



The Commonwealth of Massachusetts
DEPARTMENT OF LABOR AND INDUSTRIES

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WILLIAM F. WELD
Governor

CHRISTINE E. MORRIS
Secretary of Labor
Commissioner

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August 31, 1995

In Re: WAGE DETERMINATION APPEAL

WASTE STREAM ENVIRONMENTAL, INC., and
N-VIRO INTERNATIONAL CORP.

DECISION OF THE DEPARTMENT OF LABOR AND INDUSTRIES

APPEARANCES

Robert Prezioso, Department of Labor and Industries

Chris Ravenscroft, Attorney for Waste Stream Environmental, Inc.

George Ravenscroft, Waste Stream Environmental, Inc.

Tom Gerard, Waste Stream Environmental, Inc.

Philip Cotnoir, New England Treatment Co.

Peter Doyle, Town of Barnstable

JURISDICTION

Pursuant to M.G.L. c. 149, § 27A, the undersigned, as designee of the Commissioner of the Department of Labor and Industries, conducted a hearing on August 29, 1995 at the offices of the Department of Labor and Industries ("DLI"), 100 Cambridge Street, Boston, Massachusetts. The subject of the hearing concerned an appeal brought by Waste Stream Environmental, Inc. and N-Viro International Corporation (collectively, the "Appealing Parties") contesting job classifications and wage determinations issued by DLI for a project designated, Transportation and Final Disposal of Sludge (the "Project"). Bids for the Project were solicited by the Water Pollution Control Division of the Department of Public Works in the Town of Barnstable (the "Awarding Authority").

FACTS

The Project was first advertised for bid on July 5, 1995. On July 27, 1995, the Awarding Authority requested a schedule of prevailing wage rates and job classifications from DLI which was supplied by the Department on or about that same date. An addendum to the bid specifications for the Project, adding DLI's schedule of wages and job classifications, was provided to bidders for the Project on August 1, 1995. Bids for the Project were opened on August 4, 1995. The Appealing Parties, through counsel, filed this appeal on August 7, 1995.

The Project entails the transportation and disposal of sludge on an as-needed basis. Approximately 600 dry tons of sludge per year is produced by the Awarding Authority's wastewater treatment plant. Bidders submitted unit prices to perform the work on a per dry ton basis and a per load basis.

ANALYSIS

The Commonwealth's prevailing wage law is found at Chapter 149 of the Massachusetts General Laws, sections 26-27H. In support of their appeal, the Appealing Parties initially suggest that the work in question is not "construction" as that term

appears in section 27, and as the term is defined in M.G.L. c. 149, § 27D. The Appealing Parties therefore contend that the portion of the prevailing wage law codified in section 27 of Chapter 149 is inapplicable.

Because the wage rates in question were issued by DLI pursuant to its authority under section 27F of Chapter 149 and not under section 27, the application of section 27 is not an issue in this appeal. Accordingly, the question of whether the work is "construction" within the meaning of section 27 or as defined in section 27D is not before us and, therefore, is not reached in this decision.

The Appealing Parties next contend that section 27F of chapter 149 is inapplicable. Section 27F provides, in pertinent part, as follows:

No agreement of lease, rental or other arrangement, and no order or requisition under which a truck or any automotive or other vehicle or equipment is to be engaged in public works by the commonwealth or by a county, city, town or district, shall be entered into or given by any public official or public body unless said agreement, order or requisition contains a stipulation requiring prescribed rates of wages, as determined by the [DLI] commissioner, to be paid to the operators of said trucks, vehicles or equipment. Any such agreement, order or requisition which does not contain said stipulation shall be invalid, and no payment shall be made thereunder. Said rates of wages shall be requested of said

commissioner by said public official or public body, and shall be furnished by the commissioner in a schedule containing the classifications of jobs, and the rate of wages to be paid for each job.

The schedule furnished to the Awarding Authority by DLI and which was included in the August 1 bid addendum was prepared pursuant to the terms of section 27F. Payment of prevailing wages under section 27F is based on two main requirements: (1) that there be an agreement of lease or rental, or other arrangement for a vehicle or equipment entered into by a public entity, and (2) that the vehicle or equipment be engaged in public works.

The Appealing Parties contend that the first requirement under section 27F is inapplicable because: "The Town's bid does not require rented equipment or provide for 'other arrangements', but rather a significantly more expansive service, the transportation and final disposal of the Town's sludge and all responsibilities attendant thereto." Appealing Parties Legal Memorandum (pages not numbered). The Appealing Parties also note that the requirement that the contractor carry insurance places the Project beyond the purview of section 27F. These arguments are not persuasive.

The bid specifications by their express terms require the contractor to "provide transport vehicle to haul sludge" and for the contractor to "provide documented evidence of the tank capacity (in gallons) of the transport vehicle used." The lack of a lease or

rental agreement memorializing the terms of the use of the transport vehicle is not dispositive because section 27F merely requires the awarding authority to enter into an "arrangement" for the use of a vehicle. Accordingly, the first requirement under section 27F is met in the instant case.

In analyzing the second prong under 27F, the "engaged in public works" requirement, there is only one reported appellate decision on point. In Commonwealth v. W. Barrington Company, Inc., 363 N.E. 2d 1120 (Mass. App. 1977), the Appeals Court was faced with a determination whether a contract to furnish street sweeping equipment and operators was within section 27F. The court in Barrington defined the "critical question" in the case as "whether the sweeping of public ways is 'public' work within the meaning of § 27F." Id. at 1122. In concluding that the work was within section 27F because it satisfied the "public works" requirement under that statutory provision, the court stated: "The sweeping of public ways by motorized equipment is a function...commonly performed by or under the direction of superintendents of streets and boards and departments of public works in cities and towns." Id.

In support of its holding, the court in Barrington also looked to the functions required to be carried out by the Commonwealth's Department of Public Works (now known as the Highway Department) as set forth in Chapter 81 of the General Laws, and noted that street sweeping "is a function akin to several of those which...the Commonwealth...is specifically required to perform in the maintenance of State

highways." Id.

Applying the Barrington criteria to the instant case yields a different result. Unrebutted evidence was produced at the hearing from the Appealing Parties and the Awarding Authority that the hauling and disposal of sludge has historically been performed by private contractors and not by or under the direction of municipal departments. The Awarding Authority's representative testified that the functions to be performed under the Project have never been carried out by employees of the Town of Barnstable or through the use of rented equipment under the direction of the Town of Barnstable.

Moreover, current practices regarding the disposal of sludge are recent in origin and largely performed by specialized private contractors. In the past, sludge disposal was achieved relatively inexpensively through landfill disposal. Dwindling landfill capacities and stricter environmental regulations require alternative and more sophisticated disposal methods.

Applying the criteria in the Barrington decision to the facts of the instant case, I conclude that the transportation and disposal of sludge as specified by the Project is not public works within the meaning of section 27F of Chapter 149, and that the Project is not covered by section 27F. This decision is narrow in scope and does not concern other work performed at wastewater treatment facilities or landfills that may be covered

by the Commonwealth's prevailing wage law.

Accordingly, the appeal is granted and the wage rates and job classifications for the instant Project, issued by DLI and contained in the Project's August 1, 1995 bid addendum, are hereby revoked.

DEPARTMENT OF LABOR AND INDUSTRIES

BY:



Terence P. McCourt, Deputy Secretary and General Counsel

Massachusetts Executive Office of Labor

DATE: 31 August 1995