

## MINUTES

### PREVAILING WAGE ADVISORY COMMITTEE

Thursday, August 19, 2004

Committee Chair Norman Malbin called the meeting to order at 1:30 PM.

<u>Members Present</u>	<u>Members Absent</u>	<u>Staff Present</u>	<u>Guests Present</u>
Ed Glad	Daniel Boldt	Dan Gardner	Jerry Auril, Carpenters
Jessica Harris-Adamson	Jay Minor	Christie Hammond	Jeff Dean, ABC
Mark Holliday	Dan O'Brien	Lois Banahene	Brian Gaine, Laborers 320
Norman Malbin		Susan Wooley	Kevin Jensen, Ironworkers 29
Shawn Miller		Denise O'Farrell (OED)	John Killin, IEC
John Mohlis			Greg Miller, AGC
Bob Shiprack			Jim Pauley, Ironworkers 29
Dick Springer			

#### **Minutes of the Previous Meeting**

The minutes of the June 3, 2004 meeting of the advisory committee were reviewed and approved as presented.

#### **Committee Membership/Vacancies**

Staff reported that Ed Glad, Pacific Northwest Regional Council of Carpenters, has been appointed to the advisory committee by Commissioner Dan Gardner. Commissioner Gardner noted that one seat on the committee remains vacant at this time.

#### **Staff Reports**

Staff presented a summary of BOLI's PWR enforcement activities, including fiscal year-end investigation, collection, and violations data, and a summary of education seminars conducted during fiscal year 2003-04. A list of currently open PWR investigations was also provided to the committee.

#### **2004 Construction Industry Survey Update**

Denise O'Farrell reported that survey responses have begun coming in and the annual survey appears to be starting out smoothly. She noted that the first submissions received are generally those reporting no data. Survey responses are due by September 17, 2004.

## **Committee Recommendations for Revisions to Current PWR Localities/Districts**

Staff advised the committee that the Department of Justice had advised the commissioner that he has broad discretion under the law to determine that there is insufficient data to make a PWR determination for a locality and to consider data obtained from other localities in determining the rates to be paid in the legislatively-established localities/districts.

A copy of the methodology used by the US Department of Labor in establishing wage rates was provided. The federal methodology includes four “levels” of county and classification groupings where the data collected for a single county is insufficient. Denise O’Farrell compared the state and federal methods and pointed out that under the federal methodology, data from rural and metro counties may not be combined.

Dick Springer suggested that it might be appropriate to establish fewer regions for highway projects, and to group contiguous regions, e.g., the I-5 and I-84 “corridors” in order to avoid fluctuations in wage rates along these corridors on single projects. Bob Shiprack agreed and said there is currently an “eight year bridge project” underway with clearly defined “corridors” in which corridor groupings might well be appropriate.

Norman Malbin pointed out that although contiguous regions might make sense for highway projects and related occupations, these regions may not make sense for other trades. Mr. Malbin suggested that groupings should be made according to the “economic realities of the state.”

It was noted that it is not currently possible to break out data within a county, such as coastal vs. urban data within the same county.

John Mohlis said that he was satisfied with the current regions and the commissioner’s authority to determine what data should be included and considered in making determinations.

Mr. Malbin requested that staff contact committee member Jay Minor, who was absent from the meeting, regarding any recommendations he has pertaining to revising the current districts/localities.

## **Draft Rule Pertaining to Construction Managers/General Contractors (“CM/GC’s”)**

Staff advised the committee that there is some confusion about which PWR rates apply when a “CM/GC” is used on a public project. BOLI’s long-standing position relating to this issue was summarized. (See “Bureau of Labor and Industries Application of Prevailing Wage Rate Law to CM/GC’s” document.) Staff further reported that BOLI has been advised by the Department of Justice that the agency’s position with respect to which rates are applicable when a CM/GC is used is legally valid, however, rules to clarify the agency’s application of the law with respect to CM/GC’s were recommended since the current rules do not specifically address CM/GC’s.

Staff reported that Commissioner Gardner had appointed a workgroup, including advisory committee members Bob Shiprack and Jessica Harris-Adamson, as well as Dana Anderson from the Department of Justice, Denise Johnson from the City of Portland, and BOLI staff to draft rules pertaining to application of the PWR regulations to CM/GC’s. Draft rules were presented to the committee.

Bob Shiprack discussed the differences between CM/GC's and the traditional design/bid/build contracting model, and indicated that he did not believe it was necessary to amend the current rules.

“Early work” and “guaranteed maximum price (GMP)” amendments to CM/GC contracts were discussed as possible reference points for determining the applicable prevailing wage rates to be paid, as well as the date bid specifications for construction are issued by the CM/GC, however, it appears that none of these events may *always* occur when a CM/GC is used. Further, the possibility of an “artificial” early work amendment being used to “freeze” the applicable wage rates was identified as a potential problem.

Concern was expressed that the language in the proposed rule revisions pertaining to whether the specifications for the CM/GC contract include construction could still possibly be misread to apply to initial CM/GC contracts (without construction). In addition, some felt that what constitutes “authorization” for construction services by a public agency may not be clear.

Jessica Harris-Adamson indicated that construction is authorized by a public agency when a GMP is set, however she acknowledged that there may not always be a GMP. Bob Shiprack agreed that establishment of a GMP constitutes a “commitment for construction.” Ms. Harris-Adamson also said that bid specifications for construction generally follow after a GMP is established, but it was pointed out that CM/GC's are not required to advertise bid specifications, and it is possible for a significant period of time to elapse before construction actually begins following a GMP amendment. Bob Shiprack commented that he thought that if the CM/GC did not advertise bid specifications with 60 days of the GMP date, the rates in effect when the first bid specs were advertised should apply.

After additional discussion, it was agreed that the draft rule should be reviewed by other interested parties, including the legal committee of the AGC, the Public Contracting Coalition, and contractors who regularly act as CM/GC's for their suggestions and to ensure that the language is clear and cannot be misinterpreted. Jessica Harris-Adamson said that she would have AGC's legal committee review the draft rule; Bob Shiprack indicated that he would provide BOLI with the names of contractors who typically act as CM/GC's; and a copy of the draft rule will be provided to the Public Contracting Coalition for comments. Committee Chair Norman Malbin requested that staff report to the committee on this issue at the next meeting.

### **Draft Rule Pertaining to Definition of “Public Funds”**

Staff advised the committee that the agency had recently received an inquiry relating to coverage of a project under the PWR law in which a loan from “tax exempt” bonds issued by the Oregon Facilities Authority, a State Treasury program, was being used as a funding source. After consultation with the Department of Justice, it was determined that although such funds could be defined as “public funds” under the Prevailing Wage Rate law, the bureau's current rules defining “public funds” precluded BOLI from defining these types of funds as “public funds,” and the project, therefore, was determined to be exempt under the PWR law. BOLI was advised that such funds could be defined as “public funds” if the language in the current rules was amended.

A draft rule redefining “funds of a public agency” to include “the loan of the proceeds from revenue bonds issued through the Oregon Facilities Authority program or similar programs” was presented to the committee. Norman Malbin questioned the specific reference to the Oregon Facilities Authority in the rule and suggested that the language be modified to include similar programs.

Commissioner Gardner requested that any additional comments or suggestions regarding the draft rule be submitted to the agency before September 15, 2004

### **Draft Policy on “Waiting Time” for Truck Drivers and Owner-Operators**

Staff presented a draft memo to interested persons relating to proposed revised enforcement policies pertaining to application of the PWR law to truck drivers.

The memo proposes two policy changes; the first of which would require the payment of PWR wages for all time worked, *including waiting time*, on covered project sites by truck drivers employed by construction contractors or subcontractors.

The second proposed policy change requires contractors who use “owner-operators” of trucks on state ODOT projects to obtain evidence of the owner-operator’s prima facie status. It was noted that this proposed policy was a unanimous recommendation of a sub-committee of the advisory committee which was convened to make recommendations regarding truck driver issues, and that ODOT has approved implementation of this policy.

Commissioner Gardner requested that any comments relating to the draft memo be submitted prior to September 1 and said that he was providing a 60-day comment period relating to the proposed revised enforcement policies before making any permanent policy changes.

### **Next Meeting Date/Agenda**

The next meeting of the Prevailing Wage Advisory Committee will be held on Thursday, October 14, 2004 at 1:30 PM at the International Union of Operating Engineers, 555 East 1<sup>st</sup> Street, Gladstone, OR.

The bureau’s PWR program legislative agenda will be discussed.

The meeting adjourned at approximately 3:00 P.M.