

MINUTES

Bureau of Labor and Industries

PREVAILING WAGE ADVISORY COMMITTEE

Thursday, September 22, 2005

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

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

Members Present

Dan Bartlett
Ed Glad
Jessica Harris-Adamson
Mark Holliday
Norm Malbin
Shawn Miller
John Mohlis
Bob Shiprack
Karen Williams

Members Absent

Daniel P. Boldt
Jay Minor
Dan O'Brien

Staff Present

Dan Gardner
Christie Hammond
Lois Banahene
Susan Wooley
Mike Kern
Denise O'Farrell (OED)

Minutes of the Previous Meeting

The minutes of the May 4, 2005 meeting of the advisory committee were reviewed and approved without comment.

Staff Reports

Several staff reports were presented, including summaries of PWR enforcement activities for the 2003-2005 biennium and 2005-2007 biennium to date; seminars conducted; currently open PWR investigations; and the current list of contractors ineligible to receive public works contracts.

Denise O'Farrell, of the Employment Department, provided a survey update, reporting that approximately 60% of the surveys had been returned to date, and said that she would be sending out reminder notices to the remaining contractors who had not yet responded.

Christie Hammond advised the committee that the bureau would be issuing two separate rates publications in January; the regular PWR publication, and a second, additional publication providing the higher of the PWR or Davis-Bacon wage rate for each classification in each region, as required by Senate Bill 477.

Commissioner Gardner announced that the advisory committee now had its own webpage on BOLI's website at http://egov.oregon.gov/BOLI/WHD/PWR/docs/Committee_Members.pdf.

2005 Legislation/Rulemaking

SB 477

Christie Hammond provided a summary of the provisions of Senate Bill 477 enacted by the 2005 Legislature, which will go into effect on January 1, 2006.

In response to a question by Norman Malbin about the permissibility of using donated labor on PWR projects, Ms. Hammond responded that donated labor was only allowed if donated directly to a public agency (as opposed to a contractor).

Jessica Harris-Adamson summarized the new requirement in the law for all contractors who work on projects subject to the PWR law to obtain a \$30,000 public works bond.

Proposed Revised Rules

Commissioner Gardner reviewed the background of two proposed rules; one relating to a revised definition of "public funds," and the second relating to Construction Managers/General Contractors (CM/GC's). These rules had previously been reviewed and approved by the committee in 2004, but because of concerns later expressed by others during the rulemaking process, (primarily relating to the proposed rule revision pertaining to public funds), the rules had been put on hold during the legislative session.

Commissioner Gardner explained that the proposed rule that would amend the definition of "directly used public funds" to include conduit and pass-through revenue bonds was meant to address the particular type of pass-through revenue bond financing used for the OSU College Inn project, and said that he did not intend it to (or believe that it would) be applicable to other types of funding or projects. Commissioner Gardner expressed his intent to proceed with the rulemaking process and said that a hearing would be scheduled in connection with the rules.

Committee member Karen Williams expressed her concern that there would be other types of funding and projects unlike the OSU project that would be affected by the proposed rule and said that "revenue" bond financing, not all of which involves public funds, is a commonly used funding mechanism.

Commissioner Gardner asked Ms. Williams to provide specific examples of other types of projects that would be subject to the revised rule, and pointed out that in order for the amended rule to apply, a project would first have to meet the first part of the "two prong" test for coverage under the PWR law, i.e., be a public works project carried on or contracted for by a public agency.

Ms. Williams replied that she was not prepared to present specific examples of projects at that time. Ms. Williams said that she believed a perception existed that BOLI's interpretation of

what qualifies as a “public works” is not clear; therefore, the extent to which the proposed rule revision might apply is also not clear. Ms. Williams also indicated that she feared that tax exempt funds that are available for certain types of projects might be affected by the proposed rule. She stated that she believed that the Taskforce on Public-Private Partnerships that has been formed would be the appropriate forum to address this issue.

Commissioner Gardner responded that to date, he had not seen any public-private partnership project use any form of financing that would be affected by the proposed rule revision, and he requested that Ms. Williams and any others concerned with the application of the proposed rule provide specific examples of projects that would be newly subject to the rule. Mr. Gardner pointed out that he had been requesting that such examples be provided for several months, and to date, none had.

Dan Bartlett commented that the League of Oregon Cities was concerned that the proposed rule may apply to non-profit hospitals. Ms. Williams added that private, non-profit hospitals can act as issuers of conduit market bonds (with no public funds), and said that she was afraid that the reference to revenue bond financing in the proposed rule may subject private projects to the law. Ms. Williams also indicated that there is a general misunderstanding about revenue bonds, and she provided a brief synopsis of the revenue bond process.

Norman Malbin stated that he could not see how the proposed draft rule would have any effect on revenue bonds based on Ms. Williams’ description of the process.

Both John Mohlis and Shawn Miller encouraged Ms. Williams to present specific examples of where this type of financing had been used to fund a public works project. Jessica Harris-Adamson encouraged Ms. Williams to recommend alternative language for the proposed draft rule at the next advisory committee meeting for consideration.

A discussion of the proposed rule relating to CM/GC’s followed. Bob Shiprack said that he had spoken with representatives with Hoffman Construction about the language in the current version of the proposed draft rule and that they were still not entirely satisfied. Mr. Shiprack said that if construction did not commence within a certain period of time following the execution of a construction contract with a CM/GC, the applicable prevailing wage rates should be updated. Mr. Shiprack indicated that he believes that some public contracting agencies may issue CM/GC contracts in order to “freeze” the rates in effect at that time, knowing that construction may not actually commence for a significant period of time thereafter.

Norman Malbin agreed that this was not appropriate, and encouraged BOLI to consult with the Department of Justice regarding a way to address this issue.

Jessica Harris-Adamson said that she was comfortable with the proposed rule the way it was currently drafted.

Status of Public/Private Partnership Task Force (“TOP”)

Commissioner Gardner summarized the first meeting of the Public/Private Partnership Task Force (“TOP”) held on September 7, 2005, which is co-chaired by Advisory Committee members Jessica Harris-Adamson and Bob Shiprack. A calendar of the taskforce’s meeting schedule was provided. Mr. Shiprack advised the committee that input from the committee and public were encouraged and welcome.

PWR Checklist

Commissioner Gardner presented a draft checklist developed by BOLI to be used as a tool by public contracting agencies and contractors in evaluating whether a contemplated project might be subject to the PWR law by applying criteria and factors considered by the agency in making such determinations. Mr. Gardner said he would like to make this list available to the public.

Norman Malbin suggested adding additional language to the checklist pertaining to whether a public agency was involved in *developing or reviewing* construction specifications for a project.

Commissioner Gardner pointed out that the checklist is not an inclusive list and that it is recommended that BOLI be consulted regarding application of the law if any of the criteria in the checklist appear to apply.

Draft Policy Regarding Definition of “Residential Construction”

A draft policy was presented pertaining to the definition of “residential” construction under the PWR law. The proposed definition, which is modeled after the federal US Department of Labor’s definition, provides that exceptions to the definition may be considered by the commissioner in the event another definition has been adopted by a local ordinance or code, or the prevailing practice of a particular trade or occupation differs from the federal definition.

The committee expressed their approval of the draft policy.

Draft “Predetermination” Process (“Guidelines for Coverage Determination under the PWR Law”)

A draft procedure for requesting and obtaining determinations from BOLI regarding application of the PWR law to specific projects was presented. The procedure sets out how and when a determination may be requested, and timelines for the issuance of a determination by BOLI. The procedure also provides a “reconsideration” process.

The committee approved the draft procedure.

Next Meeting

The next meeting of the advisory committee was scheduled November 17, 2005 at 1:30 PM at the International Union of Operating Engineers in Gladstone.