

PREVAILING WAGE ADVISORY COMMITTEE

Meeting Minutes

Wednesday, November 19, 2008

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

Members Present

Jessica Adamson
Daniel Bonham
Mark Holliday
Norm Malbin
Shawn Miller
Carl Redman
Bob Shiprack

Members Absent

Greg Miller
John Mohlis
Patrick O'Brien
Pete Savage

Staff Present

Christie Hammond
Lois Banahene
Susan Wooley
Kate Newhall
Denise Voll (ED)
Leanna Harmon (ED)

Co-chair Bob Shiprack called the meeting to order at 1:40 PM.

Minutes of Last Meeting of September 17, 2008

Carl Redman requested that the minutes of the previous meeting of September 17, 2008 be amended to show that there was general consensus by the members relating to LC 821 about using the date of substantial completion or the occupancy date as a trigger date to begin counting the number of days for filing a notice of claim against a contractor's bond. Several committee members expressed agreement that this had been agreed upon, and the minutes were accepted with this modification.

Staff Reports

BOLI staff presented several reports relating to its enforcement activities and reported that 87% of PWR investigations are being completed within 90 days; thereby exceeding performance goals. A summary of educational seminars conducted during the first two quarters of fiscal year 2008-09 was also presented, along with a schedule of upcoming seminars.

Annual Construction Industry Survey Data Review

Staff provided summaries of data collected in the 2008 construction industry survey and reported that BOLI is in the process of setting the rates for the January 2009 PWR rate publications. Denise Voll reported that the Employment Department experienced its greatest survey response year at a return rate of 91%. Ms. Voll said that more surveys had been sent out this year, but there was a slight decrease in the number of peak week hours reported. It was also announced that hard copies of the OED Survey Report will not be produced as they were in the past; rather, they will be made available on line.

Shawn Miller asked for an update on the special HVAC Testing and Balancing (TAB) survey. Christie Hammond stated that the survey showed that the majority of this TAB work is done by specialty contractors and not by sheet metal contractors. Because of this, Ms. Hammond said, BOLI will be issuing a separate rate for HVAC and hydronics testing and balancing.

Audience member Greg Pelsler opined that since the survey showed that TAB work is not classified as sheet metal work, it has not technically been defined as a trade; rather it is a profession and should not be included in the rate book until and unless BOLI procedurally follows the guidelines in the administrative rules to make it a trade.

Norman Malbin stated that as a former BOLI employee, he had worked on the language in the rule (OAR 839-025-0006) which generally states that as a result of new technological advancements and/or policy changes, the commissioner may add a new trade to be included in the PWR determinations. Mr. Malbin said that part of the process is for BOLI to do a study to determine whether or not a new classification is merited. Mr. Malbin pointed out that BOLI did such a study, including the survey that was conducted, and determined that TAB work should have its own trade classification.

Mr. Pelsler responded that he believed it was inappropriate to establish TAB as a trade because the process in the law had not been followed. Mr. Pelsler stated that he wanted a written response regarding this matter from BOLI. Christie Hammond said that she would convey Mr. Pelsler's concerns to Commissioner Avakian, and encouraged Mr. Pelsler to also submit them in writing. Mr. Shiprack also advised Mr. Pelsler to follow up directly with the commissioner.

Jessica Adamson questioned whether there should be two separate TAB rates; one for HVAC TAB and one for hydronics, or the rates should be combined into one TAB rate. Denny Whitzel, a TAB contractor attending the meeting, responded that they have always been the same rate and he believed they should be combined into one shared rate for both types of TAB work.

Proposed Legislative Concepts for 2009

Kate Newhall provided copies of all LC drafts available to date and encouraged the committee members to provide their comments and any concerns regarding the concepts.

LC 821 would extend the deadline for filing a notice of claim against a contractor's bond from 120 days to 180 days; thereby allowing BOLI to file a more accurate claim or possibly resolve the claim without the necessity of filing a claim notice.

As noted previously, it was established in a previous meeting that the committee agrees that the trigger date for filing a notice of claim should be the date of substantial completion or occupancy date.

Mr. Shiprack questioned whether the same type of certificates of substantial completion was issued on heavy/highway projects (ODOT) as are issued on building projects. Ms. Newhall and Shawn Miller said they would follow up with ODOT to see if ODOT issues "substantial completion" notices on projects that aren't "occupied," like roads, parks, etc. Mr. Miller also agreed to check

with bonding companies to see if this concept might present an unforeseen impact on the ability of contractors to get a bond.

Otherwise, the committee expressed its consensus for the bill.

LC 822 would establish a PWR calculator/formula to automatically increase or decrease the amount of fees required to be paid by public agencies on public works contracts. This concept would eliminate the need to ask the legislature every session for either an increase or decrease in the fees assessed depending on the adequacy of the fund.

Ms. Newhall stated that BOLI is still talking to contracting agencies, e.g., ODOT and DAS, about this concept and suggested that the committee postpone further discussion about it until a proposed formula establishing a “floating” fee is worked out.

LC 823 would provide authority to the CCB to revoke, suspend, or refuse to issue a CCB license if there is an unpaid judgment against the contractor by the state for civil penalties or wages.

Although it was explained by staff that it is the intent to get contractors to pay such judgments or at least set up payment plans, there was some concern expressed by committee members that contractors would not be provided adequate “due process” before losing their CCB licenses. Christie Hammond explained the process by which BOLI obtains judgments against employers/contractors, which includes the right of an employer to request a contested case hearing or court trial in the case of wage claim cases. It was pointed out that the CCB could only revoke, suspend or refuse to issue a license if there is an unpaid judgment that has gone through the contested case hearing process (Administrative Procedures Act) or a court proceeding in which the contractor is provided “due process” and the opportunity to contest the matter.

Mr. Malbin asked whether the CCB could revoke, suspend or refuse to issue a license for unpaid private judgments. Ms. Hammond explained that the concept as drafted would only allow for the CCB to revoke a license for civil penalties/wages owed to a stage agency. Ms. Hammond also said, however, that BOLI has the authority to accept assignments of private judgments for unpaid wages for collection purposes, but noted that BOLI may only pursue the collection of unpaid wages and penalties; not attorney fees or court costs.

Ms. Newhall stated that it appeared that there was general consensus regarding this concept, but still a need for additional work on criteria to be met before a contractor’s license would be revoked.

Ms. Adamson suggested that the committee review the concept again once BOLI has drafted language that clearly addresses concerns regarding the provision of due process to the contractor before a license action is initiated.

LC 824 is meant to address “housekeeping”-type issues; two of which were brought about by legislation enacted last session.

The first amendment would clarify that wages on PWR projects must be paid in a timely manner. This clarification is necessary due to a recent court ruling that concluded that the current PWR law

does not require payment of PWR wages in any particular timeframe, so long as the correct amount is paid at some point.

The second amendment would delete an out-dated reference to required contract language pertaining to the payment of fees by contractors on public works projects. (The law was amended last session to require these fees to be paid by contracting agencies.)

The third amendment would align the date for the payment of the PWR fee by the public agency to match the due date for the notice of award of a public works.

The committee primarily commented on the first issue (relating to required paydays), and a question was raised about whether or not contractors could be penalized for making a simple payroll error when reading an employee's time card. It was explained that BOLI's intent is not to penalize contractors for payroll errors, but to require that contractors establish and maintain regular pay dates and pay PWR wages due on those pay dates, similar to what is required elsewhere in wage and hour law (ORS 652) relating to the payment of wages.

LC 826 would revise the certified payroll reporting requirement currently in the law from "actual wages paid" in a given week to "gross wages earned" in that week. Employers are currently required to report/certify that they paid PWR wages on a weekly basis even when they may actually be paying employees pursuant to a different pay schedule. This concept would allow contractors to report the amount of wages earned as opposed to wages paid in the week reported.

There was consensus by the committee regarding this concept.

LC 827 would add the intentional falsification of certified statements (payroll records) as grounds for placing a contractor on the list of contractors ineligible to receive public works contracts.

Daniel Bonham asked if BOLI would recommend debarment for first time violators. Christie Hammond responded that the agency seldom debars a contractor for a first time violation unless there is clear evidence that the violations were intentional. Carl Redman voiced concern over how BOLI determined if something was "intentional." Ms. Hammond explained that if the agency proposes debarring a contractor based on intentional falsification of the contractor's payroll records, the contractor would have the opportunity to contest the proposed action by requesting a contested case hearing (pursuant to the Administrative Procedures Act), and BOLI would be required to prove intent at the hearing. Overall, there was general consensus regarding the concept.

Draft City of Portland Ordinance Defining "Residential Construction"

Staff advised the committee that the agency had been provided with a copy of a draft City of Portland ordinance defining "Residential Construction," and that Commissioner Avakian was requesting that the committee review and comment on the draft. The language in the draft ordinance reads as follows:

"S. "Residential Construction" means the construction, reconstruction, major renovation or painting of any building (i) not exceeding four stories in height of any

construction type whether or not there is below grade parking under the building, or (ii) five stories in height of wood frame construction whether on grade or above a single floor of concrete construction and whether or not there is below grade parking located under the building.”

Michael Anderson (from the Community Development Network) advised the committee members that the Housing Authority of Portland (HAP) had initiated the draft ordinance and that it was similar to a definition for residential construction that had been presented to the committee as a proposal at a previous PWR Advisory Committee meeting.

Mr. Shiprack said that a similar City ordinance permitting the construction of buildings consisting of five floors of wood frame construction and five floors of wood frame construction over one floor of commercial space had been enacted in January, 1996. Mr. Shiprack stated that compromises and agreements had been made last legislative session in forming consensus for HB 2140, and it was the intent of the bill to allow this 1996 ordinance to be applied in determining what would be considered a residential project under the PWR law.

Mr. Shiprack said that developer Bob Walsh had provided him with a list of six projects that had been constructed pursuant to the City’s 1996 ordinance in which commercial wage rates did not apply. Mr. Shiprack said there were not a lot of these types of projects built, and that these types of projects had been constructed in Portland over the past twelve years. He stated that he had approached his membership about the revised definition of residential construction and there was support for it by his members. Mr. Shiprack indicated that floors with commercial space in such buildings should be subject to commercial rates under the PWR law, and he said that he believed that the affordable housing community agreed.

Jessica Adamson stated that it was her opinion that the new ordinance reflected the type of “residential” projects contemplated in HB 2140 and that residential construction should be considered separately from commercial space. Ms. Adamson said she understood the intent of HB 2140 was that commercial PWR rates would apply to the commercial part of a privately-owned project if it met the \$750,000 public funds threshold test. Ms. Adamson said she believed the City ordinance offered the clarity intended in HB 2140, that it was good policy, and she encouraged BOLI to adopt this language as well.

Norman Malbin said he believed that the list of projects referred to by Mr. Shiprack should all have been considered “commercial” projects under the law, and stated that Local 48 strongly opposes the proposed revised definition of residential construction, as it undermines the prevailing wage rate law. Mr. Malbin advised that electricians are required to have a commercial license for electrical work done on buildings over three stories.

Daniel Bonham asked about the significance of language in the proposed ordinance referring to “construction of any type,” and said that HUD (residential) rates were based on wood frame construction. Mr. Bonham expressed his opinion that any construction other than wood frame should be considered “commercial” even if the building is four stories.

Mr. Shiprack said he believed the intent of the language in the ordinance was to recognize that remodeling work was also subject to the ordinance.

Mr. Anderson commented that he believed there was a misconception about who does this kind of construction, and said that the work was typically done by union contractors.

Mr. Bonham said he saw no reason for amending the definition of residential construction and that he thought it was a bad idea. He further stated that although Mr. Anderson represented that union contractors would be used on projects subject to the ordinance (and union rates paid), there is no requirement in the ordinance for such rates to be paid.

Mr. Andrews noted that neither state nor federal law currently differentiates between construction types (wood frame or other material) for buildings four stories and under in determining whether a project is “residential.”

Shawn Miller expressed his support for the ordinance.

Mark Holliday stated his opposition.

Meeting attendee Cliff Puckett of the Carpenters union said that his union opposed the ordinance because the proposal greatly expanded and far exceeded what had been discussed and agreed upon in discussions last session regarding HB 2140. Mr. Puckett said it was his understanding that the definition of residential construction, even for four-story buildings, required the building to be wood frame.

Michael Anderson said the intent of the ordinance is to split residential and commercial rates on combination projects meeting the definition in the ordinance.

Jessica Adamson said the people she represents agreed to other provisions in HB 2140 last session based on the understanding this is how it would be applied, and that this was the deal that was made.

Mr. Shiprack said that in the past, these projects had not been covered under the PWR law because they were privately owned and therefore, not public works. Norman Malbin requested BOLI staff to clarify that public ownership was not a requirement for coverage under the PWR law, and that projects carried on or contracted for by public agencies were covered under the law, regardless of ownership.

Mr. Puckett asked for clarification of the ordinance’s reference to “any building” and below grade parking.

Mr. Shiprack said that any parking space would be considered “commercial.”

After further discussion, Mr. Shiprack acknowledged that there were a number of issues to be addressed relating to the proposed ordinance, and that additional work and discussion would be required.

Next Meeting/Meeting Schedule

It was agreed that the next PWR Advisory Committee would be scheduled sometime after the legislative session begins in January.

The meeting adjourned at approximately 3:20 PM.

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