

Prevailing Wage Opinion Letter 07-23-07

I am writing in response to your request for this Office's written opinion regarding the applicability of the Massachusetts Prevailing Wage Law, G.L. c. 149, §§26-27. Specifically, you have asked if the prevailing wage law applies to construction of a youth center by a private organization.

As I understand it, the Town of XXXX is interested in entering into a development agreement with a private organization to build a youth center on town-owned land. The town may choose to utilize a Request for Proposal (RFP) process to select the organization; however, it is anticipated that the only group interested in the project is the XXXX Youth Foundation, Inc. (XYF). (In fact, the town entered into a prior development agreement with XYF in 2002 for construction of the youth center, but the necessary funds were not raised, and the project did not go forward at that time. [1]) The development agreement would require that XYF pay for the project with private funds, but upon completion, the building would be turned over to the town. [2]

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. Therefore, to determine whether the prevailing wage law applies to a particular project, this agency considers the following questions: 1) is the project "construction", as defined in G.L. c. 149, §27D [3]; 2) is the project a "public work"; and 3) is the project being undertaken by a public entity subject to the statute? In this instance, the construction of the youth center is clearly "construction" within the meaning of the statute; what remains to be analyzed is whether this project constitutes a "public work" being undertaken by a public entity subject to the statute.

While the prevailing wage law does not define "public work," this agency looks to relevant factors such as whether the property is publicly owned, and if public funds are being utilized. In this instance, while private funds will be used to construct the youth center, the property involved is owned by the town. In addition, the youth center will be turned over to the town upon completion of the project. In fact, the ultimate goal of the project is to build a youth center that can be operated and staffed by the town for years to come.

Moreover, it is clear from examination of the proposed RFP and development agreement that the town is very much involved in the direction of the project. To highlight a few provisions from the proposed development agreement, the XYF must construct a facility containing not less than 20,000 square feet in accordance with plans and specifications approved by the town (p. 1, 6). XYF is required to submit a preliminary site plan to the Board of Selectmen "to ensure that from a conceptual standpoint the proposed facility is in substantial conformance with the needs of the Town." (p. 6) All of XYF's accounting and control systems must be satisfactory to the town, and town officials have the right to access, audit, inspect and copy all project records. (p. 4) XYF will be required to provide the town, upon request, with a written summary of the monies collected and amounts pledged. (p. 4) The town will provide XYF with the "standard specifications of major building systems ... that the [t]own utilizes in all municipal buildings." (p. 8) The town retains the right to review XYF's contract with the chosen contractor prior to execution. (p. 10) During construction, the clerk of the works/construction manager must be available for communication with the town officials. (p. 10) Prior to accepting the building, the town must be given adequate time to perform a detailed inspection to "verify that all systems are operating according to specifications." (p. 12) A review of these provisions indicates that the development agreement is, in essence, is a call for construction of a public work by a public entity.

This Office is aware that a separate request for determination as to the applicability of the competitive bid laws has been submitted to the Office of the Attorney General. While the prevailing wage and bid laws often both apply to a public construction project, it is important to note that this is not always the case. The bid laws include a dollar threshold under which competitive bids are not required - such a dollar threshold does not exist under the prevailing wage law. Additionally, it is helpful to remember that the purpose of the prevailing wage law is quite different from that of the bid laws. The purpose of the latter is fair and open competition, and best price. *See, e.g., Annese Elec. Services, Inc. v. City of Newton*, 431 Mass. 763, 767 (2000). The purpose of the prevailing wage law is to ensure that public construction projects do not "undercut the labor standards of the

local community within which those projects have been undertaken, and [it] encourages local contractors to compete for [public projects] on the basis of skill, expertise, experience, and efficiency, and not solely on the basis of payment of low wages." See House 2003, Majority Report of the Committee on State Administration, 1988. The prevailing wage law ensures that public facilities, which must be maintained with public funds throughout years of use, are constructed by well-trained and skilled tradespersons.

After consideration of the facts of this case and the underlying purpose of the prevailing wage law, it is this agency's determination that prevailing wages are required for construction of the XXXX youth center.

I hope this information has been helpful. If you have any further questions, please feel free to contact me.

Sincerely,
Lisa C. Price
Deputy General Counsel

[1] Prior to entering into the development agreement in 2002, town counsel sought advice from the then-Commissioner of the Division of Occupational Safety as to the applicability of the prevailing wage law. He was informed that the prevailing wage law may not apply, but the Commissioner stated that the town would need to submit a formal request, with supporting documentation, in order to receive an agency determination. The town elected to require the payment of prevailing wages and did not request such a determination.

[2] The development agreement submitted with the town's letter request was the January 2002 agreement, but we have been informed that the proposed agreement will be substantially the same, with the potential exception of the requirement of prevailing wages.

[3]" The term "construction" is defined, in pertinent part, as "additions to and alterations of public works." G.L. c. 149, §27D.