

PREVAILING WAGE ADVISORY COMMITTEE

Meeting Minutes

Thursday, November 9, 2006

International Union of Operating Engineers
555 East 1st Street
Gladstone, OR 97027

Members Present

Daniel Boldt
Mark Holliday
John Killin
Norm Malbin
Shawn Miller
John Mohlis
Pete Savage
Bob Shiprack

Members Absent

Jessica Adamson
Daniel Bonham
Patrick O'Brien
Karen Williams

Staff Present

Dan Gardner
Annette Talbott
Christie Hammond
Lois Banahene
Susan Wooley
Mike Kern
Denise O'Farrell (OED)
Leanna Harmon (OED)

Commissioner Dan Gardner called the meeting to order at 1:30 PM.

Introduction of New Committee Members

Commissioner Gardner announced that since the last advisory committee meeting, Dan O'Brien had resigned from the committee and he had appointed two new members; John Killin, Executive Director of Independent Electrical Contractors of Oregon, and Pete Savage, Regional Manager of Oregon and SW Washington Pacific Northwest Regional Council of Carpenters. Mr. Gardner welcomed Mr. Killin and Mr. Savage to the committee and an updated committee member list was provided to the committee members.

Minutes of Last Meeting of September 14, 2006

The committee unanimously approved the draft minutes of the September 14, 2006 meeting as written without comment or objection.

Staff Reports

A. Status of 2006 Annual Construction Industry Survey – Distribution of Summary Data

Summaries of data collected from the 2006 annual construction industry survey were provided to the committee members for review. Commissioner Gardner explained that "balance of state" data was shown when there were fewer than three respondents reporting data in a region for confidentiality.

Committee members were requested to review the data summaries and advise BOLI staff by the end of the following week if they saw anything questionable. Staff reported that the January 1, 2007 rate publication needed to be sent to the printer by the end of November.

B. Status of Legislative Emergency Board Request for Additional Position/Increase in DOJ Expenditure Limitation

Commissioner Gardner reported that BOLI had appeared before the legislative Emergency Board on September 21 to request an additional compliance specialist position to deal with the increase in PWR coverage predeterminations requested, in addition to requesting additional expenditure limitation for increased legal costs in connection with PWR advice and litigation.

Commissioner Gardner reported that the agency was given authorization to hire a “limited duration” compliance specialist for the remainder of this biennium (October, 2006 through July, 2007), and its expenditure limitation for legal costs was extended by \$300,000, with the possibility of another \$100,000 being approved if needed.

Commissioner Gardner advised the committee that a limited duration compliance specialist had been hired and was scheduled to begin work the following week. He told the committee that the agency would most likely use more experienced staff to issue predeterminations and would use the limited duration position to help process PWR cases.

Norman Malbin asked whether the fact that the position was “limited duration” affected the quality of candidates that applied for the position. Staff responded that it had not, particularly since a permanent compliance specialist had been recruited at the same time to fill a vacancy. Candidates applied for both positions and were asked whether they would accept a limited duration position if not selected for the permanent position. Most responded that they would.

The committee was also advised that the agency had established a new performance measure of 15 business days to process predetermination requests from the date of receipt (not counting any time at DOJ if necessary).

C. Status of Relevant Court Cases

The committee was updated on the status of the PDC/“Tin Roof,” Salem Hotel/Conference Center, Mastec (Coos Bay Pipeline), and Eugene 4-J School District cases, in which the bureau is engaged in litigation.

In addition to copies of briefs and legal memoranda filed in connection with these cases, committee members were provided with a copy of a Lane County Circuit Court decision in the Eugene School District 4J case, which involved a CM/GC (Construction Manager/

General Contractor). Staff advised the committee that the court had ruled against BOLI in this case, ruling that the rates in effect at the time the school district first advertised for a CM/GC were the rates that applied to the construction contracts executed later. The bureau had taken the position that the initial contract between the school district and CM/GC was not a contract for a public work, and the applicable wage rates were those in effect at the time the CM/GC first advertised construction specifications for the project.

Staff reported that one of the bases for the court's ruling was its finding that BOLI was attempting to apply the term "specifications" as used in the statute to mean different things, i.e., contract conditions **and** construction specifications, and the court concluded that the plain reading of the statute did not support this interpretation.

Commissioner Gardner indicated that although the agency could appeal this ruling, doing so would delay final resolution of the issue and he believed that promulgating an administrative rule addressing the issue of CM/GCs was preferable. Commissioner Gardner reminded the committee that at one time the committee had reviewed a proposed rule addressing CM/GCs. This was discussed further in the meeting. (See "Draft Proposed Rule Pertaining to Construction Managers/General Contractors ("CM/GC's")" below.)

D. Status of Rulemaking Pertaining to Residential Construction Projects

Committee members were provided with a copy of the permanent administrative rules filed by BOLI pertaining to residential construction projects. Christie Hammond advised the committee that with a couple of minor revisions, these rules made permanent the temporary rules filed in May of this year which would expire on November 10. Ms. Hammond told the committee that after discussions with housing authority representatives, a provision had been added in the rule allowing BOLI to consider rate determinations issued by HUD or the USDOL on previous projects within 12 months where no published Davis-Bacon residential rate was available.

Staff reported that in addition to addressing application of the PWR law to residential projects subject to state law, the rule also amended the previous requirement that the actual applicable wage rates be physically included in project bid specifications, to allow a *reference* to the applicable wage rates to be made.

Pete Savage questioned why BOLI doesn't survey residential rates, and expressed concern about Davis-Bacon residential rates being outdated.

Commissioner Gardner responded that although he was willing to consider surveying residential construction rates, there really weren't enough residential projects subject to the state PWR law to justify the expense of conducting a separate survey.

Bob Shiprack asked whether the Employment Department might have useable residential rate data collected/used for other purposes. Denise O'Farrell from the Employment Department responded that data collected by the department pertaining to construction industry wage rates does not distinguish between residential and commercial construction, and does not include fringe benefit information.

E. Status Report on PDC Construction Wage Study

Committee members were provided with copies of agendas for three PDC Construction Wage Study work sessions; the first two of which had already been held and the third of which was scheduled that evening.

Commissioner Gardner expressed his hope that the PDC would develop a policy pertaining to application of the PWR law to public/private projects that could be used as a model for legislation for other urban renewal agencies around the state, and said that the committee would continue to be briefed regarding further developments pertaining to this issue.

Commissioner Gardner also announced that committee member John Mohlis had been appointed to the Portland Development Commission.

Draft Proposed Rule Pertaining to Construction Managers/General Contractors (CM/GC's)

Christie Hammond reported that following the court's decision in the Eugene School District 4J case, the bureau requested DOJ to review the previously drafted CM/GC rule in order to determine whether it would overcome the court's decision in the Eugene 4J case prospectively. With minor modifications, Ms. Hammond said, the agency has been advised that the draft rule does so.

Ms. Hammond presented the revised draft rule and explained that it defines what a CM/GC contract is and specifies that the rates in effect at the time the CM/GC contract "first constitutes a binding and enforceable obligation on the part of the CM/GC to perform or arrange for the performance of construction..." are the applicable rates and "must be included with the construction specifications for the CM/GC contract."

Ms. Hammond pointed out that the draft rule indicates that a CM/GC will generally "have a binding and enforceable obligation to perform or arrange for the performance of construction... after the public agency and CM/GC commit to the guaranteed minimum price."

Commissioner Gardner announced that the agency planned to hold a rulemaking hearing sometime in December regarding the proposed rule in order to address this issue as soon as possible and provide greater certainty about application of the law to CM/GCs.

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Norm Malbin recalled that a workgroup, including advisory committee members, had previously been established to review the issue of CM/GCs and make recommendations regarding how the PWR law should apply to CM/GC contracts. Mr. Malbin urged the bureau to notify those workgroup participants outside the advisory committee of the proposed rule.

Daniel Boldt commented that he believed the proposed rule made it very clear when the “trigger point” for the applicable rates occurs.

Shawn Miller stated that he believed establishing a time limit for rates would be helpful in providing a “bright line” for their application, but understood that such a time limit was not possible given the constraints of the current statute.

Commissioner Gardner suggested that legislation might be appropriate to establish a time limit for how long rates would be valid between the time a contract is executed and construction actually commences.

Bob Shiprack said that he would be discussing this legislative concept further with committee member Jessica Adamson.

Legislative Budget Note Regarding Streamlining PWR Requirements

Staff reminded the committee of the budget note from last legislative session which was briefly discussed at the committee’s previous meeting, directing BOLI to work with the Prevailing Wage Advisory Committee to “evaluate possibilities for streamlining procedures and reducing administrative costs for small public works projects.” The committee was provided with a list of streamlining recommendations made and implemented to date.

Although the committee had previously discussed the possibility of inviting public testimony for additional recommendations and suggestions at a future Prevailing Wage Advisory Committee meeting, staff suggested that since time was running out before the legislative session when a report must be made, the committee consider sending a mailing to BOLI’s PWR mailing list, comprised of more than 7000 contractors and contracting agencies, asking for additional streamlining suggestions to be considered by the committee. Staff said if this suggestion was approved, it would consolidate and summarize the recommendations for review by the committee.

The committee unanimously approved staff’s recommendation.

Proposed Legislation Updates

Commissioner Gardner encouraged committee members to bring legislative concepts to the committee for discussion. Bob Shiprack said that he hoped to see legislation introduced addressing the issue of coverage of public/private projects under the PWR law.

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General agreement was expressed that concepts agreed upon by the committee were likely to be passed by the legislature.

It was agreed that legislative concepts would be discussed at the committee's next meeting.

Next Meeting

The next meeting was scheduled for Thursday, January 11, 2007 at 1:30 PM in the Labor and Industries Building in Salem.

The meeting was adjourned at approximately 3:00 PM.

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