



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

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Opinion Letter
PW-2013-03-11.01.13

November 1, 2013

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RE: Applicability of the Massachusetts' Prevailing Wage Law to Pre-Fabrication Work

Attorneys Siegel and Groner:

The Department of Labor Standards writes in response to your request for guidance under the Massachusetts' Prevailing Wage Law, G.L. c. 149, §§ 26 and 27 (the "Law") on behalf of your client, the Massachusetts Building Trades Council. You requested an opinion regarding whether custom pre-fabrication work, specifically, the off-site assemblage of architecturally custom-designed components of building systems that traditionally were constructed on-site is subject to the Law.

Your letter dated June 18, 2013, describes a construction method that is being used more frequently in the construction field. This new technology-driven method allows certain tasks that have been traditionally performed on-site to be moved off-site with the assistance of computer software known as "building information modeling" or BIM. BIM allows for the construction of custom-made component parts away from the traditional construction site. BIM takes specific blueprints from an architect/engineer and determines the dimensions of the component parts for construction on a particular project.

The term "construction" under the Law has a broad meaning. Here, the creation of custom component parts is distinguishable from off-the-shelf parts that can be used on any construction project and, accordingly, these tailor-made components (that are traditionally measured, cut, designed, etc. at the worksite) should be considered "construction" within the meaning and spirit of the Law. Indeed, DLS has previously held that the assembly of chemical tanks that were to be installed later at a construction site is "construction" under the Law and subject to the prevailing wage. See letter to Kann and Kelly, "Re: Pittsburg Tank & Tower Co." (Oct. 28, 1994).

Increasingly, however, the distinction between “on-site” work and “off-site” work is not a determining factor in whether work is covered by the Law because such a distinction can be too rigid in analyzing if the purpose of the Law is being met. The Supreme Judicial Court’s decisions in *Construction Industries of Massachusetts v. Commissioner of Labor and Industries*, 406 Mass. 162 (1989) (“CIM”) and, the companion case, *Teamsters Joint Council No.10 v. Director of the Department of Labor and Workforce Development*, 447 Mass. 100, (2006), found that the word “site,” as used in the Law, includes a location designated by the contractor as a “holding” or a “waiting” area, which may or may not be within the physical limits of the project. In reaching its conclusion, the Court reasoned that the statute speaks of “construction of public work or on said works;” the Court continued, “When the performance of a statutorily specified job has a significant connection with the construction project, then that job falls within the domain of the posted wage statute.” In other words there needs to be a “significant nexus” with the public works project. CIM, 406 Mass. 162, 168.

In a recent DLS opinion letter, PW-2012-01-02.22.12 (2012), quoting the court in *Kuehl, et. al. v. D & R Paving, LLC*, Superior Court No. 2009-0602-A, at *5 (2009), it is stated that “the statute speaks ‘not of work within the physical limits of the job site, but rather in the construction of public work or on said works. Rather than location, these phrases describe the purpose of the work performed.’”

Accordingly, the assemblage and prefabrication of custom designed components (such as plumbing, electrical conduits, air ducts, and other blueprint-specific pre-fabrication that customarily took place on the job-site) which are only useful for the particular project are subject to the Law as there is a ‘significant nexus’ between the work performed and the construction project.

The Law is meant to protect workers and employers, and as technology evolves that also protects workers and employers by increasing safety and productivity, so, too, should the Law evolve to ensure public works projects are staying true to their statutory mandates. As such, DLS issues its opinion that such custom construction work that was previously done on-site is still covered under the Law, even if technology now allows for some of that custom construction to take place off-site.

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

Sincerely,



Heather Rowe
Director

CC: Jocelyn Jones, Deputy Chief & Special Counsel for Fair Labor Policy, Fair Labor Division,
Office of the Massachusetts Attorney General