

# **PREVAILING WAGE ADVISORY COMMITTEE**

## Meeting Minutes

Thursday, September 14, 2006

Associated General Contractors  
9450 SW Commerce Circle  
Wilsonville, OR 97070

### **Members Present**

Jessica Adamson  
Daniel Bonham  
Mark Holliday  
Norm Malbin  
Shawn Miller  
John Mohlis  
Patrick O'Brien  
Bob Shiprack

### **Members Absent**

Dan Bartlett  
Daniel Boldt  
Dan O'Brien  
Karen Williams

### **Staff Present**

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

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

### **Introduction of New Member**

Commissioner Gardner welcomed Patrick O'Brien to the advisory committee, noting that Mr. O'Brien replaced Jay Minor on the committee. Mr. O'Brien, a construction contractor and member of the Associated General Contractors, said he was happy to be on the committee and that he had a strong interest in prevailing wage rate issues.

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

The minutes of the November 17, 2005 meeting, which had been distributed previously and reviewed without comment or objection, were approved by the committee.

### **Staff Reports**

#### **A. Status of 2006 Annual Construction Industry Survey**

Copies of the 2006 annual construction industry survey were provided to each of the committee members. Denise O'Farrell of the Employment Department reported that the survey was "on track" and that approximately half of the surveys had been returned to date.

**B. PWR Unit Enforcement/Education Report**

A summary of PWR enforcement activities for the 2005-2007 biennium to date (through August, 2006) was provided to the committee, in addition to enforcement data from previous biennia, and a summary of educational seminars conducted during fiscal year 2005-2006. Staff noted that 100 PWR predeterminations had been requested so far this biennium, representing a significant workload increase for the PWR Unit. A report of predeterminations issued was reviewed and several suggestions were made for reformatting the report, including providing information regarding the conclusions made by BOLI. It was noted that the predeterminations issued are disclosable public records.

Committee member Shawn Miller asked whether the Department of Justice would defend determinations made by BOLI if later challenged. Commissioner Gardner indicated that as long as the circumstances remained the same and no additional information was presented changing BOLI's/DOJ's analysis, he believed DOJ would. Commissioner Gardner also said that the agency was working on devising an appeal process using the contested case (administrative) procedure for instances in which a party disagrees with the bureau's determination in order to get the matter before the Appeals Court more quickly than by litigating the matter.

Jessica Adamson asked whether BOLI had considered assessing a fee for issuing predeterminations to recover its costs. Commissioner Gardner responded that he was concerned that doing so might serve as a disincentive for parties to request such determinations. In addition, Commissioner Gardner said he was also concerned about potential costs to the agency in collecting such fees.

The committee reviewed data relating to civil penalties assessed against contractors who failed to respond to the 2005 construction industry survey. Patrick O'Brien questioned whether it was possible that some of the firms did not respond because they were no longer viable. Staff responded that civil penalties are only assessed against active businesses.

Daniel Bonham questioned the reason(s) some contractors request a hearing to contest the civil penalties assessed. Staff responded that there are a variety of reasons, but most have to do with excuses given for why the contractor failed to file a survey in the attempt to substantially reduce or dismiss the penalty.

**C. Legislative Emergency Board Request for Additional Position and Proposed New Performance Measure**

Commissioner Gardner reminded the committee members that two additional compliance specialists for the PWR Unit had been requested by BOLI during the 2005 legislative session in connection with workload issues. One of these two positions was approved, and the

agency was directed in a budget note to report back to the Emergency Board during the interim regarding the need for the second position.

Commissioner Gardner advised the committee that the agency would be reporting to the Emergency Board as directed on September 22, requesting authorization for the second position, primarily to deal with the increase in predeterminations requested. A copy of the bureau's request was provided to the committee members.

Commissioner Gardner reported that a presentation had been made earlier that day to the Joint Legislative Audit Committee, which recommended approval of this second position, in addition to a new proposed performance measure of 15 business days from the date of receipt of a request for a predetermination for staff to make a recommendation regarding coverage.

**D. PDC/BOLI Court Case Status ("Tin Roof")**

Deputy Commissioner Annette Talbott summarized the status of the lawsuit between the Portland Development Commission (PDC) and BOLI regarding application of the law to the "Tin Roof" project. Ms. Talbott told the committee that the primary issue in the case was whether or not PDC had contracted for the project. She reviewed the May 3, 2006 Multnomah County Circuit Court transcript of the oral arguments relating to the motion for summary judgment in the case, at which the judge ruled in favor of PDC without issuing a written opinion.

Ms. Talbott pointed out that it appeared that the judge had a fundamental misunderstanding about how the PWR law is enforced because he made statements contradictory to his decision suggesting that he believed that BOLI had the authority to interpret the law in the manner it had, but should have taken action to enforce the law on the project "before the contracts had been signed." Ms. Talbott also pointed out that Judge Kantor further stated that he didn't see any restriction in BOLI creating a regulation interpreting the law in the manner it did in this case. She also noted that the judge indicated he agreed with BOLI that PDC's involvement in the project was "to serve the public interest."

Ms. Talbott indicated that BOLI is appealing the decision and that it was not binding in the meantime, particularly since the applicable statutes and administrative rules had since been amended.

**E. DOJ Opinion Re: Application of PWR Law to Grants**

Annette Talbott advised the committee that the Department of Justice had issued an opinion that the exemption of grants from the Public Contracting Code in ORS 279A did not affect the scope or application of the PWR law to public works projects funded in whole or in part

by a grant. This issue had come up after a reorganization and recodification of ORS Chapter 279 in 2003 in which an exemption for grants from certain public contracting requirements was enacted. A copy of the opinion was provided to the committee members.

### **Classification Definitions Review Plan**

Commissioner Gardner advised the committee that the agency was developing a plan to review the current PWR classifications/definitions used. The intent of the review is to make sure that the definitions are up-to-date and as clear as possible in order to avoid misclassification of workers by contractors. Commissioner Gardner shared a draft work plan for the project and said that recommendations regarding any changes would be brought to the committee for review. Commissioner Gardner also said that it may be appropriate to form a subcommittee of the advisory committee at some point to review staff recommendations. Jessica Adamson commented that she thought it was a good idea to clarify existing occupational definitions. Commissioner Gardner advised the committee that the process was not intended, nor would it be used to address or resolve any jurisdictional disputes between trades.

### **Report and Discussion on Public/Private Partnership Task Force (“TOP”)**

Commissioner Gardner reported that the Public/Private Partnership Task Force (“TOP”) had concluded after meeting over approximately an eight-month period in the attempt to provide clarity in application of the PWR law to public/private and mixed used projects. Commissioner Gardner asked the TOP co-chairs, Jessica Adamson and Bob Shiprack to comment on the work of the task force.

Jessica Adamson said that she believed the TOP had generated a productive discussion that may have laid the groundwork for future resolution of the issues. Ms. Adamson said that she was disappointed that the TOP was unable to reach consensus on critical issues, and that the ultimate breakdown was due to a lack of agreement and failure by some to move from their positions regarding the meaning of the terms “carried on” and “contracted for” in the definition of public works.

Bob Shiprack said he held a “more pessimistic” view and expressed his disappointment that the task force broke down, particularly since it was comprised of “high level” people who were in a position to provide a compromise resolution to the current situation which he believes to be “intolerable.” Mr. Shiprack said that the TOP discussions made clear that there is a “wholesale lack of understanding” of the PWR law and a “sky is falling” mentality regarding the law. Mr. Shiprack stated that he has been meeting with housing and community development representatives and said that there is a lot of misunderstanding. Mr. Shiprack also expressed his opinion that the lawsuit brought by the PDC against BOLI complicated the mission of the task force, and that the “fight” that ensued was unnecessary, ultimately requiring the involvement of

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the Portland City Council and Mayor. Mr. Shiprack said he was hopeful about the current process in which the Portland Development Commission is reviewing application of the PWR law on PDC projects, and the involvement of PDC Chair Mark Rosenbaum.

Deputy Commissioner Annette Talbott summarized some of the concepts developed and considered by the Task Force for applying the terms “carried on” and “contracted for,” to mixed use and public/private projects and a proposed “menu” approach to determine coverage on these projects.

Commissioner Gardner noted that he frequently hears exaggerated and unsubstantiated claims that the PWR law substantially increases project costs. Shawn Miller commented that he believed the difference in wages owed under the PWR law was often attributable to the payment of fringe benefits, and stated that some contractors who provide fringe benefits sometimes have to pay more to meet the established PWR fringe benefit rate, even if they are able to provide benefits at a lower cost.

Commissioner Gardner said that he and others were working with the Portland Development Commission, which is considering adopting PWR standards on projects using PDC funds. Commissioner Gardner reported that the PDC is holding a series of public meetings to review the issue and said that he was “cautiously optimistic” about the process.

Shawn Miller asked how any policy adopted by the PDC affected the broader policy issues regarding PWR law coverage. Commissioner Gardner responded that he believed as the largest urban renewal agency in the state, PDC’s policies could well influence public policy, potentially promoting compromise legislation. Jessica Adamson agreed that PDC’s actions could be a “starting point” for legislation.

Bob Shiprack expressed his belief that a separate law dealing with public/private projects was needed, and said that he hoped any legislation addressed how the law applies to the 40+ urban renewal agencies in the state.

Shawn Miller agreed, and said that “bright lines” needed to be agreed upon.

Jessica Adamson commented that it might not be possible to arrive at a “simple” solution, and said that making the law complex may be unavoidable and shouldn’t be feared, as long as the law is clarified. Shawn Miller agreed.

Norman Malbin said that he believed that the public policy shouldn’t be “cheaper is best” and that the policy should favor/recognize the value of paying living wages to workers.

### **Temporary Rules Regulating Residential Construction Projects**

BOLI Wage and Hour Division Administrator Christie Hammond advised the committee that the bureau had adopted temporary rules which had been approved by the advisory committee in September, 2005 implementing the definition of “residential construction.” Ms. Hammond explained that the new definition adopted in the temporary rule basically adopts the federal definition of residential construction, but authorizes exceptions to this definition where it is determined that a different definition of residential construction has been adopted by local ordinance or code or the prevailing practice of a particular trade differs from the federal definition.

Ms. Hammond also pointed out that a new temporary rule was adopted allowing for federal residential rates to be used on projects subject to the state PWR law without requiring application to BOLI for a “special rate” determination (reducing work for both contracting agencies and BOLI). Ms. Hammond said that this new rule also outlines a process for obtaining a residential rate for trades where no rate is published by the US DOL, and makes clear that under no circumstances may a rate less than the state minimum wage be paid.

Ms. Hammond additionally informed the committee that a rule that previously required that physical copies of rates be attached to bid specifications had been amended to allow contracting agencies to “reference” the applicable wage rates in the specifications instead.

Ms. Hammond advised the committee that the temporary rules were effective for six months and would expire on November 10 unless made permanent. She said that the agency had filed notice of its intent to make the rules permanent.

Ms. Hammond also told the committee that BOLI had met with representatives from the Association of Oregon Housing Authorities regarding the proposed rules and that some minor, non-substantive clarifications might be made.

The committee members were advised that the deadline for public comment relating to the rules is October 25, 2006, and members were encouraged to submit any suggestions or recommended revisions they have regarding the draft proposed rules.

Bob Shiprack pointed out that sometimes there are no available residential federal wage rates. Ms. Hammond responded that the rules addressed this issue and provided a process for issuing rates in these circumstances.

Mr. Shiprack suggested that BOLI consider surveying rates for crafts that were commonly used where there are no federal wage rates, such as roofers and floor covering workers. Deputy Commissioner Annette Talbott responded that BOLI would look at ways in which rates might be

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adopted that can be used by multiple agencies without having to go through a separate process each time.

Commissioner Gardner told the committee members that a presentation of Oregon's PWR survey had recently been made at a National Association of Government Labor Officials (NAGLO) meeting attended by labor commissioners from around the country, and many reported how impressed they were with Oregon's survey.

**Legislative Budget Note Regarding Streamlining PWR Requirements**

Commissioner Gardner advised the committee that BOLI had been directed in a budget note by the 2005 Legislature to work with the Prevailing Wage Advisory Committee to "evaluate possibilities for streamlining procedures and reducing administrative costs for small public works projects."

Commissioner Gardner referred to a draft list of streamlining recommendations the advisory committee and BOLI have already implemented or are working on, and invited the committee members and others attending the meeting to make additional "streamlining" suggestions.

Deputy Commissioner Annette Talbott suggested that the committee set aside time at a future meeting for public comments and recommendations for streamlining processes and reducing costs.

**Proposed Legislation**

In addition to possible legislation clarifying application of the law on residential construction and mixed use, public-private projects, Commissioner Gardner said that he was aware that there may be legislation proposing revisions to SB 477 from last session which may have created some unintended results, particularly in repealing the Davis-Bacon exemption under the PWR law.

Jessica Adamson said that the repeal of the Davis-Bacon exemption had been meant to apply only to the *rates* to be paid on projects subject to both state and federal prevailing wage rate laws, and the AGC was working on language to clarify this.

Bob Shiprack said that he had heard concerns about the public works bond enacted last session, and claims that some contractors could not afford the cost of the required bonds.

Shawn Miller agreed and said that he had heard complaints about subcontractors being required to obtain the \$30,000 bond for very small contracts, and suggested that a "de minimus" contract threshold amount might be appropriate.

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Commissioner Gardner asked Mr. Miller to summarize an LC draft he had submitted for review by the committee.

Mr. Miller explained that the proposed legislation would make public agencies liable for workers' unpaid wages in cases where the public agency failed to specify the applicable state or federal wage rates in contract specifications. Norman Malbin asked for clarification that the concept would not relieve contractors of the responsibility to pay prevailing wages on a covered project, and Mr. Miller confirmed that this was not the intent of the proposed legislation. It was pointed out that the proposed legislation does not make contracting agencies "exclusively liable" for PWR wages owed.

Commissioner Gardner encouraged other committee members to share any additional legislative concepts proposed at future meetings.

**ADJOURNMENT**

There being no further business to come before the committee, Commissioner Gardner adjourned the meeting at 3:20 PM.