

MINUTES

Bureau of Labor and Industries

PREVAILING WAGE ADVISORY COMMITTEE

Thursday, November 17, 2005

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

At the request of Commissioner Dan Gardner, who was detained for a short period of time, Committee Vice-Chair Norman Malbin called the meeting to order at 1:30 PM.

Members Present

Jessica Adamson
Daniel Boldt
Daniel Bonham
Ed Glad
Mark Holliday
Norm Malbin
Shawn Miller
Jay Minor
John Mohlis
Dan O'Brien
Bob Shiprack
Karen Williams

Members Absent

Dan Bartlett

Staff Present

Dan Gardner
Christie Hammond
Lois Banahene
Stephen Simms
Denise O'Farrell (OED)
Leanna Harmon (OED)
Dave Yamaka (OED)

Minutes of the Previous Meeting

The minutes of the September 22, 2005 meeting of the advisory committee were reviewed and approved without comment.

Staff Reports

A summary of PWR enforcement activities for the 2005-2007 biennium to date (through October, 2005) was provided to the committee, in addition to enforcement data from previous biennia, information regarding currently open PWR investigations, and a summary of educational seminars conducted and scheduled.

In addition to this information, the following reports were presented:

A) Review of Survey Data

A summary of data collected from the 2005 Annual Construction Industry Survey conducted by the Oregon Employment Department was reviewed and discussed, which included summaries of data collected by trade, and a comparison of data collected in the 2004 and 2005 surveys.

B) Proposed Rules

1. Proposed Rules Implementing SB 136 and SB 477

A summary of the provisions of legislation enacted by the 2005 Legislature to become effective January 1, 2006 was presented, including a copy of the newly enacted Statutory Public Works Bond. Draft rules implementing the provisions of this legislation were also presented and discussed.

Jessica Adamson commented that she believed that the language in the law could have been made clearer regarding amounts to be withheld from contracting agencies from contractors if certified payrolls are not filed as required. Ms. Adamson pointed out that amounts owed to a prime contractor by a contracting agency may only be withheld if the *prime contractor* has failed to file certified payrolls; not for certified payrolls not filed by subcontractors.

Shawn Miller asked whether a public agency would be liable for unpaid PWR wages owed to workers on a project if the agency provided incorrect PWR wage rates in its specifications. It was generally agreed that under the current law, a public agency would not be liable for unpaid wages in this event. Shawn Miller commented that he believed that such public agency liability should be provided by law under these circumstances.

Karen Williams said that she would advise her public agency clients to make an affirmative statement in their contract documents regarding the contractor's responsibility to pay the applicable wage rates. Ms. Williams also suggested that the provisions of SB 1006 (requiring that public agencies document their findings relating to lowest responsible bidder determinations) be brought to the attention of contracting agencies in BOLI training seminars.

2. Proposed Revised Rules Relating to Conduit or Pass-Through Revenue Bonds

Commissioner Gardner provided the background of the proposed draft rule which would revise the definition of "Directly used public funds" in the PWR rules to include "...the loan of proceeds from the sale of conduit or pass-through revenue bonds...."

Commissioner Gardner explained that the impetus for the rule revision was an Oregon State University project (the College Inn) that qualified as a public works project, but was exempt from the PWR law because the particular funds used for the project, derived from a loan by the State Treasury of the proceeds from the sale of Oregon Facilities Authority

conduit revenue bonds, were determined not to be “public funds” as defined in the bureau’s current rules.

Commissioner Gardner said that BOLI proposed the rule amendment after being advised by the Department of Justice that the agency had the statutory authority to include this funding mechanism within its definition of “public funds.”

Committee members Bob Shiprack and Jessica Adamson, who co-chair the Task Force on Public-Private Partnerships (TOP), summarized the task force’s discussion of the proposed rule.

Mr. Shiprack stated that the consensus of TOP members was that the OSU project should have been covered under the PWR law. Ms. Adamson said that although initially concerns were expressed by TOP members that the rule revision might affect the “two-prong” analysis in determining coverage of the PWR law to a project (in which use of public funds is relevant only if a project is first determined to be a “public work”), subsequently, members came to realize that the rule change would not affect or change this two-part analysis.

Shawn Miller stated that it was his understanding that the proposed rule revision only applies to the “second prong” of the PWR test pertaining to exemptions, but wondered whether this could be made clearer in the proposed rule.

Karen Williams summarized an email she sent to BOLI, copies of which were provided to the committee members, expressing her concern that while application of the law is characterized by BOLI as a two-prong test, the fact that financing contracts have been construed by the agency to meet the first prong (i.e., qualify as a contract for a “public work”), the proposed rule revision might have the effect of merging the two-prong test.

Commissioner Gardner reiterated that in order for a contract to be subject to the PWR law, the contract must be a *contract for construction* and that the proposed rule revision did not blend the two prongs of the test. Mr. Gardner said that the next step in the process would be to schedule a rulemaking hearing at which opportunity for additional input regarding concerns and suggestions relating to the rule would be provided.

Ms. Williams asked whether TOP would be working further on the language in the proposed rule revision.

Commissioner Gardner responded that TOP was not dealing with this issue and that the task force’s objectives related more to addressing issues pertaining to the first prong of the test (i.e., under what circumstances a project is carried on or contracted for by a public agency).

Ms. Williams said that she had understood that TOP would be addressing the proposed rule pertaining to “public funds” as part of its work.

Mark Holliday said that discussions of the proposed rule revision had consumed the last three meetings of the advisory committee and he believed that the committee had adequately discussed and considered the proposed rule. He stated that he saw no need to discuss the rule further.

Assistant City Attorney for the City of Salem, Sean O'Day, who attended the meeting, said that local governments were concerned about how the proposed rule might apply to the first prong of the test, and that it was his opinion that TOP should be considering both prongs of the test.

Ed Glad moved that the bureau move forward with the proposed rule revision and called for a vote by the committee.

The committee unanimously voted in favor of the motion, with the exception of Karen Williams, who voted against it.

C) Status of Public/Private Partnership Task Force ("TOP")

TOP co-chair, Jessica Adamson updated the committee on the progress of the task force. She told the committee members that TOP had been reviewing various scenarios involving mixed use and public-private projects in order to identify and recommend appropriate criteria to be considered in applying the PWR law to various types of projects.

TOP co-chair Bob Shiprack added that rather than making amendments to the existing PWR regulations that would apply to *all* public works projects, the task force was considering restricting its discussions and recommendations to deal specifically and **ONLY** with public-private projects, which might make consensus building easier, as well as avoid unintended consequences to other types of projects.

Shawn Miller expressed his support for this approach, saying public-private projects were different than "traditional" PWR projects.

Commissioner Gardner said that the goal of the task force is to make application of the PWR law to mixed use and public-private projects cleaner, simpler, and more consistent. Mr. Gardner said that public input into this process is encouraged and welcomed and will be invited and scheduled.

Application of PWR Law to Registered Apprentices

Steve Simms, Director of the Apprenticeship and Training Division of BOLI, described an issue relating to apprentices employed on projects subject to the PWR law. Mr. Simms explained that occasionally, an apprentice will perform the duties of a classification/occupation other than the occupation to which the apprentice is indentured on a PWR project. For example, the apprenticeship standards for a particular "Operating Engineers" program include up to 1,000 hours of "utility/laborer" duties toward completion of the apprenticeship program.

The question presented to the advisory committee was should an apprentice continue to be paid at the applicable rate for the period in his/her apprenticeship program on a PWR project when performing duties that would otherwise be classified under another occupation?

Dan O'Brien said that contractors should be aware of the provisions in the applicable standards and make sure apprentices do not exceed work duties of other occupations performed as part of the standards for a particular program. For example, Mr. O'Brien said that the standards for electrical apprentices provide for a certain amount of excavation work to be performed.

Norman Malbin asked whether it might be possible for a contractor to use an apprentice inappropriately on a PWR project to do work in a different classification than the apprentice's in order to save on costs.

Mark Holliday stated that employing apprentices to do the work of other trades probably most often occurs with operating engineers performing duties classified as laborer duties, and expressed concern that as a consequence, the operating engineer apprentice might not be receiving the required number of operating engineer training called for in the standards. Mr. Holliday pointed out that general labor experience is necessary for most trades, but shouldn't be substituted for specialized occupational apprenticeship training.

Mr. Simms indicated that it was staff's recommendation that so long as an apprentice is performing work duties pursuant to the approved standards for the program to which the apprentice is indentured, the apprentice should be paid at the applicable rate within that apprenticeship program (even if the duties performed may otherwise be considered to be those of another trade). Staff stated that apprentices should not be assigned or allowed to perform work duties outside those provided within the respective standards for the apprenticeship program to which they are indentured, and in the event that this occurred, recommended that the apprentice be required to be paid the applicable journeyman rate of pay for that work.

The committee unanimously adopted staff's recommendation with regard to the applicable rates to be paid to apprentices under the above circumstances.

Shawn Miller requested that BOLI consider publishing apprentice fringe benefit information along with its rate determinations. Staff agreed to do so.

Next Meeting

Commissioner Gardner indicated that the next meeting of the committee would be "on call" until there was sufficient business for the committee to convene a meeting.

The meeting adjourned at 2:55 PM.