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Re: Prevailing Wage; Title 5 Septic Systems

Dear Candace:

This letter responds to your request that, pursuant to its authority under Mass. Gen. Laws ch. 149, § 27, the Department of Labor and Industries ("DLI") determine whether the Massachusetts prevailing wage laws (Mass. Gen. Laws ch. 149, §§ 26 through 27H) apply to repair and replacement work which will be performed on residential septic systems as part of a financial assistance program administered by the Commonwealth's Department of Environmental Protection ("DEP").

1. Background.

As you are aware, recent amendments to Title 5 of the State Environmental Code, 310 CMR 15.000, require landowners to repair or replace failed on-site sewage treatment and disposal systems which may result in groundwater contamination. Pursuant to 1994 Mass. Acts ch. 85, § 2 (the "Funding Legislation"), the Legislature earmarked \$10,000,000 of state funds to assist homeowners in financing the cost of correcting the failed septic systems. The Funding Legislation states that, in allocating the funding, consideration should be given to "the financial needs of low and moderate income homeowners."

The Funding Legislation further provides that DEP is responsible for promulgating rules and regulations which govern the administration of the financial assistance program. In accordance with that authority, DEP promulgated 310 CMR 14.000 (the "DEP Regulations").

According to the DEP Regulations, municipalities may apply to DEP for funding in an amount not to exceed \$100,000 per municipality (310 CMR 14.11(2)). Priority in funding will be given to those municipalities with the fewest homes with sewers and the lowest household median incomes (310 CMR 14.11(1) and 14.17).

The DEP Regulations further provide that the municipalities which receive funding have the option of providing monies to eligible homeowners in one of two ways: 1) through a betterment program or 2) a loan program. If the municipality chooses the betterment program, the municipality -- as opposed to the homeowner -- hires a contractor to upgrade the septic systems of all of the homeowners who are chosen to receive financial assistance under the program. If the municipality opts for a loan program, homeowners will be given a loan in the amount of the proposed work and will be required to hire their own contractors to perform the work.

Whether a municipality chooses the betterment program or loan program, the homeowner is responsible for paying back the state funding used to finance the cost of the construction work. With the betterment program, the municipality must assess upon each homeowner the total cost of the repair or replacement of the homeowner's septic system plus interest at a rate of 5% (See Mass. Gen. Laws ch. 80, § 1; 310 CMR 14.12). Under the loan program, the interest rate will be established by DEP and may take into account the income level of the owner (310 CMR 14.12(4)). Except in cases of hardship, the amortization period for both betterments and loans is up to 10 years for contracts with a cost of \$5,000 or less, and up to 20 years for contracts with a cost in excess of \$5,000 (310 CMR 14.12(5)).

## 2. Betterment Program.

It is the determination of DLI that the septic system repair work under the betterment program is not covered by the Massachusetts prevailing wage requirements.

Mass. Gen. Laws ch. 149, § 26 requires the Commissioner of DLI to set hourly wage rates which must be paid to all tradesmen who are employed "in the construction of public works." For the reasons set forth below, the work at issue is not "public works" and is therefore not subject to the statutory prevailing wage requirements.

There appears to be no clear definition of "public works"

contained in the General Laws or in Massachusetts court decisions. However, given the absence of certain characteristics in the present case which are typical of all public projects, the betterment program at issue is more in the nature of a private undertaking and cannot be classified as a "public works" project regardless of the precise definition of that term which may be adopted.

First, the cost of the work itself is ultimately being paid by private homeowners. Although municipalities initially will pay the construction contractors with state funds, the homeowners will be assessed the full amount of those payments plus interest. Moreover, the cost of upgrading all of the septic systems eligible under the program will not be pooled and divided equally between homeowners. Instead, each homeowner will pay precisely the cost of repairing his or her own system.

Moreover, unlike a typical public project, in the present case, the participation of the public entity charged with administering the program has no effect on whether the construction work in question will be performed. Regardless of whether the homeowners choose to avail themselves of the state funding, the homeowners with failing septic systems must repair or replace those systems as required by Title 5. The state funds are only made available by the Legislature as a means of providing financial assistance to low and middle income households for construction work. That work necessarily would be undertaken even if such assistance was unavailable.

Parenthetically, the fact that the Funding Legislation speaks exclusively in terms of a "loan program" and does not even mention a "betterment program" highlights the Legislature's understanding that the administering agency was to have minimal involvement with the construction work itself. The legislation reads as follows:

For a loan program to assist homeowners in complying with the revised state environmental code for subsurface disposal of sanitary waste; provided, that the terms and conditions of loans made under this program shall be based upon income criteria and shall take into account the financial needs of low and moderate income homeowners; provided further, that the loan program authorized herein shall be administered by the department of environmental protection; provided further, that the department of environmental protection shall promulgate necessary rules and regulations for said loan program no later than October first, nineteen hundred and ninety-four.....\$10,000,000

Clearly, at the time that the funds were budgeted, the Legislature intended for the eligible homeowners to retain full responsibility for ensuring that the repair and replacement work is performed.

Finally, public works construction projects typically are performed on land and structures owned by a municipality, county, or agency of the Commonwealth. The construction work to be performed under the betterment program will be conducted on private property and on septic systems owned by private homeowners.

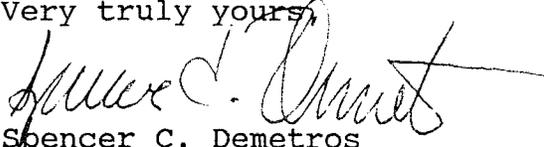
Although the municipality, as opposed to the homeowner, will be hiring the construction contractor to perform the work -- which is characteristic of a public works project -- this factor is significantly outweighed by the other factors described above which compel DLI's conclusion that the work to be performed under the betterment program is not "public works construction" and is therefore not subject to Massachusetts's prevailing wage requirements.

### 3. Loan Program.

The majority of the characteristics of the betterment program described above are also applicable to the loan program. However, under the loan program, the homeowners are responsible for hiring the contractors themselves. Therefore, there can be no question that the construction work to be performed on the septic systems under the loan program is also not subject to the Commonwealth's prevailing wage requirements.

If you have any questions regarding this matter, do not hesitate to call me.

Very truly yours,

  
Spencer C. Demetros  
General Counsel  
Dept. of Labor and Industries

cc: Richard G. Lehan, Esq. (DEP)  
Terence P. McCourt, Esq. (Executive Office of Labor)  
Robert J. Prezioso (DLI)