

August 31, 2012

I write in response to your letter requesting that the Department of Labor Standards ("DLS") reconsider its decision in which it concluded that the Massachusetts Prevailing Wage Law, M.G.L. c. 149, §§ 26 to 27, applied to the drainage improvement, resurfacing, ADA compliance and gate installation project at the High School Tennis Courts. DLS has determined, after careful consideration of the facts and information submitted by the XXXXXXXXX, that the Prevailing Wage Law applies to the project. Our analysis is set forth below.

The School Department owns a number of tennis courts located on the campus of the Middle and High School. The tennis courts are used by students as part of the school's athletic curriculum. The courts are also used by members of the public. According to the letter submitted by School Superintendent XXXX, the tennis courts are in need of the above-listed improvements, but the school lacks funding to construct the improvements. Your private organization offered to construct the needed improvements to the tennis courts through a combination of private grant funds, membership contributions and other sources. In addition, the Schools are contributing \$10,000 in funding toward the drainage improvement portion of the project. The construction contract will be bid and awarded by the private organization. The private organization will also be overseeing the construction process. Although the information was not provided to DLS, we assume that the Schools will continue to own, operate, insure and otherwise maintain the tennis courts.

Analysis

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. Accordingly, in determining the applicability of the prevailing wage law to a particular project this agency considers the following questions: 1) is the project "construction", within the meaning of the statute; 2) is the project a "public work" within the meaning of the statute; and 3) is the project being undertaken by a public entity subject to the statute. In general, consideration of whether a project constitutes construction is fairly straightforward. However, in the context of projects which include both public and private elements, such as construction or renovation of a public structure or facility with private funds, the analysis of whether the project is a "public works" project and whether it is being undertaken "by the commonwealth, or by a county, town, authority or district" can be more complex.

In a situation such as the resurfacing of a public school tennis court by a private party, such as your organization, the improvements to the school tennis courts are "construction" within the plain meaning of the statute.¹ What remains to be analyzed is whether such a construction project constitutes a "public work" being undertaken by a public entity, subject to the statute.

Is the resurfacing of school owned tennis courts, by a private entity, using both public and private funding, subject to the Prevailing Wage Law? 2

The term "public work" is not defined in the Massachusetts prevailing wage statute, nor in its decisional law. However, a number of cases have discussed the term in the context of application of public bidding statutes as well as application of the prevailing wage laws. In *Commonwealth v. W. Barrington Co.*, 5 Mass. App. Ct. 416 (1977), the Court held that street sweeping was "public work" within the meaning of G.L. c. 149, § 27F [requiring the payment of wages prescribed by the state commissioner of labor for any "order or requisition under which a truck or any automotive or other vehicle is to be engaged in public works."] In *Thorn Transit System International v. MBTA*, 40 Mass. App. Ct. 650 (1996), the Court held that alteration and remodeling work on rapid transit stations were encompassed within the term "public work" as used in the procurement statute, G.L. c. 30 § 39M, and thus the contract was governed by the statute.

In *Perlera v. Vining Disposal Service, Inc.*, 47 Mass. App. Ct. 491 (1999), a central issue was whether the term “public works”, as found in G.L. c. 149, § 27F (the prevailing wage law for non-construction public works projects), encompasses the municipal collection of refuse. The Appeals Court found that “the meaning of the phrase is somewhat elastic, expanding or contracting with the statutory context. 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* at 493-94. The *Perlera* court further found that “(a) second category of activities sometimes associated with ‘public works’ includes the work of maintaining or repairing such facilities.” *Perlera* at 494; see also G.L. c. 149, § 27D (painting of public works and public buildings subject to prevailing wage law); *Felix A. Marino Co. v Commissioner of Labor & Industries*, 426 Mass. 458 (1998) (road repairs are “construction of public works” under G.L. c. 149, § 26.) Additionally, the Court found that both federal and state legislatures, including Massachusetts, had at various times used the term “public works” even more broadly to include activities with “no immediate connection to fixed public improvements.” *Perlera* at 495 (citations omitted).³

In 2007, DLS employed a more nuanced analysis in determining that the Town of Andover youth center project was a public works project subject to the prevailing wage law. See DLS Opinion Letter PW-2007-03-7.23.07. In making its determination, DLS considered that, while the Town was not paying for the project out of public funds, and it would not be a party to the contract for construction, the project was to be constructed on property owned by the Town and Town staff was overseeing the construction work. In addition, the youth center would be turned over to the Town upon completion of the project. In sum, the ultimate goal of the project was to build a youth center that would be owned, operated and staffed by the Town for years to come. Accordingly, DLS determined that the project was a public works project being undertaken by the Town and the prevailing wage law applied.

Recently, the Massachusetts Supreme Judicial Court applied a similar analysis in formulating an approach to determine whether a project is construction of a building by a public agency. In *Brasi Development Corp. v. Attorney General*, 456 Mass. 684 (2010), the Court held that the state bid laws applied to the construction with public funds of a University of Massachusetts dormitory project on private property because the project constituted “construction of a building undertaken by a public agency under Massachusetts’ [bidding] law.” *Ibid.*

The Court concluded that, going forward, it would employ a “totality of the circumstances” test in determining whether projects with both public and private elements were subject to the bid laws. See *Brasi* at 696.

DLS, in its role as the agency charged with interpreting the prevailing wage law, proposes to apply a “totality of the circumstances” analysis that follows the approach adopted in the above-discussed cases to determine whether the resurfacing of public tennis courts with both public and private funds, by a private entity, is subject to the prevailing wage laws.

With respect to determining whether the project is a “public work” being undertaken by a public entity, DLS will consider the following criteria:

1. That the property involved is owned by a public entity;
2. Whether any public funds will be used to cover the construction costs;
3. Whether the structure is owned by the public entity;
4. Whether the structure will be used for a public purpose and be operated and maintained by the public entity;
6. The degree of control which the public entity maintains over the design and construction process, including approval of plans, oversight of construction, approval of requisitions for payment; and
7. Other relevant factors.

The Middle and High School tennis courts are owned and operated by the School Department and located on the Middle and High School campus. Ten thousand dollars of school department funding will be used to cover the approximate \$83,000 cost of the project. The tennis courts will be used for a public purpose - athletic curriculum for the students and general use by the public. The school is responsible for maintain of the courts. Though the school does not maintain any control over the design and construction process, because the project involves only resurfacing, drainage and addition of ADA access, as opposed to the base build construction at issue in the Town of Andover opinion letter and Brasicase, discussed above, that factor is given less weight as the level of supervision of a resurfacing and drainage project is substantially less than the construction of a building. Thus, the totality of the circumstances supports the application of the prevailing wage law to the project.

In sum, I uphold the earlier decision of this agency that the prevailing wage law applies to the project at the Middle and High School.

Sincerely,

Heather E. Rowe

Director

1 See DLS Opinion Letter to Richard D. Wayne, dated November 12, 1999, explaining that application of paint and other substances to roads, highways, parking lots, playgrounds and other surfaces are public works projects under the Massachusetts Prevailing Wage Law.

2 DLS recognizes that the analysis of whether a project is being undertaken by a public entity necessarily overlaps with the analysis of whether the project constitutes a “public work” within the meaning of the prevailing wage statute. DLS proposes to combine the two analyses in the context of the renovation or construction by a private entity of a public structure.

3 The Davis-Bacon Act defines “public buildings or public works” as construction work that 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 it has title to the property or another party. Similarly, the term under the Miller Act has been defined as projects “constructed or carried on...with public aid to serve the interest of the general public.” New York and Wisconsin Courts approach the question by requiring a fact specific analysis of the project including “the nature and character of the project, the ownership, use and maintenance of the project, and whether the work is being performed for the municipality.” Perlera at 495.

4 In April of 2011, the former Division of Occupational Safety was renamed the Department of Labor Standards. See Chapter 3 of the Acts of 2011 “An Act Reorganizing the Executive Office of Labor and Workforce Development.”