

MINUTES

PREVAILING WAGE ADVISORY COMMITTEE

Thursday, February 17, 2005

International Union of Operating Engineers
555 East 1st Street
Gladstone, OR 97027

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

Members Present

Daniel Boldt
Ed Glad
Jessica Harris-Adamson
Mark Holliday
Norman Malbin
Jay Minor
John Mohlis
Dan O'Brien
Bob Shiprack
Dick Springer

Members Absent

Shawn Miller

Staff Present

Commissioner Dan Gardner
Christie Hammond
Lois Banahene
Susan Wooley
Steve Simms (ATD)
Denise O'Farrell, OED

Minutes of the Previous Meeting

The minutes of the committee's November 18, 2004 meeting were reviewed and approved as written.

Staff Reports

Commissioner Dan Gardner reported that he has requested that representatives from the League of Oregon Cities (LOC) and the Association of Oregon Redevelopment Agencies (AORA) serve on the advisory committee. Commissioner Gardner also said that proposed amendments to OAR 839-016-0020 (relating to CM/GCs) and OAR 839-016-0100 (pertaining to the definition of public funds) had been put "on hold" until after the legislative session.

Staff presented a summary of PWR enforcement activity and education seminars by BOLI for the 2004-2005 fiscal year. A report of currently open cases was also provided. Staff also indicated that the bureau is initiating enforcement action against 55 contractors who failed to submit surveys during the 2004 construction industry survey.

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Legislative Concepts

Committee Chair Norman Malbin asked the committee whether any members wished to propose or discuss legislative concepts for the committee's consideration.

Jessica Harris-Adamson presented several legislative concepts proposed by the Associated General Contractors (AGC), including proposals relating to the recovery of costs incurred by contractors in defending BOLI PWR investigations under certain circumstances; apprenticeship issues; the statute of repose for asbestos; and restrictions on public contracts by out-of-state education service districts. Ms. Harris-Adamson asked for the committee's support for the asbestos statute of repose concept.

Norman Malbin presented LC 2291, which requires public contracting agencies to document the agency's determination of the lowest responsible bidder on a form prescribed by BOLI. Mr. Malbin stated that although agencies are currently required by law to consider and apply certain criteria in determining that a contractor qualifies as the lowest responsible bidder, there is currently no requirement that this analysis be documented by the agency.

Mr. Malbin asked whether the advisory committee would support this proposed legislation. Jessica Harris-Adamson agreed to review the LC draft and pointed out that the proposal would result in more work for contracting agencies. Ms. Harris-Adamson also questioned what the penalty would be for non-compliance. Christie Hammond responded that a civil penalty of up to \$5,000 for each violation of the PWR laws and rules may be assessed.

Jay Minor commented that the legislation would also cause some extra work for contractors, who will be asked to provide additional documentation to contracting agencies in connection with this legislation.

After it was clarified that contracting agencies would be required to provide the lowest responsible bidder documentation to BOLI, Dan O'Brien questioned why BOLI should collect this information rather than the Construction Contractor's Board.

Bob Shiprack indicated that there needs to be greater emphasis on the obligation of contracting agencies to make the lowest responsible bidder determination in the AG's Model Rules, and he has discussed this matter with Dugan Petty at the Department of Administrative Services, who responded favorably.

Commissioner Gardner stated that BOLI would convene a workgroup to devise the form required by this legislation if passed. It was also pointed out that the forms filed would be available as public records.

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Daniel Boldt asked Norman Malbin if he would be willing to speak at a public agency group meeting regarding this proposed legislation. Mr. Malbin agreed to do so. Bob Shiprack announced that the building trades will be proposing a legislative concept in connection with CM/GCs.

New Business

Mark Holliday said that there was some confusion with regard to when the Prevailing Wage Rate law applies to Portland Development Commission (PDC) projects and that a “bright line” test was needed.

Commissioner Gardner explained that in order for the PWR law to apply, it first must be determined that the project is a “public work” as defined by law, and that PDC funds alone did not necessarily make a project a “public work” under the law.

Norman Malbin said that if public funds are expended in the “public interest,” the project should be considered a “public work” subject to the PWR law, and projects with public funds, therefore, qualify as “public works.”

Commissioner Gardner commented that public-private partnerships are an evolving area, and that BOLI looks at the totality of the project in order to determine whether the PWR law applies. Commissioner Gardner also said that based on advice received from the Department of Justice, he has determined that he may issue separate (residential and commercial) rate determinations on a project.

Mr. Malbin encouraged particular projects be brought to BOLI’s attention in order to determine applicability of the PWR law to the project.

Mr. Holliday suggested the need for a “pre-determination” process for determining coverage of the law to a particular project.

Dick Springer commented that public agencies and contractors are not always open to these types of discussions in public. Mr. Springer also pointed out that coverage of projects under the PWR law may trigger other laws and issues, e.g., apprenticeship.

A meeting attendee expressed her concern that some contracting agencies advertise for bids (“freezing” the applicable PWR rates), and then delay awarding the contract until after the rates subsequently increase.

Another meeting attendee stated that in response to an inquiry made about a project, PDC had responded, indicating that PDC had determined that the project was not a public work.

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Jay Minor asked for an update on the OTIA III bridge delivery program. BOLI Apprenticeship Director Steve Simms reported that ODOT Director Bruce Warner was close to finalizing the apprenticeship specifications for the program, and the only remaining issue to be decided was whether the workforce requirements would be on a “per craft” basis. Jessica Harris-Adamson said that the AGC may ask for modifications to the specifications.

Mark Holliday asked whether apprentice ratios were different for different regions and whether they were required for each craft. Ms. Harris-Adamson responded “no” to both questions.

Ed Glad solicited the comments of subcontractors at the meeting who had been invited to attend.

Ed Charles mentioned that he believes there is a problem with the inappropriate classification of employees as “independent contractors.” Chair Malbin responded that a legislative task force was formed by the 2003 legislature to review this issue and resolve discrepancies between various laws pertaining to independent contractors. Mr. Malbin said that a bill before this legislature adopting an “independent contractor” definition for many state agencies to apply received unanimous consensus by the task force. Mr. Malbin pointed out that BOLI may enforce the PWR law regardless of any contractual relationship that exists (including the payment of PWR wages to “independent contractors”).

Next Meeting Date/Agenda

The next meeting was scheduled for Thursday, March 31, 2005.

Due to the legislature being in session, it was requested that the next meeting be held in or closer to Salem if possible. Dan Boldt agreed to try to arrange for a meeting room in Salem.

It was agreed to further discuss the legislative concepts presented at the meeting to determine whether consensus could be reached by the committee to support any of the concepts.

The meeting adjourned at approximately 3:00 PM.