

Prevailing Wage Opinion Letter 07-09-07

I am writing in response to your request for this Office's written opinion regarding the applicability of the Massachusetts Prevailing Wage Law, G.L. c. 149, §§26-27. Specifically, you have asked if the prevailing wage law applies to contracts to renovate or construct residential housing funded through a federal program administered by the U.S. Department of Housing and Urban Development (HUD).

As I understand it, the City of XXXX participates in the Home Investment Partnerships Program (HOME), 29 C.F.R. §92.1 et seq. Through this program, the city receives funds to renovate and/or construct affordable residential housing on city-owned properties. The City procures the design and construction services in accordance with both federal and state procurement laws. [1] The projects are 100-percent federally funded through HOME. Once the project is complete, the City offers the units for sale to low-income eligible homebuyers through a lottery system. Proceeds from the sales are returned to the program for use on future HOME projects.

The Massachusetts prevailing wage law applies to the construction of public works by the commonwealth, or by a county, town, authority or district. G.L. c. 149, §§26, 27. Therefore, to determine whether the prevailing wage law applies to a particular project, this agency considers the following questions: 1) is the project "construction", as defined in G.L. c. 149, §27D [2]; 2) is the project a "public work"; and 3) is the project being undertaken by a public entity subject to the statute? In this instance, the renovation/construction work is clearly "construction" within the meaning of the statute, and the city is also contracting for the work [3]; therefore, the remaining question is whether these projects constitute "public work."

While the prevailing wage statute does not define "public work", this agency looks to relevant factors such as whether the property is publicly owned, and if public funds are being utilized. In this instance, the properties involved are all owned by the city at the time of construction. In fact, the City selects the designer, contracts for the work, and monitors the project as it would any other municipal construction contract. While state and local funds are not utilized for these projects, the HOME and HUD regulations clearly contemplate compliance with state procurement laws in the use of the federal funding. Given these facts, we do not see the use of federal funds as altering the status of what appears otherwise to be a "public work" *Cf. Norfolk Electric, Inc. v. Fall River Housing Authority*, 417 Mass. 207, 213-214 (1994) (receipt of federal funds, without more, does not suffice to convert a local governmental entity into an agent of the Federal government; the entity must still comply with the state competitive bidding laws).

Given that these municipal construction contracts are procured by the city, and performed on city-owned property, it is this agency's determination that the prevailing wage law applies to these projects.

I hope this information has been helpful. If you have any further questions, please feel free to contact me.

Sincerely,
Lisa C. Price
Deputy General Counsel

[1] The HOME regulations require that participating jurisdictions select contractors "through applicable procurement procedures and requirements." 24 C.F.R. §92.504(c)(4). The City provided this Office with HUD procurement standards it utilizes, which include a requirement that grantees "use their own procurement procedures which reflect applicable State and local laws and regulations provided that the procurements conform to Federal law and standards" 24 C.F.R. §85.36(b). Additionally, every contract for construction of housing that includes 12 or more units must also contain a requirement to pay prevailing wages pursuant to the Davis-Bacon Act. 24 C.F.R. §92.354(a).

[2] The term "construction" is defined, in pertinent part, as "additions to and alterations of public works." G.L. c. 149, §27D.

[3] Your letter references a DOS letter opinion regarding federally-aided projects; however, please note that this opinion concerns a different prevailing wage law, G.L. c. 121B, §29, that is applicable only to housing authorities.