

In the Matter of
CITY OF KLAMATH FALLS

Case No. 02-00

January 28, 2000

SYNOPSIS

Respondent, a public agency, awarded several contracts for improvements to its municipal water system during the summer of 1998. The commissioner found that five of those contracts constituted part of a single public works project, the total price of which exceeded \$25,000.00. Consequently, Respondent was required to comply with the prevailing wage rate laws with regard to each of the five contracts, including one for which the contract price was less than \$25,000.00. Respondent failed to include with the specifications for that contract a provision stating that a fee was required to be paid to the commissioner as provided in ORS 279.375(1) and administrative rule. That failure constituted a violation of ORS 279.352(2). The commissioner assessed no civil penalty. ORS 279.352(2), ORS 279.357, ORS 279.370(1), OAR 839-016-0310, OAR 839-016-0530, OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 7, 1999, in the Hearings Room of the Oregon Employment Department, 801 Oak Avenue, Klamath Falls, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David Gerstenfeld, an employee of the Agency. Respondent appeared through its counsel, City Attorney Jeffrey Ball.

The Agency called Agency compliance specialist Lois Banahene, Agency administrative specialist Dana Woodward, and Respondent's Water Superintendent, David Steiner, as its witnesses. Respondent called Steiner as its sole witness.

The forum received into evidence:

a) Administrative exhibits X-1 to X-11 (generated or filed prior to hearing) and exhibits X-12 and X-13 (generated or filed after the hearing).

b) Agency exhibits A-1 through A-4 and A-6 through A-14 (submitted prior to hearing with the Agency's case summary) and A-15 and A-16 (submitted during the hearing).

c) Respondent exhibits R-1 through R-9 (submitted prior to hearing with Respondent's case summary).

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On July 19, 1999, the Agency issued a Notice of Intent to Assess Civil Penalties in which it alleged: a) Respondent had advertised for bids on a contract called the "Last Street Waterline Project" that was one of a series of water system improvement projects that constituted a single public works project the Agency called the "Water Project"; b) the cost of the Water Project exceeded \$25,000.00 and was not regulated by the federal Davis-Bacon Act; and c) Respondent had failed to include in the specifications for the Last Street Waterline Project a provision that a fee must be paid to the Commissioner pursuant to ORS 279.351(1) and administrative rules adopted thereunder. The Agency concluded that Respondent had violated ORS 279.352(2) and OAR 839-016-0020(2)(b) and sought a single penalty of \$2000.00.

2) The Agency served the Notice on Respondent through its counsel on July 20, 1999.

3) Respondent, through its City Attorney, filed an Answer denying that the Last Street Waterline Project and other water systems improvement contracts

constituted a single public works project. Respondent reiterated that denial in the context of an affirmative defense and also requested a contested case hearing.

4) On August 5, 1999, the Agency filed a request for hearing with the Hearings Unit and served Respondent with that request.

5) On or about August 9, 1999, the Hearing Unit served Respondent with: a) a Notice of Hearing that set forth the time and place for hearing; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

6) On September 3, 1999, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage, damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by September 24, 1999, and notified them of the possible sanctions for failure to comply with the case summary order. Respondent and the Agency filed timely case summaries.

7) At the start of the hearing, counsel for Respondent stated that he had received the Summary of Contested Case Rights and Procedures and had no questions about it.

8) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

9) At the close of the hearing, the Agency moved to amend the Notice of Intent to include an allegation that Respondent had violated ORS 279.363 by failing to notify the Agency within 30 days of awarding the Last Street Contract. The Agency sought a civil penalty of \$500.00 for the alleged violation. The ALJ granted the motion to amend. After the hearing, the Agency filed an unopposed motion to withdraw the amendment. On October 11, 1999, the forum issued an order granting that motion.

10) The ALJ issued a proposed order on January 7, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed timely exceptions.

FINDINGS OF FACT – THE MERITS

1) Respondent, the City of Klamath Falls, is a public agency.

2) Respondent has several different departments, one of which is the Public Works Department. The Water Division is part of that Department and has its own budget. David Steiner has been Respondent's Water Superintendent since March 1998 and heads the Water Division.

3) Respondent's water system serves 40,000 residential water customers as well as some industrial and commercial customers. It includes over 230 miles of water line.

4) In May 1996, Respondent passed an ordinance authorizing the issuance of water revenue bonds in an amount not to exceed \$7,000,000.00. The ordinance provided, in pertinent part:

“WHEREAS, the Council of the City of Klamath Falls (the “City”), finds that it is financially feasible and in the best interests of the City to improve the City’s water system and facilities through further development, repair and improvement (the “Project”); and

“WHEREAS, the City is authorized to finance the Project by issuing revenue bonds pursuant to Section 47 of the Charter of the City; and

“WHEREAS, Section 47 of the Charter of the City provides that such revenue bonds shall be secured solely from the unobligated revenues produced by the facility or similar facilities, and by, in the discretion of the City Council, mortgage or similar encumbrance upon the facility; and

“WHEREAS, the cost of the Project, including bond issuance costs and debt service reserves, is estimated to be an amount not to exceed \$7,000,000; and

“WHEREAS, the City anticipates incurring expenditures (“Expenditures”) to finance the costs of the Project and wishes to declare its official intent to reimburse itself for the Expenditures made on the Project from the proceeds of tax and revenue bonds, the interest on which shall be excludable from gross income under Section 103 of the Internal Revenue Code of 1986, as amended (the “Code”).

“WHEREAS, Section 47 of the City Charter provides that this Ordinance (the “Ordinance”) authorizing the issuance and sale of revenue bonds shall be subject to referendum, which pursuant to ORS 221.310 is for a period of 30 days after passage by the City Council and approval by the mayor; NOW THEREFORE

“THE CITY OF KLAMATH FALLS ORDAINS AS FOLLOWS:

“Section 1.

“Revenue Bonds Authorized. There are hereby authorized to be Issued in an aggregate principal amount of not to exceed \$7,000,000 of the City’s Water Revenue Bonds, Series 1996 on a parity with the City’s outstanding Water Revenue Bonds, Series 1994 (the “1994 Bonds”). * * *

“* * * * *

“Section 3.

“Bonds Payable Solely from Revenues. The bonds shall not be general obligation bonds of the City, nor a charge upon its tax revenues, but shall be payable solely from the net revenue of the water system and revenues which the City pledges to payment of the bonds pursuant to the ordinance to be adopted by the City and on a parity with the 1994 Bonds. * * *”

Respondent later issued two-year bonds authorized by this ordinance. Respondent referred to these bonds as the 1996 Water Bonds.

5) In a feasibility study related to the 1996 Water Bonds, Respondent's plan for spending the bond funds was described as follows:

"The Additional Bond proceeds will pay for the cost of issuing the bond, funding a reserve account, and for capital improvements to expand the capacity of the water system. Over the next ten years, the City plans to

make over \$7.09 million of capital improvements to the water system, and to spend an average of \$200,000 per year for replacement of the oldest parts of the water system. * * *

The purpose of the 1996 bond measure was to obtain funds to improve Respondent's water system.

6) Respondent included a Schedule of Capital Improvements in its feasibility study for the 1996 bond measure. In that schedule, Respondent projected spending approximately \$200,000.00 per year through the year 2005 on water system "replacement" contracts.

7) The Agency publishes a Prevailing Wage Rate ("PWR") booklet twice each year that includes the wage rates that must be paid for labor on public works. The July 1997 booklet included recommended language for public works contracts:

“ALL CONTRACTS AND CONTRACT SPECIFICATIONS MUST CONTAIN A PROVISION STATING THAT THE FEE SHALL BE PAID TO THE BUREAU.”

“Examples of language satisfying ORS 279.352(2)

***Contract Specifications:**

“-The contractor is required to pay a fee to the Bureau of Labor and Industries pursuant to the provisions of ORS 279.352(2). The fee is one-tenth of one percent of the price of this contract, but not less than \$100 nor more than \$5,000, regardless of the contract price.

***Contract:**

“-The contractor shall pay a fee equal to one-tenth of one percent (.1 percent) of the price of this contract. The fee shall be paid on or before the first progress payment or 60 days from the date work first began on the contract, whichever comes first. The fee is payable to the Bureau of Labor and Industries * * *.”

8) The February 1998 PWR booklet included a page titled "LEGISLATIVE CHANGES" that summarized 1995 and 1997 legislation affecting agencies that award contracts for public works and the contractors working on those projects. That page included the following pertinent statement:

“Public contracting agencies may not divide projects to avoid compliance with the PWR law.”

9) Respondent did not start any construction funded by the 1996 Water Bonds until 1997 and not much was done that year. When Steiner started working for Respondent in March 1998, he determined that the 1996 Water Bond funds had to be allocated by the end of 1998. The construction season in Klamath Falls generally lasts only from April to October or November. Consequently, Respondent bid out 14 water system contracts in the spring and summer of 1998.

10) In early 1998, Respondent issued an advertisement for bids on the Last Street Waterline Project, which it described as “Construction of approximately 725 L.F. of 6 inch PVC waterline, fittings, valves and appurtenances.” The advertisement did not include a statement that a fee was required to be paid to the commissioner as provided in ORS 279.375(1) and administrative rule. The bidding period for the Last Street construction closed on June 8, 1998.

11) Respondent described the Last Street contract in a memorandum as “the construction of a replacement 6” water main on Last Street from Harriman to Addison (Idaho).” The “existing 4” cast iron main” was to be replaced with “leaded joints and 3” steel main, with welded joints.” The Last Street contract was to be funded by the 1996 Water Bond.

12) The Last Street contract was awarded to Jefferson State Rock Products, Inc., at a bid price of \$15,529.00. The engineer was Adkins Engineering.

13) The Last Street contract called for construction to be complete by July 31, 1998.

14) Respondent accepted bids on a second contract – the Iowa Street/Biehn Street Water Main – until July 9, 1998. The work involved both installation of new line and replacement of existing line and involved “construction of approximately 1500 feet

of 6-inch water main and appurtenances.” The Iowa/Biehn construction was located near the intersection of Iowa and Biehn Streets, about 1/4 mile from the Last Street improvement. The engineer on the contract was Paoli Engineering; the contractor was B.J. Williams. The price of the Iowa/Biehn contract exceeded \$25,000.00 and it was funded by the 1996 Water Bond.

15) Respondent accepted bids on a third contract – the Pine Street Water Line Replacement – until July 23, 1998. That contract involved replacing approximately 2100 feet of existing 6” water main with 8” polyvinyl chloride (“PVC”) plastic pipe. The seven-block-long Pine Street improvement was located approximately one mile from the Last Street project. The engineer for Pine Street was W & H Pacific. The contractor was Grimes Construction. The Pine Street improvement cost more than \$25,000.00 and was funded through the 1996 Water Bond.

16) Respondent accepted bids on three more contracts -- the Eastside Waterline Project, the Jefferson and 11th Street Waterline Project, and the Lincoln Street Waterline Project -- until August 6, 1998.

17) Eastside involved construction of a new water main: “Construction of approximately 2760 L.F. of 12 inch ductile iron waterline, 4580 L.F. of 8 inch PVC waterline, firehydrants, valves, fittings, and appurtenances.” The construction was performed near the Klamath Falls airport, which is approximately 5 1/2 miles from the Last Street improvement. The engineer for the Eastside project was Adkins Engineering. The contractor was Mark Wendt Construction. The project cost more than \$25,000.00 and was funded by the Airport Fund.

18) The Jefferson and 11th Street project involved replacement of an existing water line and “Construction of approximately 1460 L.F. of 8 inch waterline, 420 L.F. of service line, 24 services, fire hydrants, fittings, valves and appurtenances.” This

construction ran along Jefferson Street from the Sacred Heart Academy to the end of Jefferson, near 11th Street, approximately 3/4 mile from the Last Street improvement. The engineer for the Jefferson and 11th Street project was Adkins Engineering and the contractor was Mountain Pacific. The contract cost exceeded \$25,000.00 and was funded through the 1996 Water Bond.

19) The Lincoln Street project involved replacement of metallic pipe with PVC pipe: "Construction of approximately 1400 L.F. of 6 inch waterline, fittings, valves and appurtenances." The construction ran from the intersection of Lincoln and 4th Streets to about Lincoln and 7th Streets, approximately 3/4 mile from the Last Street improvement. The engineer for Lincoln Street was Adkins Engineering. The contractor was Mountain Pacific. The contract price exceeded \$25,000.00 and the construction was funded through the 1996 Water Bond.

20) The Last Street improvement was completed in about October 1998. Respondent made its last payment on the contract on or about December 10, 1998. Respondent paid a total of \$15,735.71 to Jefferson State on the Last Street contract.

21) The six water system contracts described in Findings of Fact – the Merits 10 through 20, *supra*, involved construction, reconstruction or major renovation work in the State of Oregon. The contracts were not regulated by the federal Davis-Bacon Act.

22) Respondent funded all six of these contracts except the Eastside contract from the 1996 Water Bonds. Respondent's Water Division budget included a single line item for infrastructure improvements, with specific reference to bond funding. That line item covered the cost of the five water system contracts other than Eastside.

23) The five water system contracts other than Eastside fell within the "replacement" category on Respondent's schedule of water system capital

improvements for which Respondent projected spending approximately \$200,000.00 per year.

24) These five contracts all involved the replacement of existing water lines with new water lines of a more modern type. The Last Street construction and at least one other water main replacement were undertaken in part because the existing water lines were leaking.

25) None of these five water system construction projects was physically connected to another.

26) Completion of the Last Street construction was not necessary to implementation of any of the other five water system construction contracts. Nor was construction of any of other water lines a prerequisite to completion of Last Street. The Last Street construction could have been performed independently and in the absence of the other construction.

27) Respondent's action in bidding out the Last Street construction in a separate contract, rather than combining it with the other water system contracts, was not taken for the purpose of avoiding compliance with the PWR laws. Had Respondent combined all the water system improvements into a single contract, construction would not have been completed before the end of 1998.

28) On November 18, 1998, Hedera Trumbo, a BOLI PWR coordinator, sent a letter to Jefferson State stating that the Agency had not yet received the \$100.00 public works contract fee for the Last Street Waterline Project, and asking Jefferson State to submit a fee information form along with the fee. Jefferson State sent a copy of that letter to Steiner, who received it sometime in November 1998.

29) On November 24, 1998, Jefferson State sent a facsimile transmission to the Agency stating that Last Street was a “stand-alone project in no way connected with any other project by this corporation...”

30) On December 16, 1998, Trumbo sent another letter to Jefferson State stating that the Agency had not received any response regarding its November 18, 1998, fee request. Trumbo notified Jefferson State that it could be subject to a maximum \$1000.00 penalty if it failed to pay the fee.

31) On December 28, 1998, Agency compliance specialist Banahene sent a letter to Vicky Young, Respondent’s public works director. In that letter, Banahene explained the Agency’s position as follows:

“Our prevailing wage rate (pwr) data base shows the City of Klamath Falls advertised bids on six waterline projects between May 31, 1998 and July 26, 1998. * * *

“Oregon’s prevailing wage regulations prohibit public agencies from dividing public works projects into more than one contract to avoid regulation under the prevailing wage laws. In addition, the regulations include the criteria the Bureau uses to evaluate whether multiple contracts constitute more than one project. I have included a copy of the text of Oregon Administrative Rule 839-016-0310. Generally, if a public agency uses several contracts which are closely related in purpose time and place, to conduct a public works project, it is considered one project. The Bureau also examines the manner in which the public agency administers and implements the project.

“OAR 839-016-0020(f) (copy enclosed) requires each contractor to pay a fee equal to one-tenth of one percent (.001) of the total contract price. The fee may be no more than \$5,000 and no less than \$100, and applies to all Oregon pwr projects with a total project amount of \$25,000 or more.

“At first glance, these waterline projects appear to be closely related in purpose time and place and as such would be one large project. If so, the overall combined list of projects would amount to far greater than the \$25,000.00 threshold for coverage. Furthermore, if this is true, [Jefferson State’s] argument (that their contract amount of \$15,529.00 for the Last Street waterline makes it a stand-alone project) would not be correct and the Jefferson State Rock Projects Inc. contract fee of \$100.00 is past due.

“Please review the enclosed administrative rules. By on or before January 6, 1998, please provide a response regarding the coverage of the Last

Street Waterline project. If you determine that it is not a covered project, please provide reasons of how and why you reached that determination.”

Banahene enclosed copies of OAR 839-016-0310 and OAR 839-016-0020 with this letter.

32) The December 28, 1998, letter was the first notice the Agency sent to Respondent regarding this matter.

33) On January 29, 1999, Banahene sent a letter to Respondent’s attorney that stated, in substantive part:

“In November 1998, the Bureau of Labor and Industries notified Jefferson State Rock Products that a fee in the amount of \$100.00 was due on the Last Street Waterline contract. The company’s response to our notice was that the Last Street project was a ‘stand-alone project in no way connected with any other project by this corporation and was under the \$25,000 amt. required for the fee...’

“Through the City of Klamath Falls’ response to my letter dated December 28, 1998, (copies enclosed) and subsequent phone calls with Tom Del Santos and David Steiner, the Bureau has concluded that it appears that several waterline contracts, including the Last Street Waterline, were, for all intents and purposes, part of one public improvements project. The source of funding (a five million dollar bond) was primarily intended to cover water main replacements, new steel tank reservoirs and transmission pipelines. Although pieces of the project were bid in several separate contracts, these contracts were closely related in overall purpose, time and place. A single public works project may include several types of improvement and contain several contracts.

“Upon hearing the above, David Steiner stated that although he disagreed with the outcome, he felt it was the City’s responsibility, not Jefferson State Rocks Products, Inc. to pay the \$100.00 fee because there was no fee language in the contract. He asked that I direct my letter to you rather than the contractor.

“Please remit a fee in the amount of \$100.00 to the Bureau of Labor and Industries at the Portland address below, by no later than February 5, 1999.”

34) On August 3, 1999, the Agency served Jefferson State Rock Products, Inc. with a Notice of Intent to Assess Civil Penalties based on Jefferson’s alleged failure to pay the \$100.00 prevailing wage rate fee required by ORS 279.375 and OAR 839-016-0200 for the Last Street Waterline Project. Jefferson did not timely request a

hearing on the Notice of Intent and the Administrator of the Wage and Hour Division issued a Final Order of Determination (Default) requiring Jefferson to pay a \$1000.00 penalty for the violation.

35) There is no evidence in the record that Respondent previously has violated any PWR laws.

36) There is no evidence in the record that any worker on the Last Street contract was paid less than the prevailing wage rate.

37) The Agency's Field Operations Manual ("FOM"), Volume VI – Prevailing Wage Rate, includes an “Interpretation” as follows:

VOLUME: VI – Prevailing Wage Rate	ORS: 279.357(2)
SUBJECT: Criteria Used to Determine PWR Coverage	OAR: 839-16-310(1)(2)
SOURCE: WHD Administration	DATE: 06-27-89
<input type="checkbox"/> POLICY <input checked="" type="checkbox"/> INTERPRETATION <input type="checkbox"/> REFERENCE	PAGE: 1 of 2

“Generally

“The Prevailing Wage Rate Law, ORS 279.348 to 279.363, requires that the prevailing rate of wage, as determined by the Labor Commissioner, must be paid to workers upon all public works contracts. ORS 277.348(1); 279.350(1). “Public works” are defined very broadly to include roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on by a public agency to serve the general public interest and is not limited to those public works listed. ORS 279.348(3). The only public works projects excluded are projects regulated under the federal Davis-Bacon Act. 40 U.S.C. s 279 a, projects of \$25,000 or less and certain utility district contracts. ORS 279.357(1) and (2); 261.345.

“Criteria

“1. Does the particular project in question involve improvement of “public works?” A single public works project may include several types of improvements or structures. ORS 279.348(3).

“2. What is the ultimate intent of the parties to the particular project? Precisely what did the parties contemplate their project or entity would finally look like? It must be underscored that what is meant by this criteria is not the desire to avoid the effect of the law, but the anticipated outcome of the particular improvements the agency plans to fund. Evidence of

intent will be closely scrutinized for evasion of the statute. The amount of funding that may be available to an agency or the execution of separate contracts are not regarded as determinative of intent. OAR 839-16-008(2); 839-16-100(1)(2); 839-16-310(1)(2).

“3. Are the particular projects, alleged to be separate and distinct, in actuality, one project? A project encompassing several structures or distinct improvements may be one project if the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function.

“4. Is the timing of each particular improvement, alleged to be a separate and distinct project, indicative of one project or several projects? Improvements performed in one time period or in several phases as components of a larger entity will generally be considered a single project.

“5. Are the contractor, subcontractor and their respective workers either the same or substantially the same throughout the particular project or, if different, part of a continuum providing distinct improvements that complete the public agency’s ultimate intent?

“6. How do the public agency and contractors administer and perform the improvements alleged to be separate and distinct?

“7. Does the total value of all anticipated improvements to the public works exceed \$25,000? ORS 279.357(1); OAR 839-16-100(1)(a).”

38) The Agency assesses the fee required by ORS 279.352(2) on each contract for any part of a public works project. In the Agency's view, a project may include more than one contract.

39) Agency personnel use the FOM and the applicable statutes and rules to determine whether several contracts combine to form a single public works project.

40) The testimony of all witnesses was credible.

ULTIMATE FINDINGS OF FACT

1) Respondent is a public agency.

2) In the spring and summer of 1998, Respondent bid out 14 contracts for improvements to its city water system, six of which are at issue in this case: the Last Street, Iowa/Biehn, Jefferson, Lincoln, Pine, and Eastside contracts. These six contracts all involved construction, reconstruction, or major renovation designed to serve the public interest.

3) The Last Street, Iowa/Biehn, Jefferson, Lincoln, and Pine Street contracts were part of a single public works project, the total cost of which exceeded \$25,000.00.

4) Respondent did not include in the specifications for the Last Street contract a provision stating that a fee is required to be paid to the Commissioner of the Bureau of Labor and Industries as provided in ORS 279.375(1) and administrative rule.

5) Respondent knew or should have known that it was required to include this provision in the Last Street contract specifications.

6) No evidence in the record suggests that any person who worked on the Last Street contract was paid less than the prevailing wage rate.

7) No evidence in the record suggests that Respondent has committed any previous violations of the prevailing wage rate laws.

CONCLUSIONS OF LAW

1) ORS 279.348(3) defines "Public works" as follows:

"Public works' includes, but is not limited to, roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

OAR 839-016-0004 further provides:

"(17) 'Public work,' 'public works,' or 'public works project' includes but is not limited to roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency the primary purpose of which is to serve the public interest regardless of whether title thereof is in a public agency but does not include the reconstruction or renovation of privately owned property which is leased by a public agency.

"(18) 'Public works contract' or 'contract' means any contract, agreement or understanding, written or oral, into which a public agency enters for any public work."

Each of the six water system improvement contracts, including Last Street, was a public work, unless it fell within one of the exemptions defined in ORS 279.357.

2) ORS 279.357(1) provides, in pertinent part:

"(1) ORS 279.348 to 279.380 do not apply to:

"* * * * *

"(b) Projects regulated under the Davis-Bacon Act (40 U.S.C. 276a). * * *"

Neither the Last Street contract nor any of the other contracts was regulated under the federal Davis-Bacon Act. None of those contracts was exempted from the definition of "public works" by operation of ORS 279.357(1)(b).

3) ORS 279.357 further provides, in pertinent part:

"(1) ORS 279.348 to 279.380 do not apply to:

"(a) Projects for which the contract price does not exceed \$25,000.

"* * * * *

"(2)(a) No public contracting agency shall divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279.348 to 279.380.

"(b) When the commissioner determines that a public contracting agency has divided a public works project for the purpose of avoiding compliance with ORS 279.348 to 279.380, the commissioner shall issue an order compelling compliance.

"(c) In making determinations under this subsection, the commissioner shall consider:

"(A) The physical separation of the project structures.

"(B) The timing of the work on project phases or structures.

"(C) The continuity of project contractors and subcontractors working on project parts or phases.

"(D) The manner in which the public contracting agency and the contractors administer and implement the project."

OAR 839-016-0310 further provides, in relevant part:

"(1) Public contracting agencies shall not divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279.348 to 279.380.

"(2) When making a determination of whether the public agency divided a contract to avoid compliance with ORS 279.348 to 279.380, the

commissioner shall consider the facts and circumstances in any given situation including, but not limited to, the following matters:

- "(a) The physical separation of project structures;
- "(b) Whether a single public works project includes several types of improvements or structures;
- "(c) The anticipated outcome of the particular improvements or structures the agency plans to find;
- "(d) Whether the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function;
- "(e) Whether the work on the project is performed in one time period or in several phases as components of a larger entity;
- "(f) Whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project;
- "(g) The manner in which the public contracting agency and the contractors administer and implement the project;
- "(h) Other relevant matters as may arise in any particular case."

The Last Street, Biehn/Iowa, Lincoln, Jefferson, and Pine Street contracts combined to form a single public works project, the total cost of which exceeded \$25,000.00. Consequently, the contracts did not fall within the exemption created by ORS 279.357(1)(a).

- 4) ORS 279.352(2) provides:

"The specifications for every contract for a public work shall contain a provision stating that a fee is required to be paid to the Commissioner of the Bureau of Labor and Industries as provided in ORS 279.375(1), and the contract shall contain a provision that the fee shall be paid to the commissioner pursuant to the administrative rule of the commissioner."

Respondent violated ORS 279.352(2) by failing to include the described provision in the specifications for the Last Street contract.

- 5) The commissioner has authority to assess a civil penalty not exceeding \$5000.00 for the violation of ORS 279.352(2). ORS 279.370(1), OAR 839-016-0530(1), (4)(b), OAR 839-016-0540(1). In determining the magnitude of that penalty, the

commissioner must consider "the amount of the underpayment of wages, if any, in violation of any statute or rule" (OAR 839-016-0520(3)) plus:

- "(a) The actions of the contractor, subcontractor or contracting agency in responding to previous violations of statutes and rules;
- "(b) Prior violations, if any, of statutes and rules;
- "(c) The opportunity and degree of difficulty to comply;
- "(d) The magnitude and seriousness of the violation;
- "(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation."

OAR 839-016-0520(1).

OPINION

The Oregon Prevailing Wage Rate ("PWR") laws, collectively known as the Little Davis-Bacon Act, govern contracts for "public works," which are defined as follows:

"Public works' includes, but is not limited to, roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

ORS 279.348(3). The specifications for every public works contract must include a provision informing potential contractors "that a fee is required to be paid to the Commissioner of the Bureau of Labor and Industries as provided in ORS 279.375(1) * * * ." ORS 279.352(2).

There are several exemptions from the applicability of Little Davis-Bacon. The scope of one of those exemptions, as defined in ORS 279.357(1)(a), is the central issue in this case. That statute provides:

- "(1) ORS 279.348 to 279.380 do not apply to:
 - "(a) Projects for which the contract price does not exceed \$25,000."

The disputed question in this case is the meaning of "[p]rojects" in the context of ORS 279.357(1)(a).

The City of Klamath Falls awarded 14 different contracts for improvements to its municipal water system in 1998. The Agency contends that five of those contracts – Last Street, Iowa/Biehn, Jefferson, Lincoln, and Pine – formed a single public works "project," the total cost of which exceeded \$25,000.00.¹ Because of that, the Agency argues, the City was required to include in the specifications for each of the contracts a provision that the contractor was required to pay a fee to the Commissioner of the Bureau of Labor and Industries as provided in ORS 279.375(1) and administrative rule. The participants agree that the City did not include such a provision in the specifications for the Last Street contract. The Agency contends that, by omitting that provision, the City violated ORS 279.352(2).

The City disagrees. It believes the Last Street contract, the cost of which was below \$25,000.00, was a stand-alone job that did not combine with the other water system improvements to form a single public works project. Consequently, it argues, the specifications for the Last Street contract did not have to include a provision stating that a fee was required to be paid as provided in ORS 279.375(1).

It is important at the outset to clarify what is *not* at issue in this case. Little Davis-Bacon includes a provision prohibiting contracting agencies from "divid[ing] a public works project into more than one contract *for the purpose* of avoiding compliance with ORS 279.348 to 279.380." ORS 279.357(2)(a) (emphasis added). The Agency concedes, and the forum agrees, that no evidence in the record suggests that Respondent let five separate contracts, rather than a single contract covering all five improvements, "for the purpose of" avoiding compliance with the PWR laws. Thus, section (2) of ORS 279.357 does not apply to this case.

Instead, the Agency asks this forum to rule that the five improvements constituted a single "project" for which the contract price exceeded \$25,000.00. If that

is the case, Respondent was required to abide by the dictates of Little Davis-Bacon with regard to that entire project, because it did not fall within the exemption created by section (1) of ORS 279.357.

The threshold question, then, is whether the word "Projects" in ORS 279.357(1)(a) refers to individual contracts as they are bid out by contracting agencies or, more abstractly, to any group of public works contracts that properly are viewed as fitting together to form a single project.

The term "project" is not defined in Little Davis-Bacon. Nor has the Agency defined that word in its regulations implementing the Act.² However, the statutory context for ORS 279.357(1)(a) does shed light on the legislature's intent in using the word "project." Section (2) of the statute prohibits the division of a "project" into more than one "contract" for the purpose of avoiding the PWR laws. That language suggests that a project is a large, multiphase endeavor that may encompass more than one contract. Another portion of section (2) provides further support for that notion. It states that, in determining whether a prohibited division has occurred, the commissioner must consider:

"(A) The physical separation of the project structures.

"(B) The timing of the work on project phases or structures.

"(C) The continuity of project contractors and subcontractors working on project parts or phases.

"(D) The manner in which the public contracting agency and the contractors administer and implement the project."

ORS 279.357(2)(c). This language contemplates that the commissioner will examine various smaller public works undertakings – phases, parts, and structures – to determine whether they are, in fact, part of a single larger endeavor – a public works "project." The Agency is correct in arguing that the ORS 279.357(1)(a) exemption for

"[p]rojects for which the contract price does not exceed \$25,000.00" applies only where the cost of the *entire* project – not just a single contract – is \$25,000.00 or less.

The next question is what factors the commissioner should consider in determining whether a group of public works contracts combine to form a single public works project for purposes of ORS 279.357(1)(a). The Agency argues that the factors listed in section (2)(c) of that statute, quoted *supra*, are not relevant because subsection (c) starts "In making determinations *under this subsection*, the commissioner shall consider * * * [the quoted factors]." (Emphasis added). According to the Agency, the section (2)(c) factors are relevant only in determining whether a contracting agency violated ORS 279.357(2) by dividing a project into more than one contract for the purpose of avoiding compliance with Little Davis-Bacon. Similarly, the Agency argues that the factors listed in OAR 839-016-0310(2) are relevant only to consideration of whether a contracting agency improperly divided a project, in violation of ORS 279.357(2), and not to whether a group of contracts forms a single project for purposes of ORS 279.357(1)(a). To answer the latter question, the Agency argues, this forum should look exclusively to the discussion in the Agency's Field Operations Manual ("FOM"), which the Agency contends applies specifically to section (1) of ORS 279.357 and not to section (2).

Respondent disagrees. It argues that the factors listed in ORS 279.357(2)(c) and OAR 839-016-0310(2) are the only factors this forum should consider because they are the only guidelines properly promulgated by the legislature and the Agency. Respondent also notes that the Agency sent it a letter stating that OAR 839-016-0310 "include[s] the criteria the Bureau uses to evaluate whether multiple contracts constitute more than one project." The Agency enclosed a copy of that regulation with its letter

and essentially asked Respondent to use the rule to evaluate whether the Last Street construction was a covered project.

The forum agrees with Respondent that ORS 279.357(2)(c) and OAR 839-016-0310 contain the factors this forum must consider in determining whether the Last Street contract was part of a larger public works project. The listed factors concern whether various contract structures, phases, or parts are sufficiently related in time, space, contracting, administration and implementation so that they should be viewed as a single endeavor, or project. They have nothing to do with whether a contracting agency was improperly motivated by a desire to avoid the PWR laws when it divided the project into several contracts. In the absence of a statutory definition of "project," the factors listed in ORS 279.357(2)(c) provide the context demonstrating what the legislature meant when it used that term.

The forum also rejects the Agency's argument that the FOM discussion relates specifically to the definition of "project" in section (1)(a) of ORS 279.357 and that the forum should consider *only* that discussion in determining whether Last Street was part of a larger public works project. First, there is simply no reason to believe that the legislature intended the word "project" to have different meanings depending on whether the commissioner was deciding whether several contracts constitute a single project, under section (1)(a) of the statute, or was deciding whether a contracting agency improperly had divided a single project into several contracts, as prohibited by section (2) of the statute. Second, the page of the FOM in evidence is labeled an "INTERPRETATION," rather than a policy or reference. The page identifies a single statute, presumably the one to which the interpretation applies. The identified statute is ORS 279.357(2), the provision containing the factors which the Agency argues do not apply to this case. Thus, if ORS 279.357(2) were not relevant to this case, the FOM

also would have no significance. The forum, of course, has concluded to the contrary that the factors listed in ORS 279.357(2) *are* those that must be considered in determining whether several contracts form a single project. Consequently, both the statute and the FOM provide guidance.

Another question is what weight to give the Agency's implementing rules and the FOM. ORS 279.357(2)(c) lists four factors the commissioner "shall" consider but does not prohibit the commissioner from taking other matters into account. Consequently, the commissioner had authority to implement a rule listing additional factors related to the definition of a "project," so long as the rule did not conflict with the statute. The forum finds that OAR 839-016-0310(2) does not conflict with the statute in any way but merely provides useful guidance to contracting agencies that must determine whether their contracts form part of a public works project. In turn, the FOM provides the Agency's interpretation of that rule.

The ultimate question is whether, taking into account the statutory and regulatory factors, as further explained by the FOM interpretation, the Last Street contract and the other four water improvement contracts formed a single public works project. The factors are:

- 1) The physical separation of the project structures (ORS 279.357(2)(c)(A) and OAR 839-016-0310(2)(a))

The five water line improvements at issue do not directly connect and some of them are separated by a significant physical distance. They are, however, part of a single system – the City of Klamath Falls municipal water system – and are linked by other pipes. Because the improvements are neither directly connected nor wholly separate, this factor is not helpful in deciding whether the improvements form a single project.

- 2) The timing of the work on project phases or structures (ORS 279.357(2)(c)(B)) and whether the work is performed in one time period or in several phases as components of a larger entity (OAR 839-016-0310(2)(e))

As the FOM explains, "Improvements performed in one time period or in several phases as components of a larger entity will generally be considered a single project." Respondent contracted for the five improvements over a period of only a few months during a single construction season. The timing of the contracts suggests they were part of a single public works project.

- 3) The continuity of project contractors and subcontractors working on project parts or phases (ORS 279.357(2)(c)(C)) and whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project (OAR 839-016-0310(2)(g))

Respondent used four different contractors and three different engineering firms on the five contracts. At first glance, this diversity of contractors and engineers could be viewed as suggesting that the improvements were not part of a larger project. However, Steiner explained that Respondent could not bid out all the improvements in a single contract -- using a single contractor -- because the work could not have been completed by the year-end deadline for use of the Water Bond funds. Thus, Respondent's use of multiple contractors and engineers does not weigh as heavily against a "single project" finding as it might under other circumstances.

- 4) The manner in which the public contracting agency and the contractors administer and implement the project (ORS 279.357(2)(c)(D) and OAR 839-016-0310(2)(g))

A single line item in Respondent's budget covered all five of the water system improvements, including Last Street. Additionally, the funding for all five improvements came from the 1996 Water Bond measure. This factor weighs in favor of a determination that the improvements were part of a single project.

- 5) Whether a single public works project includes several types of improvements or structures (OAR 839-016-0310(2)(b)) and whether the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function (OAR 839-016-0310(2)(d))

The five contracts all involved replacement of old water mains with new pipes of more modern design. The work on all the contracts was of a similar nature. In addition, the new water lines are all part of a single, logical entity that has an overall purpose or function – Respondent's municipal water system. This factor weighs heavily in favor of a determination that the improvements were part of a single project.

6) The anticipated outcome of the particular improvements or structures the agency plans to fund (OAR 839-016-0310(2)(c))

By issuing the 1996 Water Bonds, Respondent hoped "to improve the City's water system and facilities through further development, repair and improvement * * *." Performance of each of the five contracts helped further this goal. Consequently, this factor, too, weighs in favor of a determination that the improvements were part of a single project.

This is not a clear-cut case because the factors to be considered weigh both in favor of and against a finding that the five water system contracts constituted a single public works project. However, on balance, the forum finds that each of the five improvements, including Last Street, was part of a larger project. In making that finding, the forum considers each of the following facts to be significant: 1) each contract was performed to improve part of a single, large facility – Respondent's municipal water system; 2) the improvements were of a similar nature; 3) the improvements took place during a single construction season; and 4) the funding source for all the improvements was identical. In the absence of any one of these facts, the result of this case might be different.

The remaining question is whether Respondent violated ORS 279.352(2), which provides:

"(2) The specifications for every contract for a public work shall contain a provision stating that a fee is required to be paid to the Commissioner of the Bureau of Labor and Industries as provided in ORS 279.375(1), and

the contract shall contain a provision that the fee shall be paid to the commissioner pursuant to the administrative rule of the commissioner."

The statute requires each contract for a public work to contain the specified provision. The only time the statute does not apply is if the contract – and any public works project of which the contract is a part – has a total contract price of \$25,000.00 or less. ORS 279.357(1)(a). Here, the Last Street contract was part of a larger public works project, the cost of which far exceeded \$25,000.00, and the specifications for the contract did not include the provision described in ORS 279.352(2). Respondent violated that statute by failing to include the required provision in the contract specifications.

The Agency asks this forum to impose a civil penalty of \$2000.00 for Respondent's violation of ORS 279.352(2). The commissioner may, but is not required to, assess a civil penalty for each violation of any provision of ORS 279.348 to 279.380, including ORS 279.352(2). ORS 279.370(1), OAR 839-016-0530(1), (4)(b), OAR 839-016-0540(1). In this case, there are several mitigating circumstances. First, there is no evidence that any person was paid less than the prevailing wage rate on the Last Street contract. Second, there is no evidence in the record that Respondent previously has violated Little Davis-Bacon. Finally, Respondent did not intentionally sever the Last Street contract from the other water line improvement contracts to avoid having to comply with the prevailing wage rate laws. Under these circumstances, the forum imposes no civil penalty.

ORDER

NOW, THEREFORE, the Commissioner of the Bureau of Labor and Industries hereby finds that Respondent **City of Klamath Falls** has violated ORS 279.352(2). The commissioner assesses no civil penalty.

¹ The Agency initially charged that an additional contract – Eastside – also was part of this public works project. At the close of the hearing, the Agency essentially conceded that Eastside was not part of the project, because its location was relatively remote from the other five improvements, it had a different funding source, and it involved construction of a new water main and not replacement of existing pipes. The forum agrees.

² A regulation does define the term "public works project," but equates that phrase with the terms "public work" and "public works." This rule speaks only to the *type* of work that may constitute a public work and does not speak to the issue of whether and when several public works contracts may combine to form a single "project."