

Prevailing Wage Program Opinion Letter February 22, 2012 (2)

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Re: Construction of Leasehold Space in Private Buildings by Charter Schools for the Purpose of Use as a School

The Department of Labor Standards (“DLS”) has received a number of inquiries regarding the applicability of the Massachusetts Prevailing Wage Law, G.L. c. 149, §§26-27, to construction projects performed by charter schools, or their designees, in connection with leases of private buildings. The DLS issues this opinion letter to provide guidance to charter schools which enter into leases of private buildings, including build out of the leasehold premises, for the purposes of using the premises as a school

Factual Background

In the Commonwealth, charter schools are public schools that operate under charters granted by the Massachusetts Board of Elementary and Secondary Education (“BESE”). G.L. c. 71, § 89(c). The BESE grants charters for five year terms. 603 CMR 1.02¹. Charter schools are independent of any school committee and are governed by a board of trustees. G.L. c. 71, §89(c) and (d). Accordingly, charter schools will often lease space in private or public buildings, rather than build permanent facilities.²

Like all public schools, charter schools are open to all students and are responsible for educating students at no cost to parents.³ In Massachusetts, each charter school is its own local education agency, and is defined as a school district. Significantly, charter schools are publicly funded, either through the school district in which the school is located or, directly, through the state.⁴ Charter schools are also eligible for the same federal funds that are provided to all public schools.⁵ Accordingly, lease payments for school facilities and other expenses of a charter school are publicly funded.

Following is a general analysis of issues the DLS will examine when presented with a situation where the board of trustees of a charter school enters into a lease agreement with a private landlord which includes build out of the leasehold space for suitability of use as a school.⁶

Analysis

The Massachusetts prevailing wage law applies to the construction of public works by the commonwealth, or by a county, town, authority or district. G.L. c. 149, §§26, 27. Accordingly, in determining the applicability of the prevailing wage law to a particular project, this agency considers the following questions: 1) is the project “construction”, within the meaning of the statute; 2) is the project a “public work” within the meaning of the statute; and 3) is the project being undertaken by a public entity subject to the statute. In general, consideration of whether a project constitutes construction is fairly straightforward. However, in the context of projects which include both public and private elements, such as construction of a charter school in a private building, the analysis of whether the project is a “public works” project and whether it is being undertaken “by the commonwealth, or by a county, town, authority or district” can be more complex.

In situations involving leases of private buildings by a charter school, the build out of lease hold space is clearly “construction” within the plain meaning of the statute. What remains to be analyzed is whether such a construction project constitutes a “public work” being undertaken by a public entity, subject to the statute.

A. Is the build out of leasehold premises for use as a charter school a “public work” being undertaken by a public entity, subject to the statute?⁷

The term “public work” is not defined in the Massachusetts prevailing wage statute, nor in its decisional law. However, a number of cases have discussed the term in the context of application of public bidding statutes as well as application of the prevailing wage laws. In *Commonwealth v. W. Barrington Co.*, 5 Mass. App. Ct. 416 (1977), the Court held that street sweeping was “public work” within the meaning of G.L. c. 149, § 27F [requiring the payment of wages prescribed by the state commissioner of labor for any “order or requisition under which a truck or any automotive or other vehicle is to be engaged in public works.”] In *Thorn Transit System International v. MBTA*, 40 Mass. App. Ct. 650 (1996), the Court held that alteration and remodeling work on rapid transit stations were encompassed within the term “public work” as used in the procurement statute, G.L. c. 30 § 39M, and thus the contract was governed by the statute.

In *Perlera v. Vining Disposal Service, Inc.*, 47 Mass. App. Ct. 491 (1999), a central issue was whether the term “public works”, as found in G.L. c. 149, § 27F (the prevailing wage law for non-construction public works projects), encompasses the municipal collection of refuse. The Appeals Court found that “the meaning of the phrase is somewhat elastic, expanding or contracting with the statutory context. The core concept of ‘public works,’ in Massachusetts and elsewhere, is commonly expressed as involving the creation of public improvements having a nexus to land, such as a building, road, sewerage or waterworks facility, bridge, or park.” *Perlera* at 493-94. The *Perlera* court further found that “(a) second category of activities sometimes associated with ‘public works’ includes the work of maintaining or repairing such facilities.” *Perlera* at 494; see also G.L. c. 149, § 27D (painting of public works and public buildings subject to prevailing wage law); *Felix A. Marino Co. v Commissioner of Labor & Industries*, 426 Mass. 458 (1998) (road repairs are “construction of public works” under G.L. c. 149, § 26.) Additionally, the Court found that both federal and state legislatures, including Massachusetts, had at various times used the term “public works” even more broadly to include activities with “no immediate connection to fixed public improvements.” *Perlera* at 495 (citations omitted).⁸

In 2007, DOS⁹ employed a more nuanced analysis in determining that the Town of Andover youth center project was a public works project subject to the prevailing wage law. See *DOS Opinion Letter, Town of Andover Youth Center (July 23, 2007)*. In making its determination, DOS considered that, while the Town was not paying for the project out of public funds, and it would not be a party to the contract for construction, the project was to be constructed on property owned by the Town. Town staff were overseeing the construction work. In addition, the youth center would be turned over to the Town upon completion of the project. In sum, the ultimate goal of the project was to build a youth center that would be owned, operated and staffed by the Town for years to come. Accordingly, DOS determined that the project was a public works project being undertaken by the Town and the prevailing wage law applied.

Recently, the Massachusetts Supreme Judicial Court applied a similar analysis in formulating an approach to determine whether a project is construction of a building by a public agency. In *Brasi Development Corp. v. Attorney General*, 456 Mass. 684 (2010), the Court held that the state bid laws applied to the construction with public funds of a University of Massachusetts dormitory project on private property because the project constituted “construction of a building undertaken by a public agency under Massachusetts’ [bidding] law.” *Ibid*.

The Court concluded that, going forward, it would employ a “totality of the circumstances” test in determining whether a lease project with a construction component constituted construction of a building by a public entity in the context of the bid laws. See *Brasi* at 696. Factors that may be helpful in making the determination include: the extent of control retained by the agency during construction; the length of the proposed lease, including options to extend; whether the project is publicly funded; whether lease payments cover the costs of construction; whether the public entity retains an option to purchase the property at the end of the lease period; whether the facility is of a specialized nature that would render it unsuitable for another commercial purpose without significant renovations and similar factors. *Ibid*.

DLS in its role as the agency charged with interpreting the prevailing wage law, proposes to apply a “totality of the circumstances” analysis that follows the approach adopted in the above-discussed cases to determine whether the build out of space, in connection with the lease of a privately owned building, by a charter school, constitutes a “public work” within the meaning of the prevailing wage law.

With respect to determining whether the project is a “public work” being undertaken by a public entity, DLS will consider the following criteria:

1. That the property involved is owned by a private entity;
2. Whether public funds will be used to construct the build out of the leased premises, including consideration of whether the lease payments will cover the costs of construction;
3. Whether the build out will involve specialized construction, including child-equipped restrooms (in the case of elementary school age children); library facilities; cafeterias; classrooms for language laboratories, audio visual facilities, a gymnasium etc.
4. Whether the premises will be used for a public purpose and be operated and staffed by the charter school for the term of the lease;
5. Whether the lease hold will require some degree of renovation to render it suitable for a commercial purpose, at the end of the lease term;
6. The degree of control which the charter school board maintains over the design and construction process, including approval of plans, oversight of construction, approval of requisitions for payment; and
7. Other relevant factors, including, in the case of lease of a private building, whether the charter school maintains an option to purchase the premises for a nominal sum at the end of the lease term.

DLS will consider each of the above-listed criteria to determine whether the build out of leased premises by a charter school is a public work project subject to the prevailing wage law.

Sincerely,

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General Counsel

¹ A charter school may seek renewal of its charter for additional five-year periods pursuant to 603 CMR 1.12.

² G.L. c. 71, §89(k)(3) provides that charter schools have the power to acquire property, including by lease. *See also, c. 71, §89(q).*

³ Massachusetts Department of Elementary and Secondary Education “Massachusetts Primer on Special Education in Charter Schools”, Section II. Information for State Officials and Others, dated February 2009. *See also, G.L. c. 71, §89 (ff); 603 CMR 1.03(3) and 603 CMR 1.08*

4. *Ibid*

5. *Ibid*

6. *This office has previously held that construction work by a charter school on public property leased to it by a school district is subject to the prevailing wage statute. See DOS Opinion Letter to Oppenheimer, Pioneer Valley Building and Construction Trades Council, March 3, 1997.*

7. *DLS recognizes that the analysis of whether a project is being undertaken by a public entity necessarily overlaps with the analysis of whether the project constitutes a “public work” within the meaning of the prevailing wage statute. DLS proposes to combine the two analyses in the context of leases by public entities of privately owned premises, which involve a construction component.*

8 The Davis-Bacon Act defines “public buildings or public works” as construction work that is “carried on directly, by authority of or with funds of a federal agency to serve the interest of the general public” regardless of whether it has title to the property or another party. Similarly, the term under the Miller Act has been defined as projects “constructed or carried on...with public aid to serve the interest of the general public.” New York and Wisconsin Courts approach the question by requiring a fact specific analysis of the project including “the nature and character of the project, the ownership, use and maintenance of the project, and whether the work is being performed for the municipality.” *Perlera* at 495.

9 In April of 2011, the former Division of Occupational Safety was renamed the Department of Labor Standards. *See Chapter 3 of the Acts of 2011 “An Act Reorganizing the Executive Office of Labor and Workforce Development.”*