often clear, the answer to this final inquiry can get clouded; fortunately the Supreme Judicial Court has offered some guidelines on whether a project is construction by a public entity in the context of privately owned property leased to a

⁴ Webster’s Third New International Dictionary of the English Language Unabridged© 1981 defines **Public Works** as ; fixed works (as school, highways, docks) constructed for public use or enjoyment esp. when financed and owned by the government...

The Federal DOL regulation defining “public work” for purposes of the DBA states:
The term public building or public work includes building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency. 29 C.F.R. § 5.2(k).

⁵ This language is cited in DLS Opinion Letter PW-2012-02-02.22.12

⁶ G.L. c. 71, §89(c), 603 CMR 1.02

⁷ Opinion Letter dated September 1, 2006 to Murray. Although painting of Town Hall is “construction” of “public works” where it is performed by a private trust without the use of public funds, “the work is not being done ‘by’ the town...the prevailing wage law does not apply.”

public entity such as we have here. In Brasi Development Corp v. Attorney General, 456 Mass. 684 (2010) the court suggested considering various factor to make such a determination, an approach it deemed a “totality of the circumstances test”. DLS has adopted this approach and considers, on a case-by-case basis, all relevant factors bearing on this issue including: whether any public entities are parties or guarantors of the construction contract, whether the project is privately or publicly funded, the degree of control which the public leasee retains over the design and construction process, whether the leasee is required to approve any requisitions for payment, the length of the proposed lease, the terms of any options to purchase the property at the end of the leased period, whether any portion of the lease payments are allocated to cover the cost of construction, whether the facility is of a specialized nature that would render it unsuitable for another commercial purpose without significant renovations at the end of the lease, and whether the leasee is responsible for reimbursement of any construction costs in the event of an early termination of the lease.

I summarize the case-specifics facts that relate to this final inquiry. XXXXX is a thirty acre, *privately owned* multi-building, multi-use site located on Salem’s historic waterfront.⁸ The present owner is XXXX. XXXX (hereinafter “the owner”) has owned the property in various capacities since he first acquired it in 1958, approximately five years after the old mill there closed. Over the years, he has adapted and leased spaces at the Park for a variety of uses including office, commercial, research and development, manufacturing, storage and warehouse space. Over the course of this owner’s lengthy tenure, there has been a revolving list of tenants too long to list. Presently, over 100 tenants lease space at XXXXX, the charter school at issue is only one of them. The owner has commissioned his contractor to design and build a “multi-purpose” athletic facility on the site that he wants to lease to the school for 15 years. The owner is bearing all the costs of construction without any contribution from the charter school or other public funding entity. And, as he is reluctant to construct something that could not be easily adapted for use by future tenants, the owner is retaining all design control and is contemplating a space that may be easily retrofitted for other uses down the road. The tenant has no rights to approve plans, oversee construction, or approve requisitions for payment. The risks and costs of construction shall be borne solely by the owner.

The charter school’s lease will not commence until *after* the construction has been completed. Neither the school nor any other public-funding entity will be guarantying any construction-related loans or financing. All ancillary expenses related to the project, including the retention of an engineer for site planning and attorneys for zoning approval are to be borne exclusively by the owner without any right of contribution from the charter school

⁸ *The site was first developed as a textile mill and operated by the Naumkeag Steam Cotton Company. Locally, the area was referred to as the “Pequot Mills” because the textiles produced there were marketed under the “Pequot” brand name. The mills operated continually on the site from approximately 1845 until 1953 with one historically noteworthy exception being the period of time immediately following the Great Salem Fire of 1914 as the mills were not spared from the devastation that leveled much of the city. After the fire, the Naumkeag Steam Cotton Company rebuilt the buildings out of steel reinforced concrete, which have endured to this day*

After the project is completed, the charter school is expected to lease the space. The anticipated lease shall provide for rent at the fair market value and shall not be tied in any way to the costs of construction. The lease shall be for the modest time-period of 15 years. If the lease is terminated prior to the expiration of its full term, the tenant is not responsible for reimbursement of any construction related costs. At the end of the lease's term, the charter school *will not* have an option or right to purchase.

In stark contrast to the facts buttressing this department's opinion that a youth center in Andover was subject to the prevailing wage law⁹, the multiuse facility at issue here, will not be constructed on municipal property, nor will construction be supervised by any public entity, nor will the school be given the facility after the construction is complete (or at any other time). DLS has never held that the prevailing wage law extends to privately constructed projects on private property such as this one; and, DLS declines to do so here.

Considering all the factors surrounding this proposed construction, and intending to limit this decision to the specific facts of this particular project, DLS does not find sufficient funding, control, or oversight by the commonwealth, or by a county, town, authority or district to classify this project as one undertaken "by a public entity". Rather, this is a project being planned, financed and constructed by a private landowner on his own private property. Thus, DLS answers the third threshold question negatively, and completes the required analysis by concluding that this project is not subject to M.G.L. c. 149, §§26-27.

Sincerely,

John H. Ronan
General Counsel

⁹ PW-2007-03-7.23.07 In determining that the Town of Andover youth center project was a public works project subject to the prevailing wage law, the department considered that the center was being built on town property, was being overseen by town staff, and would be turned over to the town upon completion of the project. It concluded that goal of the project was to build a youth center that would be owned, operated and staffed by the Town for years to come.