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COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF LABOR AND INDUSTRIES

WAGE DETERMINATION AND JOB CLASSIFICATION APPEAL;
TOWN OF FALMOUTH DEPARTMENT OF PUBLIC WORKS ON BEHALF OF
SOUTHEASTERN MASSACHUSETTS CONSORTIUM;
CONTRACT FOR BITUMINOUS CONCRETE REPAIR OF UTILITY TRENCHES

PETITIONER, TOWN OF FALMOUTH

Appearance for Petitioner: William B. Owen
Director, Falmouth Department of Public Works

Appearance for Felix A. Marino, Co.: Steven H. Goldberg, Esquire

Appearance for Marino Brothers of N.E., Inc.: Robert S. Marino, President

Appearance for Massachusetts Building Trades Council, AFL-CIO:
Donald J. Siegel, Esquire

Appearance for Department of Labor and Industries: Robert Prezioso

DECISION OF THE DEPARTMENT OF LABOR AND INDUSTRIES

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 September 13 and 20, 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 the Town of Falmouth Department of Public Works on behalf of the Southeastern Massachusetts Consortium ("Petitioner") contesting job classifications and wage determinations issued by DLI for a project designated, "Bituminous Concrete Repair of Utility Trenches, Southeastern Massachusetts Consortium Towns of Falmouth, Plymouth and Yarmouth, September 1, 1995 to June 30, 1998" (the "Project").

The record in this case closed on September 22, 1995 at 5:00 p.m. In addition to the below referenced letters from Petitioner, the record consists of the following: the Project's Invitation for Bids ("IFB"); Memorandum of Felix A. Marino Co. with exhibits ("Marino Company Brief"); Supplemental Memorandum of Felix A. Marino Co. with exhibit ("Marino Company Supplemental Brief"); Loose-leaf Notebook titled "Pavement Guide Felix A. Marino Co., Inc." ("Marino Company Notebook"); Letter from Marino Brothers of N.E., Inc. with exhibits; Memorandum of Massachusetts Building Trades Council, AFL-CIO with exhibits ("MA Building Trades Brief"); Supplemental

Memorandum of Massachusetts Building Trades Council, AFL-CIO ("MA Building Trades Supplemental Brief"); and, audio cassette tapes of the hearing.

FACTS

The Project was advertised for bid on August 11, 1995. Bid specifications for the Project included wage rates and job classifications provided by the Department of Labor and Industries ("DLI") pursuant to the Massachusetts prevailing wage law, M.G.L. c. 149, §§ 26-27H. By letter to DLI dated August 17, 1995, the Petitioner requested that DLI review "the rates that have been issued for this contract that may more appropriately reflect the type of work that will be performed under this contract." Upon review, DLI declined to revise the wage rates and job classifications originally issued to the Petitioner. Subsequently, by letter to DLI dated August 22, 1995, the Petitioner brought an appeal pursuant to M.G.L. c. 149, § 27A based on DLI's "failure to establish wage rates for infra-red technicians and their helpers...." The Petitioner further notes that if "appropriate rates cannot be established for these classifications, I would suggest using the driver and laborer rates of our Unionized public works employees." Bids for the Project were opened on August 31, 1995. While four contractors requested bid packages, only one contractor, Felix A. Marino, Co., actually submitted a bid. No award of the contract had been made as of the date of the hearing.

The Project is described in detail in the IFB issued by the Petitioner. According to

the Technical Specifications Package in the IFB, the scope of work covers three main areas: (1) temporary patching, (2) patch and trench maintenance, and (3) permanent restoration of temporary repairs, including work involving repair of bituminous concrete by the infra-red and conventional methods, concrete repairs, loam and seed/sod, curbing replacement, correction of leak detection damage, and wheelchair ramps. (IFB at p. 30). The IFB also contains a "good faith" estimate of quantities for the Project based on past activity. The quantities estimate indicates that the largest items of work are temporary patching of bituminous concrete, permanent restoration of temporary repairs using the infra-red method, and sealing/filling of pavement. (Id. at 9-10). According to the Petitioner, the work under the Project is to be provided by the successful bidder on an as needed basis depending on the requirements of the towns in the Southeastern Massachusetts Consortium.

ANALYSIS

Mr. Owen, on behalf of the Petitioner, testified that he has been employed by the Town of Falmouth for 12 years and has been involved with previous contracts similar to the Project, involving temporary and permanent patching that specified the infra-red method. According to Mr. Owen, the previous contracts contained job classifications and wage rates issued by DLI pursuant to the Commonwealth's prevailing wage law.

According to the Petitioner, the work covered by the IFB is maintenance work and

not construction work so that the job classifications provided by DLI are not applicable. The Petitioner requests that DLI establish separate job classifications for infra-red technicians and crack-filling personnel that would be appropriate for this Project. The Petitioner further suggests that proper wage rates for job classifications covered under the Project could be found by reference to the collective bargaining agreement entered into between the Town of Falmouth and its DPW workers. As precedent for this approach, the Petitioner points out that in establishing prevailing wage rates in a prior instance involving Falmouth's bid for curbside refuse and recycling services, DLI used the rates of Falmouth's unionized municipal employees.

Support for the Petitioner's appeal was also presented by the only company which bid on the Project, Felix A. Marino, Co. ("Marino Company"). Marino Company makes two main legal arguments. Its first argument is that the work under the Project is not "construction" within the meaning of the Commonwealth's prevailing wage law, and, therefore, the prevailing wage law does not apply to the Project. Alternatively, Marino Company urges that if the Project is covered by the prevailing wage law, DLI has failed to properly determine the job classifications and wage rates for the Project.

1. Applicability of the Prevailing Wage Law

Marino Company's initial argument, that the prevailing wage law is inapplicable to the Project, exceeds the more narrow argument advanced by Petitioner as the basis for

this appeal. This argument will, nevertheless, be considered as part of the instant appeal. Moreover, Marino Company's first legal point will be considered as a threshold matter because if we find that the prevailing wage law is inapplicable, the relief sought by the Petitioner to modify classifications and wages would be moot.

Marino Company produced voluminous evidence in support of its contention that the Project is not covered by the prevailing wage law. A summary of Marino Company's major arguments is as follows: the IFB by its express terms does not invite bids on construction work, but calls for repair and maintenance work; DLI's own precedents support the distinction between construction covered by the prevailing wage law and repair/maintenance work not covered; the prevailing wage law does not include "repair" within its definition of "construction" in c. 149, § 27D; and, other state and federal laws distinguish between construction and repair/maintenance.

The terms of the IFB will first be examined. While the IFB is captioned, "Bituminous Concrete Repair of Utility Trenches", it is clear that the work called for by the IFB is more expansive than suggested by its title. The fact that the IFB avoids the use of the terms "construction" and "alteration" is insufficient to conclude that the work does not fall within those categories. It is necessary, therefore, to examine the IFB in more detail. Some elements of the work under the IFB call for excavation and removal of excavation (IFB at p. 44), installation of expansion joints (Id.), permanent curb replacement (Id. at 46), and construction of sidewalks and wheel chair ramps (Id. at 49).

The IFB is not confined to bituminous concrete repair of utility trenches.

In addition, Marino Company's reliance on DLI precedent in support of its position is misplaced. The precedent cited by Marino Company is a July 25, 1995 decision on a section 27A appeal brought by the Town of Framingham (Marino Company Brief Ex. "U") and an August 29, 1994 letter from Mr. Demetros, DLI General Counsel (Marino Company Brief Ex. "A").

In the Framingham decision, DLI found that a contract proposal for landscape maintenance services on property owned by Framingham is not covered by the prevailing wage law because it is not public works construction within the meaning of c. 149, §§ 26-27D. The Framingham decision dealt with activities such as trimming grass and removing fallen leaves that are wholly distinct on a factual basis from the tasks called for in the IFB.

As for the Demetros letter, the legal analysis requested by, and provided to, Marino Company concerns whether the patching of portions of roadways following the installation of underground cable by private companies is covered by the prevailing wage law. The Demetros letter concludes that such work is not "public" construction because the installation of the cable necessitating the pavement patching is "performed solely for the benefit, and at the direction, of private entities" and with "private monies." By contrast, the question presented by Marino Company in the instant appeal assumes

that the work is public. When placed in its proper context, it is clear that the single sentence from the Demetros letter relied on by Marino Company has no bearing on the issues in this appeal.

As for its statutory arguments, Marino Company has shown indisputably that when the Legislature acted on various occasions to expand the definition of construction in the prevailing wage law by adding terms contained in section 27D, the term "repair" was not added. The question then becomes whether the absence of the term "repair" in the prevailing wage law places this Project, self-described by Petitioner and Marino Company as repair work, outside the terms of the law. Various definitions of repair and alteration were offered by the parties. It is safe to conclude that the term "alteration" suggests a modification while "repair" suggests a restoration. See, e.g., M.G.L. c. 7, § 39A. It does not appear that the two terms are mutually exclusive.

We need not decide in this case whether all types of repair work are covered or are not covered by the prevailing wage law. Rather, our inquiry is confined to whether the work called for by the IFB, regardless of the nomenclature employed by Petitioner, is "construction" under the prevailing wage law which, as specified in section 27D, includes, inter alia, "additions to and alterations of public works." As pointed out by Robert Marino of Marino Brothers of N.E., with 27 years of experience in the highway patching business using infra-red patching techniques, the work under the IFB alters the roadway by sometimes adding new backfill, sometimes changing the geometry of the

road, integrating the new asphalt with the existing road surface, and changing the grade. In addition, Marino Company 's own evidence, depicting the patching work in the Marino Company Notebook and Marino Company Brief Ex. Y, shows that the patching process results in an alteration of the roadway. Finally, as discussed above, the IFB does call for work beyond the scope of patching of trenches.

Accepting as valid the contention by the Petitioner and Marino Company that the intent of the Project is not to modify the road, but to restore it to its condition (prior to a trench cut), does not answer the question presented. The test is not whether the road looks the same to an observer or feels the same to a driver. Rather, as noted above, the inquiry for purposes of section 27D is whether the public work has been added to or altered. Putting aside obvious cases of additions such as new curb, sidewalks or wheelchair ramps, re-paving does alter the roadway.

Marino Company attempts to make a distinction under the prevailing wage law based on the size of the area being repaved. Namely, that work required to repair damage from a sinkhole is construction while work required to repair damage from a pothole is maintenance. (Marino Company Brief Ex. "W"). Obvious inconsistencies would arise if DLI adopted such a standard. Additionally, the same process is used - backfill and compaction of the backfill, application by machine and/or by hand of various layers of asphalt, and compaction of each layer of asphalt - whether the work involves repaving a trench, a pothole, a sinkhole or an entire road. In none of these

cases is the roadway returned to the condition it was in immediately prior to the paving work. In some of the cases, the roadway might be repaired and altered. In each case, the roadway is altered.

For all of the reasons set forth above, I conclude that the work at issue is included within the meaning of the term "public works construction" and is, therefore, subject to the prevailing wage law.

2. Proper Job Classification and Wage Rate

Petitioner's appeal assumes that the prevailing wage law applies, but argues that the classifications and wage rates set by DLI should be modified. Petitioner makes two specific suggestions. First, that there be a rate established for infra-red technicians and their helpers, and, second, that if appropriate rates cannot be established for these classifications, that DLI utilize rates contained in Falmouth's DPW collective bargaining agreement. While Marino Company does not acknowledge the applicability of the prevailing wage law, it essentially advances, in the alternative, this same two-pronged argument.

On the first issue, I find that Marino Company's infra-red operation does not warrant the creation of new job classifications. The testimony of Marino Company and Marino Brothers of N.E. shows that the infra-red machinery is of two types: (1) a heat

source for the asphalt storage container or hot box which keeps the asphalt hot, and (2) an infra-red heater which is either towed or is part of a vehicle and which is applied to the area to be patched (or already temporarily patched) and the surrounding area to prepare the surface for repaving and/or repair. Operation of these pieces of machinery appears to require not much more than turning on a switch and ensuring that the surface is heated for the proper period of time. There was no evidence produced to show that special training was required or that a specific worker on each repaving crew specialized in the operation of the infra-red equipment.

Mr. Frederick Marino of Marino Company provided detailed testimony on the nature of the work performed A typical first visit, as described by Mr. Marino, would require a two member crew, and involves the installation of paving material, asphalt raking, compaction of each lift of asphalt, and sealing of joints with a liquid substance. A typical second visit would require a three member crew, and involves use of the infra-red pavement heater, scarifying with a rake, application of pavement material and compaction. In either case, with the exception of the use of the asphalt heater during the second visit, the patching process involves loading and unloading wheel barrows of asphalt, raking asphalt, and compacting or rolling the asphalt. These functions are part of all conventional paving operations. The evidence submitted does not warrant the creation of a separate job classification for the worker (or his helper) who turns on and off the infra-red heater switch. Finally, MA Building Trades stated that the employee operating the infra-red equipment would be covered as a laborer by the collective

bargaining agreement between the Labor Relations Division of Construction Industries of Massachusetts, Inc. and Massachusetts Laborers District Council of the Laborers International Union of North America, AFL-CIO for the period June 1, 1994 to May 31, 1997, which can be found at (MA Building Trades Brief Ex."1").

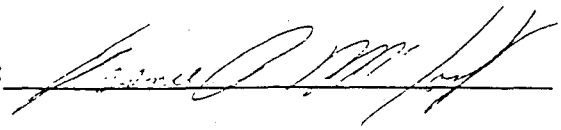
As for the second part of this issue, Petitioner suggests that DLI rely on the municipal collective bargaining agreement between the Falmouth DPW and the Laborers' Union in setting wage rates for the Project. Petitioner references a prior circumstance involving trash hauling where DLI did rely on a municipal collective bargaining agreement. The trash hauling project is, however, distinguishable.

Pursuant to M.G.L. c. 149,§ 26, if in the town where the work is to be performed, wage rates have been established in a collective bargaining agreement in the private construction industry, then DLI is constrained to refer to that agreement in setting the applicable rate. If no such rate is established, DLI is directed to set the wage rate by reference to rates paid to workers engaged in the municipal service of the town where the work is to be performed. In the case of the trash hauling project, there was no applicable private industry collective bargaining agreement in Falmouth establishing the wage rates for that work, so the prevailing wage rate was set by reference to the wage rate paid to municipal employees performing the relevant type of work. In the instant case, there is an applicable private construction industry agreement which covers Falmouth (as well as Plymouth and Yarmouth), thereby precluding DLI from setting the

rate by reference to municipal employee wage rates. The applicable agreement, relied on by DLI in setting the classifications and wage rates for the Project, is the collective bargaining agreement between the Labor Relations Division of Construction Industries of Massachusetts, Inc. and Massachusetts Laborers District Council of the Laborers International Union of North America, AFL-CIO.

Accordingly, DLI's original determination of wage rates and job classifications provided to Petitioner is hereby upheld.

DEPARTMENT OF LABOR AND INDUSTRIES

BY: 

Terence P. McCourt, Deputy Secretary and General Counsel

Massachusetts Executive Office of Labor

DATE: September 27, 1995