

PREVAILING WAGE ADVISORY COMMITTEE

Meeting Minutes

Thursday, March 8, 2007

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

Members Present

Daniel Bonham
Sonny Chickering
Mark Holliday
Norman Malbin
Shawn Miller
Patrick O'Brien
Bob Shiprack

Members Absent

Jessica Adamson
John Killin
John Mohlis
Pete Savage

Staff Present

Dan Gardner
Doug McKean
Christine Hammond
Lois Banahene
Susan Wooley
Mike Kern

Commissioner Dan Gardner called the meeting to order at 1:30 PM and introduced and welcomed new Deputy Commissioner Doug McKean, a former BOLI employee, who replaced former Deputy Commissioner Annette Talbott.

Mr. McKean stated that he had worked for the bureau for several years as an Administrative Law Judge. More recently, Mr. McKean said, he had been employed with Legislative Counsel for the past nine years.

Minutes of Last Meeting of February 8, 2007

The committee unanimously approved the draft minutes of the February 8, 2007 meeting as written.

Proposed Legislation

A summary of PWR-related legislation was provided to the committee members, along with copies of each bill, any proposed amendments, and a summary of the status of each bill. The following bills were reviewed and discussed.

HB 2021

Commissioner Gardner summarized the provisions of HB 2021, which would make public agencies liable for workers' unpaid wages, fringe benefits and liquidated damages when a public agency fails to include certain required information about the prevailing rates of wage in the specifications for public works projects.

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Committee member Shawn Miller said that there had been two amendments to HB 2021, and that it was the intent of the bill to make contracting agencies liable for the difference between the wage rate required to be paid to workers on PWR projects also subject to the federal Davis-Bacon Act, where the higher of either state or federal rates is required to be paid, if the public agency fails to include the applicable state and federal rates in a PWR project's contract specifications or fails to include information showing which prevailing rate of wage is higher.

Committee member Chickering expressed concern regarding the liability of contracting agencies for liquidated damages in addition to any unpaid wages.

Deputy Commissioner McKean discussed subsection (5) of HB 2021, which would hold agencies liable to contractors for the unpaid difference between the applicable lower state rate of wage and the higher federal rate of wage paid by the contractor in the event a contracting agency erroneously requires the higher of the state or federal wage rates to be paid on a PWR project NOT also subject to the federal Davis-Bacon Act.

Committee Co-Chair Norm Malbin questioned whether this provision would provide an unfair "windfall" to contractors who, along with other contractors, theoretically bid the project using these incorrect (higher) wage rates.

Mr. Malbin also posed the possible scenario where an agency fails to provide the applicable rates of wage due to the fact the agency was unaware of their being any federal funds involved.

Committee member Daniel Bonham replied that, as an investigator, he has not encountered a situation where a contracting agency did not know if there were federal funds on a project. He also stated that the federal government makes it very clear when there are federal funds involved in a project.

Shawn Miller proposed deleting subsection (5) from the bill and asked whether the committee members were otherwise supportive of the other provisions relating to contracting agency liability.

Committee member Patrick O'Brien said he agreed with committee member Chickering and thought making contracting agencies liable was unnecessary.

Mr. Chickering said he would like to see subsection (5) removed from HB 2021 and asked the committee, bureau staff in particular, whether there have been any documented cases of the wrong rates being paid on a project subject to both state and federal prevailing wage laws.

Commissioner Gardner responded that the law requiring the higher of the two rates be paid on projects subject to both state and federal law had only been in effect for a little over a year, and no violations of the law had yet been determined by the agency.

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Wage and Hour Division Administrator Christie Hammond told the committee that proposed amendments to HB 2021 would repeal some of the existing provisions under the prevailing wage rate law on projects subject to both state and federal laws, including the bureau's enforcement authority on these projects. Commissioner Gardner pointed out to the committee that the US DOL will not enforce the higher of the two rates if the higher rate is a state rate, and that enforcement of this requirement would be up to the bureau.

HB 2140

Deputy Commissioner McKean explained that HB 2140 provides technical amendments to ORS 279A, B, and C in the Public Contracting Code.

Christie Hammond indicated that the proposed amendments in HB 2140 to the PWR law were clarifying in nature and not substantive.

HB 2618

Commissioner Gardner advised the committee that HB 2618 would require contractors with public works contracts in excess of \$350,000 to be registered apprentice training agents and at least 15 percent of the total hours worked on such projects to be worked by apprentices.

Bob Shprack indicated that he would be testifying against the bill. Shawn Miller said he would be too.

Committee member Chickering said he was concerned about the percentage of total hours that would be required on public works contracts to be worked by apprentices, and suggested that the threshold of \$350,000 be increased. Mr. Chickering also voiced concern regarding the quality of work performed under these requirements and how the legislation might have a negative effect on small contractors.

Patrick O'Brien asked Shawn Miller why he was opposed to HB 2618 since it supported the use of apprentice training agents on public projects.

Mr. Miller responded that he felt that HB 2618 would provide an unfair advantage to union apprenticeship programs in certain trades and that there were already problems with existing programs. Mr. Miller also stated that he was not happy about the requirement that apprentices work a percentage of the total hours worked on the project.

Mr. O'Brien asked whether agencies were currently required to have registered apprentices on public works projects and was advised they were not.

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Mr. Shiprack indicated that there was no support for HB 2618 from the building trades because the bill would essentially force contractors to train, even if they do not want to. He also noted that a similar ODOT training program had not been successful.

Mark Holliday responded that he understood what Mr. Shiprack was saying, but believed it was a good idea to require apprentices to be employed on public works projects. Mr. Holliday said he believed that there exists a need to “shore up” the workforce of skilled workers, and HB 2618 would serve to enhance training opportunities and was a responsible use of public money.

Mr. O’Brien agreed with Mr. Holliday’s comments.

HB 2664

Commissioner Gardner explained that HB 2664 would exempt certain public school construction projects from the prevailing wage rate law and asked whether any of the committee members had any comments regarding the bill. None were expressed. Commissioner Gardner said he doubted that the bill would pass.

HB 2776, 2777 and 2778

Staff explained that these three house bills all addressed in some manner the current public works bond exemption for disadvantaged, minority, women and emerging small business enterprises.

Greg Miller of the AGC (who attended the meeting in Jessica Adamson’s absence) stated that the AGC had agreed to an extension of the current one-year exemption for these contractors to three years.

Commissioner Gardner asked the committee members whether anyone had any objection to this extension.

Mr. O’Brien said that although he might support a reduced bond amount, he thought the bond requirement was reasonable and expressed concern about exempting businesses that are trying to integrate into the contracting “mainstream.” Mr. O’Brien stated that the public works bond helped ease the concerns of general contractors in hiring these contractors.

Mr. Shiprack agreed with the comments made by Mr. O’Brien regarding the advantages of having a public works bond requirement and said the reason some contractors are unable to obtain these bonds or must pay higher amounts for the bonds is because the contractor has a problem. Mr. Shiprack said he believed that waiving the requirement for such bonds actually hurt small businesses that shouldn’t be on a public works project if they can’t get a bond.

HB 2795

Commissioner Gardner told the committee that HB 2795 would require the commissioner to audit information collected in the annual construction industry survey, as well as increase the fees paid by contractors on public works contracts.

Norman Malbin asked who had requested this legislation. Commissioner Gardner responded that State Representative Paul Holvey had because he was concerned about the accuracy of the survey information provided by some contractors, particularly with regard to the regions in which data is reported. Mr. Malbin questioned whether it was Senator Holvey's intent to catch contractors who intentionally try and skew the survey results.

Mark Holliday expressed his doubts that a contractor would intentionally attempt to skew survey results by reporting hours in other regions. Mr. Holliday acknowledged the possibility that mistakes might be made in reporting survey data, but pointed out that by the time these were discovered, it would be too late to do anything about them, and likely would not impact the wage rates in any event.

Staff reported that a request had been made to the Oregon Employment Department to determine potential costs associated with performing such audits.

Shawn Miller voiced concerns regarding how the audits would be performed and questioned how a contractor would know that another contractor may have falsified their survey information.

Commissioner Gardner informed the committee that should HB 2795 become law, he would request input and advice from the committee prior to performing any audits.

Mr. Shiprack expressed his approval of the idea that the Oregon Employment Department perform any audits.

In a response to a question raised about the reporting of data by region, staff responded that the bureau had once attempted to collect data from contractors for their peak week in each region, which proved difficult and cumbersome for contractors, and that is why the bureau now surveys only one peak week for each contractor.

Shawn Miller questioned why language relating to the conduct of surveys on page two of the bill was being moved. Deputy Commissioner Doug McKean explained that this was an editing change that was made because definitions should not include substantive provisions as this one did.

Commissioner Gardner told the committee that in a meeting he had attended earlier that day at the AGC, it had been suggested that contracting agencies rather than contractors pay the PWR fee.

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Sonny Chickering said he had attended a meeting where concerns were expressed by public agencies about increased administrative costs to public agencies that would be incurred by requiring the agency pay the prevailing wage rate fee, and that they were opposed to this change.

Willie Tiffany (audience member), who represents the League of Oregon Cities, said there had been similar discussion within the league about requiring public agencies to cut a checks.

Patrick O'Brien stated that the bureau would receive payment faster if the agency were required to pay the PWR fee, and said he thought it made more sense for contracting agencies to pay the fee.

Shawn Miller agreed.

It was suggested and agreed that committee members Chickering and Miller arrange to meet with representatives of AOC and LOC to discuss the advantages of contracting agencies paying the fee.

Commissioner Gardner asked the committee members whether there was general support for the fee increase provisions in the bill. The committee members all expressed their support.

Mr. Shiprack questioned the reasoning behind including the fee increase provisions in the bill with the audit provisions, when the audit portion may fail.

Commissioner Gardner agreed that the fee increase proposed may need to be moved to another bill.

HB 2944

Commissioner Gardner asked Willie Tiffany to explain the provisions of HB 2944 to the committee.

Mr. Tiffany explained that the purpose of HB 2944 was to establish a timeline for the issuance of predeterminations by the bureau and judicial review process for disputed predeterminations.

Commissioner Gardner stated that he thought the 15-day timeline in the bill should be clarified to provide 15 *business* days, and said that the bureau had been able to process 75% of predeterminations within fifteen business days in the most recent calendar quarter.

Commissioner Gardner also stated that he would like to see language clarifying that the 15 business days begins from the point the bureau has all of the necessary documentation to complete the predetermination and replace the judicial review process with the contested case hearing (administrative) process, whereby predeterminations issued in this forum could be appealed directly to the Appeals Court.

Mr. Tiffany said he was amenable to Commissioner Gardner's suggestions.

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Commissioner Gardner asked Johanna Matanich from the Department of Justice, who is legal counsel to the bureau, if she thought DOJ could work within the fifteen business day timeline.

Ms. Matanich responded that the fifteen day turnaround time was a pretty tight timeframe for the Department of Justice to meet.

Norman Malbin expressed his concern with the imposition of tight timelines for completing these analyses that are essentially quasi-legal determinations.

Commissioner Gardner indicated he will work further with Mr. Tiffany on this bill.

SB 361

Staff explained that SB 361 would add inspectors to the definition of “worker” under the PWR law and would require them to be paid prevailing wages.

Daniel Bonham questioned whether inspectors as defined in SB 361 would include both public and private employees. Commissioner Gardner said it appeared they would.

Next Meeting

Commissioner Gardner suggested that the next advisory committee meeting be held in one month to further review and discuss PWR-related legislation and developments. The committee members agreed, and the next meeting was scheduled for Thursday April 12, 2007 at 1:30 pm in conference room “F” of the Labor and Industries Building in Salem.

The meeting was adjourned at approximately 3:00 PM.