

pw-2009-02-05-2009

Opinion Letter PW-2009-02-5.5.09

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, §§26-27D. You have asked for an understanding of the job classifications and wages applicable to persons who perform work related to installing underground cable alongside roadways, specifically consisting of the excavation, feeding and installing of conduit, and backfilling and tamping work, on the "Installation of Advanced Traffic Management System on XXXX" project, extending through Hampden, Hampshire, and Franklin Counties of Massachusetts (the "Project"). The application of this letter is limited to the proper classifications and wages to be paid for the excavation and backfilling portions of work, and does not address the cable installation portion of work at this time. A letter will follow soon hereafter addressing the proper classifications and wages to be paid for the cable installation and related portion of work.

As you know, 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. The term "construction" is defined, in pertinent part, as "additions to and alterations of public works." G.L. c. 149, §27D. When public awarding authorities contract for construction work, within the meaning of the statute, the Division of Occupational Safety (DOS) sets prevailing wage rates for these projects based on "collective agreements or understandings in the private construction industry between organized labor and employers." G.L. c. 149, §26. DOS also looks to these agreements and understandings, and other relevant information, to determine the appropriate job classifications under the prevailing wage law.

For the geographic location encompassed by the Project, the following collective bargaining agreements ("CBA") establish the classifications and wages for the work in question:

- CBA between the Operating Engineers Local 98 and the Construction Industries of Massachusetts, which includes work "including but not limited to highway, heavy and utility construction on roads...highway and railroad bridges...grade separation involving highways, conduits";
- CBA between the Massachusetts Laborer's District Council, Zone 3 - Heavy and Highway, and the Construction Industries of Massachusetts, which includes "[a]ll work performed in connection with the Heavy and Highway Construction Industries", including "heavy and utility construction of all roads...conduits, grade separations, service mains...elevated highways...transmission lines...", the "backfilling, grading, and resurfacing and all other labor connected therewith...", and the "[b]ackfilling and compacting of all ditches..."

It has been suggested that the wages for the subject work are established by the Outside Teledata Agreement between Henkels & McCoy, Inc., and Local Union 42, IBEW and/or the Commercial or Traffic Control and Illumination agreements between Local Union 42 and the Northeast Line Constructors Chapter National Electrical Contractors Association, Inc. This office has reviewed those agreements and other relevant facts as well and we do not agree that these CBAs establish the proper wages for the work in question.

DOS has previously determined that the proper wages for the excavating portion of the work described in your inquiry are established by the CBA with the Operating Engineers. In fact, similar work was conducted in connection with a railroad project in 2006. At that time, you asked this office which was the proper rate for "digging the trench to install electrical cables" and this office determined, in an email to you dated June 28, 2006, that "trench digging done prior to laying pipe and electric cables for railroad lines . . . would be covered by the operating engineers agreement." Further in connection with this office's analysis of the work in connection with the instant inquiry, Local 98 provided evidence that its signatory contractors, presently and in the past, employ operating engineers to perform the excavating and related work encompassed on, and in the jurisdiction of the Project, including projects in Springfield, Northampton, Agawam, Westfield, Pittsfield, Charlemont, and Hardwick, among others. Accordingly, and consistent with prior determinations of this office, a worker operating machinery to perform excavating and/or trenching work for the installation of conduit on the Project must be paid the *Bulldozer/Power Shovel* or *Crane/Backhoe* operator rate.

Similarly, upon request by this office to the Massachusetts Laborer's District Council, Zone 3, the Laborer's provided evidence that its signatory contractors, presently and in the past, employ laborers to perform work related to that which is encompassed on the Project, most notably backfilling, tamping and grading related work, in the jurisdiction of the Project, including Springfield, Amherst, Westfield and Northampton, among others. Accordingly, a worker on the Project performing laborer duties in conjunction with the trenching work, including backfilling, tamping, and grading related work, must be paid the *Laborer* rate.

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

Sincerely,
Nicholas Arieni
Deputy General Counsel