

PREVAILING WAGE ADVISORY COMMITTEE

Meeting Minutes

Wednesday, May 21, 2008

Portland State Office Building
Room 1B
800 NE Oregon Street
Portland, OR

Members Present

Jessica Adamson
Daniel Bonham
John Killin
Greg Miller
Shawn Miller
John Mohlis
Patrick O'Brien
Bob Shiprack

Members Absent

Mark Holliday
Norm Malbin
Pete Savage

Staff Present

Brad Avakian
Christie Hammond
Lois Banahene
Mike Kern
Gerhard Taeubel
Debbie Sluyter
Kate Newhall

Commissioner Brad Avakian called the meeting to order at 1:30 PM and welcomed the committee members. After introductions, Commissioner Avakian explained the circumstances leading to his appointment by the Governor as Commissioner of the Bureau of Labor and Industries, and explained that his vision of the role of the advisory committee was providing the commissioner with advice regarding PWR issues. Commissioner Avakian announced that he was appointing Jessica Adamson and Bob Shiprack as co-chairs of the advisory committee.

Minutes of Last Meeting of November 14, 2007

The committee unanimously approved the draft minutes of the November 14, 2007 meeting as written.

Quarterly Statistical Reports

Staff presented several quarterly statistical reports, including summaries of PWR enforcement activity and education seminars conducted biennium-to-date. Staff also reported on the number of coverage predeterminations requested and issued. Staff further explained the performance measures for PWR-related data that are tracked, including the number of days to complete PWR investigations and the number of days to issue predeterminations.

Staff presented and summarized a chart of 2007 Construction Industry Survey Non-Respondents Enforcement Actions, explaining how the bureau focused its enforcement actions on those contractors with ten or more employees.

Committee member John Killin asked how many contractors in total had participated in the 2007 survey. Denise Voll from the Oregon Employment Department responded that roughly 4,000 contractors had participated in the 2007 survey.

Legislative Concepts for 2009

Christie Hammond summarized legislative concepts the agency is considering.

Ms. Hammond explained that the first concept was based on a suggestion from a DOJ attorney who represents the bureau in its civil enforcement actions. The attorney identified a concern regarding the agency's current inability to make claims against more than one bond in the event that a contractor's prevailing wage rate bond is not available for one reason or another. The attorney proposed that the law be amended to allow *claims* to be made against multiple bonds, but that the commissioner be prohibited from *recovering from* more than one bond. Ms. Hammond explained that the attorney likely was unaware that the purpose of the public works bond was to protect the prime contractor's payment or performance bond from claims against subcontractors.

The second legislative concept presented to the committee would change the deadline for filing a notice of claim from the last date of work for each individual worker to the completion date of the project. It was explained that this change would allow BOLI to resolve more complaints without having to file a bond claim notice, as well as allow the agency to file more complete and accurate notices.

The third legislative concept explained would establish a PWR "floating fee" whereby a formula for determining the PWR fees to be paid in a biennium would be based on previous biennium ending fund balances, and the amount of the fees required would automatically be adjusted (increased or decreased). Such an automatic fee adjustment, Ms. Hammond said, would eliminate the need to determine prior to each legislative session whether or not the fee amounts needed to be adjusted in order to cover PWR program costs the following biennium.

Committee member Shawn Miller asked whether there could be a cap on the fees collected.

Ms. Hammond responded by stating that establishing a cap on the fees was certainly a possibility. She also stated that it was her understanding that unemployment insurance taxes were computed using a similar type of formula/schedule, and that this might be used as a model.

Committee member Greg Miller reported that his agency incorporates the PWR fees as part of the agency's budget, providing those who do business with his agency a basis upon which to plan, and expressed concern about fluctuating fees in terms of planning.

Ms. Hammond explained that the concept was that any PWR fee schedule would be calculated at the end of each biennium and then implemented some time in the following biennium. This would at least give those interested parties some notice as to any fluctuation in the PWR fee schedule.

Greg Miller replied that if that is how the proposed fee schedule is determined and carried out, then he would be fine with it.

Shawn Miller said he thought that there should be controls in place, and said that the UI fee formula was not comparable because it is a different system dependent upon the economy.

John Killin expressed his apprehension about basing the fee schedule on ending fund balances, providing the example of costs getting out of hand. Mr. Killin further questioned whether this method would be the best public policy.

Co-chair Jessica Adamson stated that the committee should further discuss the details of a floating fee schedule, including the purpose and scope of the PWR fund. She suggested it might be appropriate to form a subcommittee if the bureau is serious about moving forward with this particular legislative concept.

The fourth legislative concept presented to the committee would grant authority to the Construction Contractors Board to revoke, suspend, or refuse to issue a contractor's license if there is an unpaid judgment against a contractor by the state for unpaid civil penalties or wages.

Ms. Hammond told the committee that there are currently licensed contractors that owe civil penalties to BOLI or against whom there are judgments for unpaid wages. She explained that this concept would allow BOLI to notify the CCB of contractors against whom the agency has a judgment for unpaid civil penalties or wages where the contractor is not making an effort to pay the judgment, and the CCB could consider a licensure action.

Shawn Miller asked about the anticipated timeframe for initiating such a licensure action and how soon after a judgment has been issued would a licensure action take place. He also asked if there would be a grace period given to contractors to pay any unpaid judgments.

Ms. Hammond responded by saying that the CCB would have to first give notice prior to revoking or suspending a contractor's license for unpaid civil penalties or wages. She explained how this would give the contractor an opportunity to either pay any unpaid amounts or to enter into a payment schedule. Ms. Hammond said that it was not the intent for BOLI to obtain a judgment and then immediately revoke the contractor's license, but to seek the contractor's cooperation in paying amounts due.

Shawn Miller was curious about the standard time frame for enforcing such actions, asking if BOLI would give the contractor a certain period of time in which to pay before declaring that contractor delinquent.

Ms. Hammond responded that BOLI turns over its unpaid judgments to the Department of Revenue for collection only after the contractor has been through the contested case hearing process. She explained that once BOLI obtains a judgment against a contractor, the agency requests payment from the contractor, and only if the contractor refuses to pay the judgment or enter into a payment schedule, is the judgment referred to the Department of Revenue. It would only be at this point, she said, that BOLI would consider notifying the CCB of the outstanding judgment.

John Killin asked how many contractors have unpaid judgments. Ms. Hammond replied that there were approximately 25-30 contractors.

Mr. Killin asked whether any of the judgments were on appeal or had they all become final. Ms. Hammond responded that all of the judgments were final, and that BOLI would not turn a contractor over for collection or to the CCB if the judgment was on appeal and not final.

Christie Hammond went on to explain that the next legislative concept would require the payment of PWR wages owed on contractors regularly scheduled paydays. Ms. Hammond explained that a recent court ruling (“North Marion School District”) had determined that as written, the current PWR law does not require the payment of PWR wages at any particular time, and that regardless of whether PWR wages are paid in a timely or untimely manner, a contractor may not be considered to have violated the PWR law and will not be liable for liquidated damages as long as the contractor eventually pays the correct amount of PWR wages owed.

Shawn Miller expressed some concern that BOLI could assess liquidated damages against a contractor without allowing the contractor to first try and correct the situation.

Ms. Hammond stated that it is not typically the agency’s policy to assess penalties against a contractor who cooperates with the agency and pays any wages due, however, she noted that BOLI has dealt with contractors who have either stalled or failed to pay PWR wages determined to be owed, requiring BOLI to initiate legal action to enforce payment, in which case liquidated damages are sometimes pursued.

Committee member John Mohlis stated that as long as there is a standard procedure in place that treats contractors equally, he would not have a problem with this legislative concept. He also stated that if a contractor repeatedly ignores demands for payment, then BOLI should have another tool to utilize.

Ms. Hammond pointed out that a contractor still has the opportunity to contest the amount that BOLI has determined to be due, and that if the contractor is successful, then liquidated damages are not assessed.

Ms. Adamson agreed that a contractor who has repeatedly ignored BOLI’s demands should not receive a “second chance” to pay just because of the way the law is written. She did express some concern that contractors who are new to the PWR law might often make honest mistakes and that those contractors who are willing to make it right should not be assessed liquidated

damages. Ms. Adamson said she felt that BOLI could more clearly identify when penalties are to be assessed.

Co-chair Bob Shiprack said that he was familiar with the North Marion case and that he believed the central issue of the case was that in the PWR statutes there are no “payday” requirements as there are in other wage and hour statutes. Mr. Shiprack said he felt the concept was really a fix to make sure that workers get paid under the PWR law when they are supposed to get paid.

The next legislative concept discussed was a suggestion from BOLI staff who answer questions from contractors relating to the completion of certified payroll reports. Ms. Hammond explained that the current PWR law requires that contractors report deductions made and actual wages paid for the “prior week’s” payroll. She also explained that this language assumes that contractors are paying on a weekly basis, when this is not required under state law, and that this is a source of confusion for contractors who do not pay weekly. Ms. Hammond said that this proposed concept would amend the statutory language pertaining to certified payroll filing requirements to require the contractor to report the gross wages *earned* by the employee for each week. Ms. Hammond said that another option would be to require that employers pay on a weekly basis, as they are required to do on Davis-Bacon projects.

Mr. Killin stated that a third option would be not to require weekly certifications. Ms. Hammond responded that while contractors are required to *report* their weekly payroll information, the certified reports are only required to be *submitted* on a monthly basis.

Jessica Adamson questioned how the requirement to file monthly certified payroll reports came about. Shawn Miller recalled that Bob Shiprack had sponsored the legislation that had amended the requirements for filing certified payroll reports in a prior legislative session. Bob Shiprack stated that he thought the reason for the monthly reporting was in order to help management.

Committee member Daniel Bonham recalled that previously, contractors were required to have the certified payroll reports; they just were not required to submit them on a monthly basis prior to the change in the law. He further explained that under the old requirements for submitting certified payroll reports, contractors were only required to provide certified payroll reports for the first week and thereafter, every ninety days, and that contractors were using this system to under-report workers on prevailing wage rate projects.

Ms. Hammond asked what the federal requirement was for the submission of certified payroll reports. Mr. Bonham replied that it was weekly.

John Killin stated that it was his understanding that weekly pay was still the standard in construction, but that some companies may pay bi-weekly.

Committee member Patrick O’Brien questioned whether it is appropriate for the law to mandate when/how frequently a contractor pays.

John Mohlis responded that he didn't think it was as important when a contractor paid, just as long as they report what they are paying.

Patrick O'Brien stated that it seemed to him that the proposed legislation was requiring the information to be reported on a weekly basis.

Christie Hammond responded by stating that the information was already required on a weekly basis, but that it is difficult under the current reporting requirements for a contractor to supply the required information if they do not pay on weekly basis.

The next two legislative concepts presented by Ms. Hammond were described as "cleanup" from the last legislative session. Ms. Hammond reminded the committee that the responsibility for the payment of PWR fees had been shifted from contractors to contracting agencies, but said that ORS 279C.830(2) still requires public agencies to include in public works contract specifications a provision stating that a fee is required to be paid to BOLI.

The second "housekeeping" concept proposed deals with the timeline requirements for payment of the PWR fee and notification to BOLI of a public works contract. Ms. Hammond explained that currently ORS 279C.825 requires payment of the fee *at the time the public agency enters into the public works contract*, but that this is inconsistent with ORS 279C.835, which requires public agencies to notify BOLI whenever a contract subject to the PWR law has been awarded *within thirty days of the date that the contract is awarded*. Ms. Hammond explained that this legislative concept would require the fee to be submitted at the same time as and along with the notice of contract, giving the public agency thirty days to submit both.

The final legislative concept discussed by Ms. Hammond would allow for a contractor who intentionally falsifies certified payroll records to be placed on the list of ineligible contractors. Ms. Hammond provided some examples of violations which could result in a contractor's being placed on the list of ineligibles pursuant to this concept, such as deliberately under-reporting the number of hours worked by employees and/or exaggerating the amount of wages actually paid.

Daniel Bonham referred back to legislative concept number two and asked how BOLI would define the completion date of a project. Ms. Hammond responded to Mr. Bonham's question by stating that the completion date would be the last day on which anybody performed labor.

Mr. Bonham asked if the completion date would include "punch list" work which might occur after the date a notice of completion was issued. Ms. Hammond responded that she believed BOLI could define "completion date" for purposes of this legislation however the agency wanted to.

John Killin expressed concern about defining the last day of a project, saying it would be really difficult to do. He further stated that it could be years between the time an employee had last worked on a project and its ultimate completion.

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Ms. Hammond asked the committee if there were any obvious dates that could help define the last day of a project.

Greg Miller responded that in his agency, a first, second, and third notice for road work were issued, but added that there might still be warranty work done at a later date that may be subject to the PWR law.

Jessica Adamson pointed out that on large projects there could be a situation where it could be years from the time the first sub had been on the project, and there may or may not have been an issue. She further explained that it would be really difficult to go back years later and try to resolve an issue.

Ms. Adamson also expressed her concern about the legislative concept that would amend the statutory language that currently prohibits BOLI from making claims against more than one bond. She stated that the public works bond is there for only BOLI to file claims against--no one else can file a claim against this bond. Therefore, in theory, BOLI should know if there are multiple claims against the PWR bond.

Ms. Hammond responded by providing an example of a situation in which BOLI might be investigating a case and file a notice of claim against the PWR bond only for less than \$30,000, not knowing there are other workers who may also have claims against that bond. In that situation, she pointed out that without filing a claim against the prime contractor's bond, any amounts owed over \$30,000 may not be recovered.

Jessica Adamson responded by stating that once the public works bond has been exhausted, the contractor is then required to replenish that bond. She reiterated her concern about allowing multiple claims to be filed against multiple bonds, indicating that the purpose of the public works bond was that the individual responsible for the damages would be the one to have a claim filed against their bond.

Patrick O'Brien agreed with Ms. Adamson's point that the purpose of the public works bond was to remove the ability to file claims against the performance and payment bond provided by the general contractor.

Ms. Adamson stated that the language of the law has always provided that if there were no other bonds available, that the general contractor's bond would be available. She said the idea was that before a claim is filed against the general contractor's bond, that the subcontractor should be responsible.

Patrick O'Brien suggested that the completion date of a project might be determined based on the last certified payroll reports submitted, which he stated is very clearly indicated on the form being submitted by the contractor.

John Killin said he believes the day the employee last worked on the project makes sense, and that if BOLI requires more 120 days to file a notice of claim, perhaps another reasonable number of days after that should be considered.

Mr. Shiprack pointed out that the agency was merely asking the committee for comments as a courtesy prior to having legislative concepts drafted, and that no decisions needed to be made that day: Once drafted, the committee will have time to review the draft language and comment prior to legislation being introduced. Mr. Shiprack stated that the committee did not necessarily have to support any of the concepts just because they are drafted.

Shawn Miller agreed that the committee should be able to look at the actual language in the draft concepts before making an informed decision, either positive or negative.

Patrick O'Brien suggested to the committee that no one's time be wasted by having a bill drafted that no one supports. He also commented that once a contractor's CCB license is revoked, the contractor's ability to pay the fine has basically been terminated.

Ms. Hammond responded that the concept was that the contractor would at least enter into some type of payment schedule rather than just doing nothing.

Greg Miller agreed with Bob Shiprack's suggestion that the committee review the proposed legislation after it is drafted, noting that if the committee doesn't support any of the draft legislation, it can later be withdrawn.

Mixed-Use and Affordable Housing Projects/Criteria for Determining When a Project is "Residential"

Bob Shiprack explained that HB 2140, which was enacted last legislative session, was intended to clarify when prevailing wage rates would apply to those projects involving public-private partnerships. Mr. Shiprack noted that the legislation appeared to be working well, except in one area; for those projects that are known as "mixed-use" projects, i.e., projects with both residential and commercial construction elements. Mr. Shiprack stated that he and the other folks who helped draft HB 2140 thought there was understanding about how the law should apply to such mixed-use projects, but that the way that the law was written, it could be interpreted differently than intended. Mr. Shiprack stated that he and others had believed that by referencing city codes in the law, a definition of residential construction had been captured that would apply to mixed-use projects with affordable housing under the PWR law.

Mr. Shiprack introduced Michael Anderson who represents the Community Development Network to further discuss the issue of mixed-use projects.

Mr. Anderson told the committee that the Community Development Network represents approximately 40 non-profit housing developers who provide affordable rental and home ownership opportunities throughout the state.

Mr. Anderson explained that as HB 2140 was being developed, there were three main goals to be addressed: The first two goals, consistency and clarity in the law, were especially important in his business, as they relate to the ability to line up sources of funding. He next explained that the third goal was fairness. Mr. Anderson talked about the trend for projects with commercial space to be constructed underneath affordable housing, and said that there had been agreement in discussions during the 2007 legislation session that the affordable housing portion of these types of mixed-use projects with both commercial space and affordable housing would be exempted under the definition of affordable housing provided in HB 2140. Mr. Anderson explained, however, that there is no language in HB 2140 that clearly provides that a project that includes commercial space in addition to affordable housing qualifies as an exempt affordable housing project under the law.

Mr. Anderson presented a written proposal that would allow for residential projects that include no more than one floor of commercial space to qualify for the affordable housing exemption provided in HB 2140 if that commercial space is ancillary to the residential portion. In addition, the proposal also recommended exempting mixed-use residential/commercial projects under the law when a commercial occupant is a nonprofit organization. Further, the proposal recommended exempting the residential portion of a project and breaking out the commercial portion “(w)hen the commercial occupant is a for-profit organization and the public funding in the commercial portion exceeds \$750,000.”

Daniel Bonham asked Mr. Anderson what the additional project cost would be if the one floor of commercial space were required to be paid at the prevailing wage rate.

Mr. Anderson responded that the sticking point from the affordable housing viewpoint was not necessarily the wage costs associated with paying PWR; but that on some of the smaller mixed-use projects, contractors were hesitant about placing bids on these types of projects due to the complex requirements of PWR law. Mr. Anderson said that many of the contractors on these types of projects were not familiar with the “paperwork” required by the law.

Jessica Adamson asked if the members of the Prevailing Wage Advisory Committee could agree that it should be the policy for affordable housing projects with one floor of commercial space to be exempt under the law.

Shawn Miller responded by stating that he thought it was already the policy and that if the committee was trying to fix that policy, then he supported the effort.

John Mohlis said he would be OK with this as long as any commercial space used by a for-profit business or a project in which a public agency invested a large amount of money was covered.

Daniel Bonham stated that he felt there may be a concern that this policy may create some type of loophole for a large development. He wondered if there could be a limit put on the size of the project, so that the loophole could not be taken advantage of by someone asking for the exemption on a large project.

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John Killin responded that there was a limit already in place--one floor of commercial with four floors of residential above.

John Mohlis mentioned that he met with Mr. Anderson a few weeks prior to discuss how to define a "floor." He suggested that "floor" be defined by using a percentage of the total structure.

John Killin replied that the idea presented by Mr. Mohlis fixes one of his issues with a mixed-use project and said that he thought a percentage calculation would solve a lot of the problems associated with determining how to define a floor.

Michael Anderson stated the affordable housing people would be comfortable with having some sort of reasonable cap so that having housing is not an excuse to do a big commercial project.

Mr. Anderson next explained his proposal to clarify the maximum allowable building height in the affordable housing exemption in the law to include projects of up to five stories of residential space over one story of commercial space as allowed by Portland city code.

Mr. Anderson also proposed allowing developers of affordable housing to choose either the higher of local or state area median income (AMI) statistic in meeting the statutory requirements for qualification as affordable housing. Mr. Anderson explained that the problem with linking affordable housing to the AMI is that it is not clear whether a state or local AMI indicator should be used to determine whether a person qualifies for affordable housing. Mr. Anderson said that he believed that allowing developers to choose between a state and local AMI indicator would provide equity in determining who qualifies for the affordable housing exemption.

Shawn Miller asked whether these suggestions could be implemented by rule or would require legislation.

Bob Shiprack responded that this was not known, but that BOLI could review this issue if there was agreement by the committee with the recommendations presented. Mr. Shiprack said that the reason for bringing these affordable housing proposals to the committee was merely to refresh the memories of the members as to the original goals of the affordable housing legislation. Mr. Shiprack said the next step would be to ask the bureau whether or not the proposed changes would need to be made by statute or rule.

John Killin moved that the bureau review the proposals presented relating to the affordable housing exemption in the law in order to determine whether they could be implemented by rule or would require legislation.

John Mohlis second the motion.

Jessica Adamson asked the committee members if they were in favor of having the bureau review the proposals as requested. The committee members present at the meeting responded with a unanimous yes.

Ms. Adamson asked if audience member Shawn Sullivan would like speak regarding the affordable housing issues presented by Mr. Anderson.

Mr. Sullivan introduced himself as an architect in the development community. He stated that he disagreed with the proposal presented by Mr. Anderson because he found it confusing to refer to projects with both residential and commercial components as “mixed use” projects. Mr. Sullivan said he believed that memoranda issued by the US DOL referenced in the law very clearly define when commercial construction is “incidental” to a residential project by the percentage of the construction and construction cost that is related to ancillary improvements. Mr. Sullivan said he felt that there were already adequate guidelines in place, i.e., federal Davis-Bacon guidelines that define what constitutes residential and commercial construction. Mr. Sullivan expressed concern that the recommendations being proposed by the Community Development Network might work for some community development projects, but that other urban projects that should be treated as “affordable housing” projects may not qualify under the proposed guidelines.

Shawn Miller asked Mr. Sullivan whether he had been involved in the discussions last legislative session regarding these issues. Mr. Sullivan replied that he had not.

Jessica Adamson and Bob Shiprack offered to meet with Mr. Sullivan following the committee meeting to discuss his concerns.

Recommendations of the HVAC Testing, Adjusting and Balancing (TAB) Subcommittee and TAB Survey

Christie Hammond reminded the committee members that several months ago, Commissioner Gardner had appointed a sub-committee to review the issue of application of the PWR law to testing, adjusting, and balancing (TAB) HVAC systems. Copies of the sub-committee’s recommendations were provided to the committee members. Ms. Hammond advised the committee that the sub-committee had recommended that a survey be conducted to determine the extent to which workers who perform TAB work has evolved into a separate trade, and that the advice of sub-committee members Denny Whitzel and Willy Myers should be utilized in developing the survey.

Ms. Hammond told the committee that the bureau was close to finalizing the TAB survey instrument, and that approximately 250 pre-survey screening postcards had been sent to contractors who were identified as being either sheet metal or TAB specialty contractors, asking whether the contractors employed workers who perform TAB work. Ms. Hammond noted that to date, the Employment Department had received 45 positive responses and 123 negative responses to the postcards sent out.

Ms. Hammond indicated that the agency was soliciting input from the committee regarding a couple of issues pertaining to the survey, including the definition of TAB to be used in the survey, and whether only TAB-certified firms should be surveyed. Ms. Hammond explained that the TAB specialty contractors wanted a broader/more general definition that included hydronics

TAB, although it was BOLI's understanding that the subcommittee had only been charged with considering TAB work for HVAC systems.

Shawn Miller responded by stating that the sub-committee's letter/recommendations to Commissioner Gardner did not specifically reference HVAC TAB, and said that the industry does a lot more than testing/balancing HVAC systems. Mr. Miller went on to say that thirty percent of the industry involved hydronics TAB, and that if the TAB industry was going to be surveyed, the survey should accurately reflect all the work being performed by the industry.

Committee co-chair Jessica Adamson invited Willy Myers representing the sheet metal workers and Greg Pelsler representing the specialty contractors to present their respective views regarding the TAB survey.

Mr. Pelsler pointed out that a draft classification index provided to the PWR Advisory Committee mistakenly included TAB work under the sheet metal classification. Christie Hammond responded by explaining that the proposed classification index was to be used for another purpose and that TAB work was not currently published in the sheet metal classification in the agency's occupational definitions.

Mr. Pelsler said that the goals of the TAB sub-committee were to determine whether TAB work should be subject to the PWR law and if so, to determine the appropriate classification for the work. Mr. Pelsler stated that he believed that combining TAB engineers and sheet-metal workers into the same trade/occupational definition exceeds the authority granted to the Commissioner under the PWR law. Mr. Pelsler also stated that the duties of TAB engineers and sheet metal workers never do and never should coincide.

Mr. Myers told the committee that air balancing is included as part of the sheet metal classification in all neighboring states, and said that this is a common practice. Mr. Myers explained that hydronics TAB was excluded from the special TAB survey to isolate and resolve the issue of the prevailing practice for the performance of HVAC TAB work, and said that hydronics TAB should also be surveyed at a later date to determine the prevailing practice with regard to the performance of this work.

Shawn Miller stated his opinion that not including hydronics TAB as part of the definition in the survey would not provide an accurate representation of the work performed by the TAB industry.

At the request of John Mohlis, Mr. Pelsler provided a brief description of hydronics TAB. Mr. Mohlis asked Mr. Myers if the sheet metal industry had contractors that performed HVAC testing.

Mr. Myers replied that most of his HVAC contractors performed some testing and balancing on both prevailing wage rate and non-prevailing wage rate projects. He went on to explain that on certain projects, the specifications require that testing and balancing be performed by an independent contractor, separate from the HVAC installation contractor, although it is not required that the independent contractor be separate from a specific trade.

Mr. Mohlis asked if the purpose behind having the testing and balancing contractor being independent from the HVAC installation contractor was to ensure the integrity of the system. Mr. Myers replied that it was.

Mr. Pelsler stated that every definition of TAB work includes both air and hydronic balancing. He further stated that he saw no point in BOLI fragmenting a particular industry, especially when the portion of work being excluded is substantial.

Daniel Bonham stated that he was somewhat confused by that fact that 45 contractors had responded to the postcard claiming to have performed TAB work if only eight TAB contractors were responsible for 99-100% of the TAB work statewide as claimed.

Shawn Miller stated that he believed there were a number of contractors who had performed at least some TAB work, either private or on public works projects, and that would account for the number of contractors responding that they had performed TAB work.

Greg Pelsler reiterated that the majority of TAB work is performed by eight independent air balancing firms and that these firms perform 99-100% of the prevailing wage jobs. He also stated that his firm did not receive a postcard asking if it performs TAB work, and that he was concerned with the fairness of this survey.

Christie Hammond told the committee that both the sheet metal and TAB specialty industries had been asked to submit lists of contractors that potentially do TAB work and should receive surveys. She further explained that any firm that employs a TAB worker should receive a survey.

Mr. Pelsler asked Ms. Hammond if he could request a list of those contractors who were sent a postcard. He stated that his main concern was that everything was done fairly and that the definition was a concern because it had been altered to differ from every other definition of TAB work. Mr. Pelsler also voiced concerns with the content of the survey and who was being surveyed.

Ms. Hammond asked Denise Voll of the Oregon Employment Division, who is conducting the survey, whether it was too late to add additional contractors to the list of those to receive a survey. Ms. Voll responded that it was not too late. She also told the committee that the list of those contractors being surveyed was confidential and not available for review.

Patrick O'Brien questioned why this issue was even being brought before the committee.

Jessica Adamson responded, saying she understood the reason this issue had been put on the agenda was to discuss the recommendations put forth by the TAB subcommittee as they related to conducting a survey for TAB work, specifically, the appropriate definition to be used in surveying TAB work and whether or not it should include hydronics.

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Ms. Adamson asked the committee if there was consensus by the committee that the definition of TAB used in the survey should include hydronics.

The committee unanimously agreed that hydronics TAB should be included as part of the definition in the survey.

Christie Hammond noted that if hydronics TAB was included in the definition, plumbing contractors that perform hydronics work would have to be included in the contractors surveyed. Ms. Hammond asked Ms. Voll from the Employment Department whether this would require the survey to be started again “from scratch,” due to the fact the TAB survey was ready to go.

Ms. Voll responded by confirming that including hydronics TAB at this point would require the agency to start completely over with the survey, and it could not be conducted as planned during the peak summer months.

Jessica Adamson stated that since the ultimate classification of TAB work would affect a lot of people in both the sheet metal trade and TAB industry, she believed that it was important to do the survey correctly, even if it takes more time. Ms. Adamson said she believed it was important for the committee to be able to say that the survey was done in the most transparent and fair manner possible.

Bob Shiprack noted that former Labor Commissioner Jack Roberts had disregarded the entire first wage survey that was conducted until a second survey was conducted and he had confidence in the data collected. Mr. Shiprack agreed with Ms. Adamson that the process needs to be transparent, and if the survey is done, it needs to be done right.

Patrick O’Brien questioned where it would stop if the agency went through with surveying the TAB industry, and asked whether other construction trades’ inspectors, civil engineers, and architects would eventually be included. Mr. O’Brien expressed his opinion that covering this type of work under the law was going in the wrong direction, and said that it is not the job of the committee to determine industry practice, but rather to monitor industry.

Shawn Miller agreed that this could open up other industries to scrutiny.

Daniel Bonham pointed out that the guiding principal in determining whether someone is performing covered work on a project is whether the work is physical or manual in nature.

Shawn Miller said he believed the TAB definition needed a little more work, and suggested that the TAB subcommittee be reconvened for this purpose.

Jessica Adamson asked the committee whether they agreed with Mr. Miller’s suggestion. She also expressed her belief that the committee should continue to work on this issue in an attempt to determine where the TAB people fit.

Patrick O'Brien stated that he knew exactly where TAB people fit. He also stated that typically, TAB people are not employed by him directly; they are hired by the project owner to perform TAB work. Mr. O'Brien explained that the reason for this was to obtain an independent review of the air and hydronics systems, completely separate from the construction of such systems.

John Mohlis responded by questioning whether it really matters who the contract is between, if the work performed is the same type of work performed by other individuals at different times in the job.

Christie Hammond explained that the objective of the survey was to capture the number of HVAC TAB hours worked by employees over a three-month period in order to determine whether the majority of those hours were worked by TAB specialty contractors or by sheet metal workers.

Shawn Miller stated he believed that the survey will show that the majority of TAB workers perform a little sheet metal, a little mechanical, and a little bit of plumbing, which proved his point that TAB should either be considered a separate trade or not covered at all under the law. Mr. Miller also explained that although he did agree with Mr. O'Brien on most points, he still believed there is a fear in the TAB industry that if this issue is not clearly resolved, TAB contractors could face future complaints on prevailing wage rate projects.

Proposed Revisions to the PWR Rate/Occupational Definitions Publications

Christie Hammond informed the committee that the bureau was continuing to work on occupational definitions, and provided the committee with a draft cross-reference list of occupations that had been compiled by PWR staff. Ms. Hammond reiterated that BOLI would not be including TAB work under the sheet metal definition until the issue of its correct classification was resolved.

Next Meeting/Meeting Schedule

Jessica Adamson proposed the next meeting be held on September 17, 2008. The committee unanimously approved this date.

The meeting was adjourned at approximately 3:45 PM.

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