

PREVAILING WAGE ADVISORY COMMITTEE

Meeting Minutes

Thursday, January 11, 2007

Labor & Industries Building
350 Winter St. NE, Room 260
Salem, OR 97301-3878

Members Present

Jessica Adamson
Mark Holliday
John Killin
Shawn Miller
John Mohlis
Patrick O'Brien
Bob Shiprack

Members Absent

Daniel Bonham
Sonny Chickering
Norm Malbin
Pete Savage
Karen Williams

Staff Present

Dan Gardner
Christie Hammond
Mike Kern

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

Introduction of New Committee Member

Commissioner Gardner announced that since the last advisory committee meeting, Daniel Boldt had resigned and he had appointed a new member, Sonny Chickering, a County Engineer for Lane County. Mr. Gardner advised the committee that Mr. Chickering was unable to attend the meeting that day due to his official responsibilities in connection with inclement weather.

Mr. Gardner also noted that committee member Karen Williams had resigned from the committee and said that the Association of Oregon Redevelopment Agencies (AORA) would be nominating a replacement for Ms. Williams.

Minutes of Last Meeting of November 9, 2006

The committee unanimously approved the draft minutes of the November 9, 2006 meeting as written without comment or objection.

Staff Reports

A. Quarterly Statistical Reports

Staff provided several quarterly statistical reports, including a summary of PWR seminars held and the current schedule of PWR seminars.

Staff reported that the PWR unit had exceeded its performance measure goal for completing 50% of its PWR investigations within 90 days in the previous quarter. Staff also reported that its first quarter of performance for a new quarterly performance measure relating to the issuance of predeterminations resulted in 70% issued within fifteen days. The goal is 75%. Staff explained that one reason for not meeting the performance measure this first quarter was that many of the requests for PWR predeterminations had been received before the performance measure was implemented and some were forwarded on to the DOJ for review, prolonging the issuance of the predetermination. Staff also explained that it is common for requests for predeterminations to be submitted without all of the necessary information to complete the predetermination and that this can also cause delays in the issuing of predeterminations. Staff reported that an additional compliance specialist position authorized by the Legislature's Emergency Board had enabled the division to dedicate and assign an experienced PWR compliance specialist to issuing predeterminations. Commissioner Gardner also noted that a new Assistant Attorney General had been assigned to the agency and that the turn-around time for advice from DOJ relating to predeterminations had improved dramatically.

B. Updates on Relevant Cases

A report summarizing several PWR cases in litigation and other notable cases was provided to the committee members. Commissioner Gardner reported that the Mastec (Coos Bay pipeline) case had been settled and that the Appeals Court had ruled in favor of BOLI in the R.L. Coats case. Commissioner Gardner also noted that a Final Order issued in one of several Labor Ready cases, debarring the business for one year, had been upheld by the Court of Appeals. In response to an inquiry about the terms of the settlement agreement between Mastec and the Bureau of Labor and Industries, staff responded that Mastec had asserted that the terms of the settlement were confidential under the public records law and BOLI had agreed to notify Mastec in the event a formal public records request was received for the information so that Mastec, may assert, if it wishes to do so, in a court of law that disclosure is not required.

Committee member Shawn Miller asked whether Labor Ready would be held liable under the PWR law, even if they were not told by the contractor for whom workers were provided that a particular project was subject to the PWR law. Commissioner Gardner responded that most of the projects Labor Ready supplied labor on were school projects. Mr. Miller further inquired whether a developer that told Labor Ready that a project was not subject to PWR would be held accountable under these circumstances and was told that, yes, the developer would also be liable. Mark Holliday agreed that the developer should also be held accountable in this situation. John Killin asked if Labor Ready would be considered a subcontractor or commercial supplier. Patrick O'Brien responded that Labor Ready is a subcontractor because it provides laborers for projects, not commercial supplies. Mr. O'Brien also noted that subcontractors are typically bound by all conditions in the prime contract, including compliance with the PWR law, even if the provisions of the subcontract don't address PWR directly.

C. Status of Proposed Rule Revision Relating to CMGCs (Construction Managers/General Contractors)

Staff reported that a rulemaking hearing was held on December 20, 2006 pertaining to the proposed draft CMGC rule previously reviewed and approved by the committee. Only one person testified at the hearing, although comments were received from two others. Staff advised the committee that although there appeared to be general support for BOLI's proposed definition of "construction specifications" in the rule and the concept that a CMGC contract is not a public works contract for purposes of the PWR law until there is a binding and enforceable agreement for construction between the public agency and CMGC, there remained the problem of how to deal with "early work" performed by the CMGC before the contract became a binding and enforceable agreement for construction, which occasionally occurs. Staff also indicated that there seemed to be general support for different rates applying to early work and the actual construction project, particularly if a significant period of time elapses between the early work and primary construction project, however, this cannot be done by rule, and would require a legislative change. In order to address the "early work" issue, staff brought to the committee's attention new language in the draft rule that was added since the last draft, specifically addressing early work. Staff noted that it was the goal of the bureau in the revised draft to define exactly what "construction specifications" are for the purpose of setting the wage rates. Bob Shiprack said that he thought the revised draft was an improvement over the previous version and that the rule was "better than what we have" without a statutory amendment.

Patrick O'Brien commented that he had never seen an instance where a contractor used early work to freeze the rates on a project and questioned whether the agency was trying to solve a problem that did not exist.

D. Status Report on PDC Construction Wage Study

Commissioner Gardner summarized the provisions of the Portland Development Commission's resolution adopting a construction wage policy on public/private construction projects. Staff reviewed a portion of an email sent by BOLI to the PDC discussing the bureau's concerns regarding conflicts between the PWR law and PDC's construction wage policy proposal; in particular, the sections of the proposal dealing with the coverage threshold of \$1 million and the percentage of public ownership required to trigger coverage under the proposal. Staff also reported the agency's concern that the PDC policy could conflict with a determination by the bureau that an entire project is covered under the PWR law.

Commissioner Gardner advised the committee that the bureau would not be splitting projects floor by floor and that the PWR law would still be applied regardless of the guidelines the PDC implements. Commissioner Gardner said that the proposed construction wage policy did not resolve the issues in the "Tin Roof" case, which he noted is still pending before the Appeals Court. There was a brief discussion regarding whether or not the fact that the Tin

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Roof case was decided under PWR laws that had since been amended presented a substantive issue in the case. Shawn Miller and Jessica Adamson both opined it did not.

Committee member Bob Shiprack discussed the PDC meeting the previous evening and noted that the topic of the meeting had oddly shifted from the issue of the PDC Construction Wage Study to one of minority contractors and apprentices. Several committee members indicated that these issues were and should be separate from application of the PWR law.

Shawn Miller stated that coverage of public/private partnerships under the PWR law was the biggest PWR law issue in a long time. Bob Shiprack pointed out that PDC's policy did not resolve the matter since it will only apply to the PDC and said a statutory change was needed. Mr. Shiprack also said that the issue needs a public hearing and that it was incumbent upon the committee to do the "right thing" in this matter with regard to resolving the issue legislatively. Mr. Shiprack said that there is a general consensus that doing nothing regarding the issue is not an option, and further said that he had heard from only one group who disagrees; attorneys and mayors. He also noted that the bill could and should be very simple, so that anyone could do a predetermination.

Commissioner Gardner asked for an expression of interest in forming a workgroup of the advisory committee to work on legislation in this regard. Mr. Shiprack responded that a workgroup would definitely need to be formed which may or may not be a subcommittee of the Prevailing Wage Advisory Committee.

John Mohlis commented that he believed that the PDC policy was a good springboard/starting point for legislation. He also said that he thought the PDC was well-meaning, but did not understand construction like members of the committee do. Mr. Mohlis also agreed that the law needed to be simpler.

Commissioner Gardner told the committee that thirty-two states have PWR laws, but don't have the same problem determining coverage on public/private projects because unlike Oregon's law, coverage is determined by the presence of public funds alone. Mr. Gardner said that public agency funds provide the "brightest line" test. Bob Shiprack indicated that the use of funding percentage tests for determining coverage under the law tended to complicate things and that using a dollar amount exclusively is clearer.

Patrick O'Brien asked whether the PDC was considered a "public agency," to which Commissioner Gardner responded affirmatively. Mr. O'Brien also asked whether the PDC was the only urban renewal agency for which the issue of PWR coverage has been a problem. Mr. Gardner responded that it was an issue for other URAs as well, but PDC is the biggest URA in the state, is involved in far more projects than other URAs, and unlike most other URAs, functions independently from the City.

Mr. O'Brien questioned whether the PDC had quantified how much in savings would be realized by not making projects subject to the prevailing wage law. Commissioner Gardner

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replied that he had seen no such projections by the PDC to date. Mr. O'Brien said that the majority of subcontractors used on PDC projects paid union scale (with the possible exception of drywall and painting contractors) and he was at a loss to understand PDC's argument with the PWR law.

Commissioner Gardner noted that in the "Tin Roof" case the cost of unpaid health care and retirement benefits accounted for more of the increase in amounts due to employees under the PWR law than did the actual wages and that there was not that much of a difference in the amount of wages paid between PWR and non-PWR projects, to which Bob Shiprack agreed. Commissioner Gardner said that he believed that the law was largely misunderstood, and that BOLI was putting together a "Frequently Asked Questions" document about the law. Mr. Gardner also said Employment Department statistics showed that the average annual salary for construction workers is only about \$40,000. Shawn Miller commented that this amount seemed low, to which John Mohlis replied that it most likely included the earnings of apprentices and transient construction workers.

Mr. Shiprack mentioned a study which showed that highway projects subject to the PWR law actually cost less than non-PWR projects due to cost savings related to the quality of workmanship and efficiency.

Shawn Miller asked Bob Shiprack what in particular it was in the PDC proposal he did not agree with. Mr. Shiprack responded by stating one of his main concerns was the 50% floor space criterion in the policy, in addition to his opinion that the \$1 million dollar PDC funding threshold was too high. Mr. Shiprack noted that prior to adopting the \$1 million threshold amount, the PDC had tentatively agreed to a threshold amount of \$750,000. John Mohlis explained that the PDC had revised a previous proposal applying a million dollar *or* funding percentage test and went with the \$750,000 threshold requirement at the request of the mayor. Mr. Mohlis also indicated that the PDC had concerns regarding the ability of minority and small business contractors to compete for PWR projects. Patrick O'Brien commented that the money PDC provided on these projects was primarily "seed" money for much larger projects and asked how the PWR law impacted minority contractors and small businesses. Commissioner Gardner responded that the PWR law doesn't impact MSBs as much as other issues that need to be addressed enabling them to be able to be more competitive, such as the need for more operating capital, access to low interest loans, and prompt payment on construction projects. Jessica Adamson agreed and commented that contractors are either ready to work on public works projects or they aren't.

Mr. Shiprack said that he was working on legislation making clear that tax increment financing is considered public funds, and establishing coverage guidelines for public/private projects.

There was a brief discussion about the pros and cons of "indexing" any public fund threshold amount in the law. Shawn Miller said he favors indexing the threshold in relation to inflation because set amounts become outdated. Bob Shiprack replied that public agencies have told

him they don't support indexing the threshold amount, because it keeps changing, making it difficult to keep up with.

E. Response to Request for Recommendations Regarding Streamlining PWR Requirements

Staff reported that the bureau had sent out over 7,000 requests for suggestions for streamlining PWR requirements, but received only six responses. Staff provided a summary of the suggestions made, most of which it was noted would require legislative changes, and told the committee that a joint certified payroll form for projects subject to both state and federal prevailing wage rate laws has been developed and is available on BOLI's website.

Bob Shiprack questioned whether it was really necessary to survey every craft every year. Shawn Miller agreed that the survey required "a lot of paperwork" for contractors. Staff noted that the law currently appears to require an annual survey to be conducted of each craft and that substantive changes related to the methodology of the survey would most likely require legislation. Commissioner Gardner indicated that he was always willing to consider improvements that can be made to the survey, including the possibility of accepting electrical filings.

Bob Avery, Legislative Coordinator for Representative Hanna, introduced himself to the committee and said Representative Hanna was interested in looking at ways to streamline the PWR requirements to enhance opportunities for small and rural area contractors. Mr. Avery reported that one of the suggestions Representative Hanna was considering included allowing for a "blended" wage rate to be paid on projects under \$250,000 to employees of contractors who employ workers in multiple crafts, have 24 or fewer FTE, and where the project can be completed in 30 days or less. Mr. Avery stated that this could be a way for allowing smaller contractors to become more involved in PWR projects. Bob Shiprack inquired of Mr. Avery what types of contractors specifically were having problems and asked whether they were building or heavy highway contractors. Mr. Avery responded that concrete contractors were an example of the type of contractor that might benefit by being allowed to use a "blended rate." Patrick O'Brien stated that contractors having 24 or fewer employees described about 75% of all AGC contractor and subcontractor members.

Proposed Legislation

Bob Shiprack briefly summarized an LC draft which would exempt certain public/private projects and privately owned affordable housing projects.

A copy of HB 2021 was also presented to the committee. According to Shawn Miller, the intent of this bill is to make public agencies liable for unpaid wages on projects subject to both state and federal law if the public agency fails to incorporate the applicable state and federal prevailing wage rate publication in the project's bid specifications.

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Shawn Miller asked the committee for its support for the bill. Commissioner Gardner expressed his concern that the public agency members of the committee were not at the meeting to discuss it, however, a vote was taken, and all members present at the meeting (excluding John Mohlis who had left) voted in favor of the proposed legislation.

Jessica Adamson stated that she would be working on an amendment to the provisions of SB 477 from last session, in which the exemption for projects subject to the Davis-Bacon Act was repealed. Ms. Adamson said that this repeal had resulted in unintended application of some of the other provisions of the PWR law to Davis-Bacon projects. Commissioner Gardner asked for informal approval for this concept by the committee members. All present expressed approval.

Next Meeting

Commissioner Gardner suggested that the agenda for the next advisory committee meeting be limited exclusively to legislation. The committee members agreed and the next meeting was scheduled for Thursday, February 8, 2007 at 1:30 pm in Room 260 of the Labor and Industries Building in Salem.

The meeting was adjourned at approximately 3:00 PM.