

## **Prevailing Wage Program Opinion Letter September 30, 2013**

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Re: Construction by Private, Non-Profit Organization Lessee of a Public Building

Dear XYZ:

XYZ (a 501(c)3 non-profit organization) currently leases a retired Fire Station owned by the Town of XXXXX and wishes to make structural modifications to the facility. XYZ recently inquired as to whether the Prevailing Wage applies to the work required for the modifications. In this instance, this is a private, non-profit organization performing construction on a building it leases from the Town utilizing private funds. The Prevailing Wage applies in this instance because the Town limited the award of the lease only to non-profits operating YYY, and the building requires alteration to conform with that prescribed purpose. The Department of Labor Standards' (DLS) analysis follows.

### **Background**

In January 2013, the Town of XXXXX (the "Town") released an RFP seeking bids for a non-profit organization to occupy a town-owned retired Fire Station (the "Property") for the sole purpose of operating a YYY. XYZ, a non-profit organization, won this bid.

Under the terms of the RFP and subsequent lease agreement, XYZ would make a one-time rent payment to the Town in the amount of \$20,000. The Town would use these funds to relocate the city's building workshop out of the Property. The lease would then take effect ninety days after the Town's receipt of those funds, allowing XYZ to make any structural improvements or modifications to the Property as necessary for the operation of the YYY, provided that such modifications are first approved by the Town. Any subsequent alterations to the Property may not be performed without the advance consent of the Town (in the case of construction) or 30-days prior notice (in the case of non-structural alterations). In either case, the Town reserves the right, in its sole discretion, to allow or disallow alterations, for any or no reason.

The lease further provides that the facility may be used only for the purposes of YYY, and during the five-year lease all maintenance and upkeep of the Property are the sole responsibility of XYZ. Other than the up-front \$20,000, XYZ will owe no further amount in rent to the Town during its five-year lease. At the conclusion of the five years, the Town may, in its sole discretion, renew the lease once. After ten years of occupancy, however, the Town will re-issue the RFP and allow bids to other organizations.

XYZ has contacted DLS for clarification as to whether proposed alterations to the Property, including an addition to the structure, require the payment of the prevailing wage. DLS requested RFP and lease information from the Town, who submitted such documents with the following statement:

"It should be understood that these improvements were not initiated by the Town and they do not serve any particular purpose to the Town as the property owner. The improvements, including a potential addition, are desired by XYZ to further their objectives in providing YYY."[\[1\]](#)

## Discussion

The Massachusetts Prevailing Wage law applies to the construction of public works by the Commonwealth, or by a county, town, authority or district.[\[2\]](#) When determining whether the prevailing wage applies to any particular project, DLS considers the following:

1. Whether the project is “Construction” under its definition within the statute;
2. Whether the project is a “Public Work” under its definition within the statute; and
3. Whether the project is being undertaken by a public entity subject to the statute.[\[3\]](#)

In this situation, the structural alteration of a building is undoubtedly construction activity. While “Public Work” is not specifically defined in the statute, the courts have expressed it as “public improvements having a nexus to land, such as a building.”[\[4\]](#) A public work would thus include “the actual physical “construction” (including reconstruction, alteration, maintenance, remodeling or repair) of public buildings ... by the Commonwealth or one of its subdivisions.”[\[5\]](#) In this situation, the Property is owned by a public entity, the Town of XXXXX, and such alteration would occur to the publicly owned building. Thus, the remaining question is whether the project is being undertaken by the Town for public works purposes.

## Standard of Review

In 2010, the Massachusetts Supreme Judicial Court stated it would utilize a “totality of the circumstances” analysis for all cases involving projects with both public and private elements.[\[6\]](#) DLS subsequently proposed a “totality of the circumstances” analysis to bring its interpretations in line with the Court’s cases.[\[7\]](#) In doing so, DLS outlined generally six questions it would use in its evaluations:

1. Whether the property involved is owned by a public entity;
2. Whether the structure is owned by the public entity;
3. Whether any public funds will be used to cover the construction costs;
4. Whether the structure will be used for a public purpose and be operated and maintained by the public entity;
5. The degree of control the public entity maintains over the design and construction process, including approval of plans, oversight of construction, approval of requisitions for payment; and
6. Any other relevant factors.[\[8\]](#)

## Relevant Previous Opinions Regarding Prevailing Wage

The following Advisory Opinions have been issued under fact patterns similar or otherwise relevant to those faced by XYZ:

**Middleborough**[\[9\]](#): In 2006, the Division of Occupational Safety indicated that the painting of the Middleborough Town Hall, where such painting is done at the unsolicited request of a private Trust and where no public employees or funds would be utilized, was not subject to the prevailing wage. It indicated that the work was not being done “by” the town, and thus fails the requirement under the statute that prevailing wage apply only to projects done by a public entity.

**Andover**[\[10\]](#): In 2007, DLS found that where the Town of Andover entered into an agreement with a non-profit organization to build a youth center on town-owned land, the construction workers were entitled to the prevailing wage. In their request, Andover indicated that it planned to use an RFP process to select the youth organization that would build the youth center. The RFP indicated a significant number of specifications and conditions on the organization that would ultimately win the bid, including square

footage, site plans, and an oversight process to be administered by the Board of Selectmen. This was determined to be, “in essence, [a call for construction of a public work by a public entity.]”

**Lee[11]:** In 2012, DLS determined where a private community organization undertakes the construction improvements of a public high school’s tennis courts, where such construction is paid via a combination of private grants, private donations and funds from the public school district, the prevailing wage applies. The opinion discusses the fact that the tennis courts would continue to be owned, operated and maintained by the school district, for use by students and the general public, and thus under the totality of the circumstances is more akin to public work by a public entity than not.

## **Application of Standard**

There is no question in this case that the property and structure are both owned by the Town of XXXXX. Likewise, it appears that no public funds will be used in the construction or maintenance: the RFP requires that XYZ pay up-front the costs the Town would have in relocating the Property’s current occupants, and the costs to alter and maintain the premises during the lease period. The primary question is whether the alterations are being done by the Town, and whether the structure will be used for a public purpose.

The Town frames its role as that of a disinterested landlord. They indicate that the proposed alterations to the Property are “not being initiated by the Town” and that they “do not serve any particular purpose to the Town as the property owner.”[12] However, the Town at least contemplated that construction would need to be performed on the building given its prior function as a building maintenance workshop.[13] While the specific alterations may not have been requested by the Town itself, they logically follow the Town’s prescription that the Property lease only be awarded to a non-profit organization for the use of YYY activities.

In this way, the proposed construction by the XYZ is substantially similar to the construction of the youth center in our Andover opinion.[14] In Andover, the Town placed significant restrictions on the award recipient related to the construction of the youth center. In this way, DLS determined that such Town involvement in the process amounted to, “in essence, a call for construction of a public work by public entity.”[15] Likewise, XXXXX did not choose to release an RFP for the rental of their property for any purpose: they specifically directed that its award recipient utilize the property as only a YYY. Thus, in essence, XXXXX made a call for the operation of a specific service to the public benefit, to be performed by a private entity in a public space, who would then assume all costs necessary in preparing that space for the service.

The Town’s prescription of the activities to be performed in the Property can be contrasted with the Middleborough opinion, where an unsolicited third party paid for the repainting of a public building.[16] Here, the Town specifically has requested the activities within its building, and requires Town notification and approval before any construction or alteration can be performed. As such, unlike Middleborough, it is the actions of the Town that have brought rise to the construction activities, and not the unrequested actions of a third party.

Finally, the Andover[17] and Lee[18] opinions placed particular weight in the use of public resources, namely staff time, as a factor in their analysis. While, at least during the term of the lease, the Town will not be assuming direct construction costs of the building (whether measured in dollars or wages of public employees engaged in oversight), upon the completion of the five-year lease the building will remain in the ownership and control of the Town. Thus, the alterations made by the XYZ in order to comply with its mandate to operate a YYYY on the Property are similar to the construction of the Andover Youth Center and the improvements to the Lee Tennis Courts: in all situations the towns will be assuming or reassuming

control, oversight and maintenance of the properties at some point after construction. In XXXXX, the only difference is that the Town is delegating such operations to third parties via an RFP process.

## Conclusion

The Prevailing Wage applies to the construction activities performed on the XXXXX Fire House by XYZ. While no public funds are being utilized on the proposed construction and the Town has not directly requested the alterations, the XYZ's structural alterations are being made in order to comply with the requirements of the public award it won: the operation of a YYY within a public building. In this way, the Town is acting less as a disinterested landlord and more as the awarding authority in a public contract. Because the RFP pre-determined that all operations within the public building must be for the purposes of running a YYY, and alterations of the space are contemplated in both the RFP and the lease given its prior purposes as a building workshop, the construction by XYZ is a public work on a public building done at the behest of a public entity.

Sincerely,  
Heather Rowe  
Director

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[1] E-mail from [Assistant Town Administrator], August 29, 2013.

[2] M.G.L. c. 149 §§ 26, 27.

[3] *Letter to Lahey*, [DLS Opinion Letter PW-2012-03-08.31.12](#).

[4] *Perlera v. Vining Disposal Service*, 47 Mass. App. Ct. 491, 493-4 (1999).

[5] *Andover Consultants, Inc. v. Lawrence*, 10 Mass. App. Ct. 156, 160 (Mass. App. Ct. 1980) (discussing “public works” in the context of Massachusetts bidding laws).

[6] *Brasi Development Corp. v. Attorney General*, 456 Mass. 684, 696 (2010).

[7] *Letter to Lahey*, DLS Opinion Letter [PW-2012-03-08.31.12](#) at page 4.

[8] *Id.* See also *Construction of Leasehold Space in Private Buildings by Charter Schools for the Purpose of Use as a School*, DLS Opinion Letter [PW-2012-02-02.22.12](#).

[9] *Letter to Murray, Town of Middleborough*, DOS Opinion Letter, September 1, 2006.

[10] *Letter to Stapczynski, Town of Andover*, DLS Opinion Letter [PW-2007-03-7.23.07](#).

[11] *Letter to Lahey*, DLS Opinion Letter [PW-2012-03-08.31.12](#).

[12] E-mail from [Assistant Town Administrator], August 29, 2013.

[13] Town of XXXXX RFP #: 001, Section III.

[14] *Letter to Stapczynski, Town of Andover*, DLS Opinion Letter [PW-2007-03-7.23.07](#).

[15] *Id.*

[16] *Letter to Murray, Town of Middleborough*, DOS Opinion Letter, September 1, 2006.

[17] *Letter to Stapczynski, Town of Andover*, DLS Opinion Letter [PW-2007-03-7.23.07](#).

[18] *Letter to Lahey*, DLS Opinion Letter [PW-2012-03-08.31.12](#).