COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Department of Labor
and Industries

In Re: WAGE DETERMINATION APPEAL; CENTRAL ARTERY/TUNNEL PROJECT; ENGINEERING FIELD SURVEY SERVICES CONTRACT (MO25V).
PETITIONERS: WILLIAM RYAN, JAMES GRIFFIN, AND PAUL HAYES ON BEHALF OF LOCAL 4, INTERNATIONAL UNION OF OPERATING ENGINEERS.

Appearances for Petitioners:

1. Arthur Flamm, Esq.
   Counsel for Local 4
2. William P. Ryan
   Business Manager
   Local 4
3. Karen Courtney
   Director
   Foundation for Fair Contracting

Appearances for Awarding Authority:

1. David P. Mullen, Esq.
   Deputy Chief Counsel
   Massachusetts Highway Department
2. Louis J. George, Esq.
   Counsel
   Massachusetts Highway Department

Appearance for Department of Labor and Industries:

1. Robert J. Prezioso
   Director of Statistics
   Department of Labor and Industries

DECISION OF THE DEPARTMENT OF LABOR AND INDUSTRIES

Pursuant to Mass. Gen. Laws ch. 149, § 27A, the undersigned, as designee of the Commissioner of the Department of Labor and Industries ("DLI"), conducted a hearing on July 6, 1995 at DLI's offices at 100 Cambridge Street, Room 1107, Boston, MA. The subject of the hearing concerned an appeal brought by William Ryan, James Griffin, and Paul Hayes on behalf of Local 4, International Union of Operating Engineers (collectively the "Petitioners") contesting a wage determination made by DLI concerning the Central Artery/Tunnel Project; Engineering Field Survey Services Contract (MO25V) (the "Survey Contract").

The Petitioners claim that DLI's determination that the work to be performed under the Survey Contract is not subject to the prevailing wage requirements of Mass. Gen. Laws ch. 149, §§ 26-27H violates the requirements of the statute.

STATEMENT OF THE FACTS

On May 3, 1995, the Massachusetts Highway Department ("MHD") first advertised an invitation for bid proposals for the Survey Contract in The Boston Globe. At that time, specifications for the Survey Contract and other contract documents (the "Contract Specifications") were made available to prospective bidders. The Contract Specifications did not state that Massachusetts's prevailing wage requirements were applicable to the Survey Contract and no Massachusetts prevailing wage schedule was contained or referenced in the Contract Specifications.

On May 8, 1995, James Snow of the Foundation for Fair Contracting called Robert Prezioso, DLI's Director of Statistics, and inquired why there was no mention of Massachusetts's prevailing wage requirements in the Contract Specifications. Mr. Prezioso oversees issuance of the prevailing wage schedules. Prior to Mr. Snow's call, neither Mr. Prezioso nor any other representative of DLI had any knowledge of the Survey Contract. Mr. Prezioso informed Mr. Snow that he would contact MHD and investigate the matter further.

Mr. Prezioso then contacted Terry Raymer, Contracts Specialist for MHD, who assisted in administering the Survey Contract. Mr. Raymer informed Mr. Prezioso that MHD believed that the Massachusetts prevailing wage requirements were not applicable to the work performed under the Survey Contract because the Survey Contract was a "services contract" as opposed to a "construction contract." At that time, Mr. Raymer provided DLI a copy of the Contract Specifications.

Shortly thereafter, Mr. Prezioso informed MHD through Mr. Raymer that, although DLI did not necessarily agree with MHD's analysis, DLI did agree that, based on the nature of the work to be performed as described in the Contract Specifications and the applicable statutory language, the prevailing wage requirements contained in Mass. Gen. Laws ch. 149, §§ 26-27H were inapplicable to the Survey Contract.

On June 7, 1995, MHD made available to prospective bidders on the Survey Contract an addendum to the Contract Specifications

(the "Addendum"). The Addendum stated explicitly that the Massachusetts "Prevailing Wage Rates do not apply" to the Survey Contract (Addendum, Questions and Answers, pg. 3). The Addendum did contain a provision requiring that certain "minimum" rates be paid to employees of the successful bidder for the Survey Contract. (Addendum, Attachment E, ¶ 26).

On June 13, 1995, the Petitioners filed with DLI an appeal, pursuant to Mass. Gen. Laws ch. 149, § 27A, contesting DLI's "wage determination for the classifications, Chief of Party, Instrumentman and Rodman."[1]

---

[1]Included in the majority of prevailing wage schedules issued by DLI are the following three job classifications: Rodperson, Instrument Person, and Chief of Party. The collective bargaining agreement upon which the prescribed prevailing wage rates are based for these classifications, Agreement between Contractors and International Union of Operating Engineers Local 4E, contains the following definitions of the classifications:

> 1. RODPERSON shall care for surveying equipment and tools; drive stakes, man tape and level rod; index, file and maintain line and grade date; make and flag grade stakes; prepare, apply and maintain control points, monuments, stations, turning points, and bench marks on construction sites; trace and letter maps and drawings from field sketches.
>
> 2. INSTRUMENT PERSON shall be capable of performing all of the duties of Rodperson, shall set up and operate transit, level and related surveying instruments; make simple field drawings of lines and grades from sketches; direct Rodperson, establish lines and grades; handle all related computation problems.
>
> 3. CHIEF OF PARTY shall be capable of performing all duties of Rodperson and Instrument Person, shall lay out building and related lines and grades, direct the work of Rodperson and Instrument Person.

ANALYSIS

A. Procedural Issues Raised by MHD.

MHD claims that DLI lacks jurisdiction to hear this appeal because there was no "wage determination" made by the DLI Commissioner.[2] MHD argues that, since DLI allegedly did not perform the "affirmative act" of making a wage determination, "there is no legal basis upon which Local 4 may appeal . . . ." (MHD's Memorandum in Opposition to Petitioner's Appeal at 5).

Contrary to MHD's assertion, DLI indeed made a "wage determination" for purposes of § 27A. On behalf of DLI's Commissioner, Mr. Prezioso investigated whether the work performed under the Survey Contract would be subject to Massachusetts's prevailing wage requirements. After he initially raised the issue with MHD, he investigated the matter and subsequently informed MHD that the Department had determined that the prevailing wage requirements do not apply to the project.

Section 27A does not require that a wage schedule be issued in order for there to be a "wage determination" for purposes of the statute. DLI's initial determination that MHD need not

---

[2]Mass. Gen. Laws ch. 149, § 27A states, in relevant part:

> Within five days from the date of the first advertisement or call for bids, two or more employers of labor, or two or more members of a labor organization, or the awarding officer or official, or five or more residents of the town or towns where the public works are to be constructed, may appeal to the commissioner or his designee from a wage determination, or a classification of employment as made by the commissioner, by serving on the commissioner a written notice to that effect.

request a prevailing wage schedule for the Survey Contract is no less a "wage determination" than if DLI had notified MHD that the prevailing wage requirements do apply thereby issuing a wage schedule. Moreover, nothing in § 27A suggests that DLI is divested of jurisdiction to hear appeals if the wage determination is communicated orally as opposed to in writing.

MHD also argues that DLI should dismiss this appeal because the Petitioners' appeal was not filed with the Commissioner within five days from the date of the first advertisement or call for bids as required by § 27A. Although MHD's factual assertions concerning the timing of the Petitioners' appeal are correct, the technical violation of the statute committed by the Petitioners does not warrant dismissal of the appeal in this case.

As the Petitioners stated during the hearing, until the time that the Addendum was disseminated on June 7, 1995, none of the contract documents contained any mention of whether the prevailing wage requirements were applicable to the project. The Petitioners did file their appeal within five days of the receipt of the Addendum. Although they should have filed it within five days of the first call for bids, May 3, 1995, the fact remains that as soon as the Petitioners became aware that the prevailing wage requirements were determined to be inapplicable to the work performed under the Survey Contract, they filed their appeal without delay. Moreover, MHD was unable to show any prejudice as

a result of the Petitioners' untimely filing of their appeal.[3]

Nothing in the statute compels dismissal of a 27A appeal where the equities of the case favor applying some degree of flexibility to the five-day appeal requirement. The 27A appeal process is an inexpensive and expeditious means of adjudicating prevailing wage disputes and should be encouraged. Dismissing the appeal based on a technical violation of the statute in a case such as this would force the parties to resort to more costly forms of litigation which may otherwise be avoided.[4]

B. Applicability of Prevailing Wage Requirements to Survey Contract.

In this appeal, the Petitioners assert that, pursuant to Mass. Gen. Laws ch. 149, §§ 26-27H, the Massachusetts prevailing wage requirements are applicable to the Survey Contract and, therefore, wage schedules containing minimum wage rates for the classifications of Chief of Party, Instrument Person, and

---

[3]During the hearing, MHD argued that it was indeed prejudiced by the Petitioners' late filing of their notice of appeal because, had the appeal been filed timely, MHD's counsel would have had more time to prepare for the hearing on this matter. However, contrary to MHD's claim, the date on which the Petitioners filed their notice of appeal, most likely, would not have affected the amount of time which would lapse between the filing of the notice of appeal and the scheduling of the hearing. In other words, if the Petitioners had filed their notice of appeal one month earlier, theoretically, the hearing would also have been scheduled one month earlier, leaving the same amount of time for the parties to prepare for the hearing in either case.

[4]MHD's claim concerning the Petitioners' late filing may have been given greater consideration if it was brought to the attention of DLI at the time that MHD first learned of the appeal. However, in this case, MHD first raised the issue of the Petitioners' untimely filing after the notice of hearing had been sent to all of the interested parties and had been posted in the newspaper.

Rodperson should have been issued for the project.

Mass. Gen. Laws ch. 149, § 26 requires the Commissioner of DLI to set hourly wage rates which must be paid to "mechanics and apprentices, teamsters, chauffeurs and laborers" who are employed "in the construction of public works." As the Supreme Judicial Court noted in Construction Industries of Massachusetts v. Commissioner of Labor and Industries, 406 Mass. 162, 167 (1989), based on the language of the statute, the Commissioner has authority to issue wage rates for a particular project only if the following two requirements are met: 1) that the workers hired for the project are "mechanics, apprentices, teamsters, chauffeurs, or laborers" and 2) that the workers are employed "in the construction of public works."

Based on the nature and purpose of the work to be performed under the Survey Contract, the individuals to be employed thereunder will not be engaged "in the construction of public works." Thus, I need not reach the more general question of whether such employees are "mechanics, apprentices, teamsters, chauffeurs, or laborers" and decline to address that issue in this appeal.

Section 721.051(1.01A) of the Contract Specifications (referred to herein as "Scope of Work") describes the services to be provided by the successful bidder under the Survey Contract. As indicated below, the majority of the survey contractor's responsibilities will be performed prior to the time that the construction work (excavation and placement and erection of

structures) commences:

> 1. Measure horizontal and vertical distances between boundaries and existing structures in order to document the areas in which unobstructed construction may occur (see Scope of Work, ¶¶ 8 and 11);
>
> 2. Establish points of reference and baselines from which measurements may be taken during the design phase of the project and later verified during the construction phase (see Scope of Work, ¶¶ 9 and 13);
>
> 3. Locate and document the position of utility lines for the purpose of preparing design plans (see Scope of Work, ¶ 10); and
>
> 4. Perform miscellaneous survey work as requested by the design consultant which is necessary for the preparation of design plans (see Scope of Work, ¶ 14).

Clearly, one of the primary purposes for which the survey contractor will be hired is to provide pre-construction survey data to the design consultant so that the design consultant may prepare the design plans and specifications for the construction contract(s).

In Mass. Gen. Laws ch. 149, § 27D, the legislature spoke on the issue of when work done preliminary to the construction of public works is considered part of the "public works construction" for purposes of the prevailing wage requirements contained in §§ 26-27C. Section 27D states, in pertinent part:

> Wherever used in sections twenty-six to twenty-seven C, inclusive, the words "construction" and "constructed" as applied to public buildings and public works shall include . . . certain work done preliminary to the construction of public works, namely, soil explorations, test borings and demolition of structures incidental to site clearance and right of way clearance . . . .

Since "field surveying" is not included in the list of preliminary services explicitly designated by the legislature as

constituting "public works construction," the question arises whether the legislature intended the list to be exhaustive or merely examples of the types of activities covered by the wage requirements in the statute. The answer depends on the meaning of the word "namely."

At the hearing, the Petitioners argued that the word "namely" means "including, but not limited to" or "for example." However, The American Heritage Dictionary of the English Language (1992) defines the term "namely" as: "That is to say; specifically." Based on this definition, the list of preliminary activities included in § 27D is exhaustive and was not included merely to provide examples of the types of preliminary activities covered by the phrase "construction of public works." In addition, no statutory authority or case law was found which would give the term "namely" the meaning attributed by the Petitioners. Moreover, it must be assumed that if the legislature did not intend for the list of preliminary activities contained in the statute to be exhaustive, it would not have used a restrictive term such as "namely" to precede the list of activities.

In addition to the pre-construction services listed above, the Contract Specifications also delineate certain activities which the survey contractor must perform either while the construction is occurring or after the construction is completed:

> 1. Verify and re-establish points of reference over the course of the construction project which were initially established during the pre-construction survey (see Scope of Work, ¶¶ 12 and 15);

2. Verify the accuracy of the layout for construction (see Scope of Work, ¶ 16);

3. Monitor points previously established on roadways, buildings, and other structures to determine whether settlement or other types of movement during construction caused a horizontal or vertical shift in the points of reference (see Scope of Work, ¶ 17); and

4. Document the positions of newly constructed structures and utility lines during and after construction (see Scope of Work, ¶¶ 18 and 20).

Although these tasks are not preliminary to the construction, they nevertheless cannot be considered "public works construction" for purposes of the prevailing wage statute. The measurements and other data obtained as a result of these activities are not provided directly to the construction contractors to aid in excavation and the placement and erection of structures. Instead, this information is provided directly to MHD and MHD's on-sight management consultant, Bechtel/Parsons Brinckerhoff, for quality control purposes and to ensure that the construction work is being performed in compliance with the construction contract specifications. The successful bidders on the Survey Contract will be acting more in the capacity of on-site quality assurance consultants to the awarding authority as opposed to employees hired to assist in the construction project itself.[5]

---

[5]At the hearing, the Petitioners argued that the Survey Contract must be considered a "public works construction contract" because the contract is being bid in accordance with the competitive bidding requirements contained in Mass. Gen. Laws ch. 30, § 39M. However, nothing in the that statute suggests that the requirements thereof apply only to construction projects. In fact, by its own terms, the statute applies to, among other things, procurement of materials.

In contrast, the construction layout activities, which are expressly excluded from the contract,[6] may be considered as part of the public works construction project for purposes of the prevailing wage statute. These functions will be performed by employees or subcontractors of the construction contractors and conducted under the construction contractors' direction and supervision. The field survey technicians who are hired to perform the construction layout activities are responsible for, among other things, inserting demarcations on the construction site as guide-posts, so that the construction work can be performed in the proper locations and to the correct heights and depths. Unlike the services performed under the Survey Contract, the construction layout activities directly aid in the construction process itself.

The Petitioners argue that if the prevailing wage requirements are determined to be inapplicable to the Construction Contract, a situation will arise in which some field survey technicians on the work site will be subject to the statute's wage requirements and other survey technicians performing similar tasks on the same work site will not.

---

[6]Section 721.051(1.01B) of the Contract Specifications states:

> The Scope of the Work excludes the following:
>
> 1. The Contractor shall not be responsible for final survey calculations, CAD drafting, field crew assignment and scheduling, research, and final report and plan preparation.
>
> 2. The Contractor shall not perform construction layout work on the Central Artery/Tunnel Project.

However, it is often the case that the prevailing wage requirements will apply to only one of two employees performing similar or identical tasks yet working under different types of contracts.

For example, the prevailing wage need not be paid to asphalt rakers working on the repair of a public road which was excavated by a private utility company in order to lay utility lines. Since the road repair work in that case is being financed with private money, contracted by a private entity, and necessitated by work giving rise to benefits to private parties, it cannot be considered "public works construction." However, asphalt rakers who work on the repair of roadways necessitated by normal wear are subject to the statutory wage requirements. Thus, even if the two sets of asphalt rakers are working on adjacent roadways and performing identical tasks, the prevailing wage statute requires that one group be subject to the wage requirements and the other group not.

CONCLUSION

For the foregoing reasons, the Chiefs of Party, Instrument Persons, and Rodpersons who will be hired to perform the work under the Survey Contract will not be engaged "in the construction of public works." The Commissioner would have exceeded her statutory authority had DLI issued prevailing wage schedules for the project. Therefore, DLI's prior wage determination is hereby upheld.

Dated: July 11, 1995

DEPT. OF LABOR AND INDUSTRIES

By: Spencer C. Demetros

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