



January 9, 2012

Andrew J. Bean
Community Before & After School
Child Care Program (CAP)
250 Broadalbin Street, Suite 2B
PO Box 1717
Albany, OR 97321

Re: *Determination Whether Project is Subject to Prevailing Wage Rate Law*
Project: Oak Grove auxiliary building site prep / Oak Grove CAP facility
Requested by: Community Before & After School Child Care Program (CAP)

Dear Mr. Bean:

On December 16, 2011, you submitted a request on behalf of Community Before & After School Child Care Program (CAP) asking if the Prevailing Wage Rate law would apply to the Oak Grove auxiliary building site prep and Oak Grove CAP facility project ("project"). Additionally, you requested a division of the project pursuant to ORS 279C.827. Sufficient information to make a determination was received on January 3, 2012, and therefore, the commissioner issues the following determination:

FINDINGS OF FACT:

1. The Albany Community Before & After School Child Care Program ("CAP") is a non-profit organization that operates a before and after school child care program in the Greater Albany Public School District 8J ("GAPS"). CAP has been registered as a domestic non-profit since October 3, 1988.

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800 NE Oregon St. Suite 1045
Portland, OR 97232-2180
(971) 673-0761
Fax (971) 673-0762

EUGENE
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Eugene, OR 97401-7103
(541) 686-7623
FAX (541) 686-7980

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Worksource Bend
1645 NE Forbes Rd, Ste 106
Bend, OR 97701-4990
(541) 322-2435
FAX (541) 389-8265

MEDFORD
Apprenticeship and Training
119 N Oakdale Ave.
Medford, OR 97501-2629
(541) 776-6201
FAX (541) 776-6284

SALEM
3865 Wolverine St. NE; E-1
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2. As a result of overcrowding at GAPS schools, CAP has looked for ways to provide its services by placing separate structures on school grounds. CAP wants to construct a permanent structure on the Oak Grove Elementary School grounds.
3. GAPS, a public agency, owns Oak Grove Elementary School and its grounds. GAPS may be willing to provide funding for the site preparation work which would allow CAP to undertake the cost and responsibility of constructing the building. Therefore, CAP and GAPS are requesting that the project be divided into two projects – the Oak Grove auxiliary building site project and the Oak Grove CAP facility project.
4. Once the site work is completed by GAPS, CAP will be responsible for the building construction, at no cost to GAPS. The building will be designed specifically for the CAP program.
5. CAP will lease the site pursuant to a long-term ground lease, and CAP will own the building. At this time, the exact length of the lease has not yet been determined. GAPS will continue to own the property, including the improvements underlying the building. The long-term ground lease that will be proposed by CAP to GAPS will include nominal rent and will include a reciprocal lease for limited use of the building during school hours, when not in use by CAP. When the CAP program is not running, GAPS will be granted use the building for reading groups, music classes or some other use that is currently limited due to the unavailability of school facilities. When students are dismissed from class, including kindergarten age children, the CAP building would again be used by CAP. CAP would also control evening and weekend use of the building and be responsible for all maintenance. GAPS will not provide any funding through the lease for the purpose of financially assisting CAP in construction of the building.
6. If CAP is no longer able to fund its program, the expectation is that a successor organization providing a similar service would be able to assume CAP's rights and obligations under the lease, with reasonable requirements for GAPS approval of such a successor. If there were no such successor, ownership of the CAP building would likely have to transfer to GAPS.

7. The total project cost is estimated to be \$457,306. Site preparation is estimated at approximately \$87,337. Funding for the project includes the following sources:
 - a. Funds of a public agency: \$87,337
 - i. GAPS capitol improvement funds
 - ii. Funds designated for site preparation work
 - b. Other Funds: \$369,969
 - i. CAP – grants, bank financing, fundraising
 - ii. Funds designated for building construction
8. CAP is working with Fortis as the general contractor for building construction. GAPS will go through an intermediate procurement process to determine the contractor for the site prep. GAPS may choose to act as its own general contractor. It is expected that there will be separate contracts for the site work and building construction.

CONCLUSIONS OF LAW:

1. The proposed project meets the definition of “public works” under ORS 279C.800(6)(a)(C) because it is a project for the construction of a privately owned building that uses funds of a private entity and in which 25% or more of the square footage of the completed project will be occupied or used by a public agency. Here, GAPS will have use of 25% or more of the building during school hours when the building is not in use by CAP.
2. The proposed project includes parts that will be owned by a public agency and parts that will be owned by a private entity. The Oak Grove auxiliary building site prep portion of the project will be owned by GAPS, a public agency. The Oak Grove CAP facility portion of the project will be owned by CAP, a private non-profit company. ORS 279C.827(3) provides that if a project includes parts that are owned by a public agency and parts that are owned by a private entity, the commissioner shall divide the project, if appropriate, after applying the considerations set forth in ORS 279C.827(1)(c) and OAR 839-025-0310. Some factors used in making this determination include:
 - a. The physical separation of the project structures,
 - b. The timing of the work on project phases or structures
 - c. The continuity of project contractors and subcontractors working on project parts or phases,
 - d. The manner in which the public agency and the contractors administer and implement the project,
 - e. Whether a single public works project includes several types of improvements or structures, and

- f. Whether the combined improvements or structures have an overall purpose or function.
- g. Other relevant matters as may arise in any particular case.

A consideration of the factors weighs against dividing the project. Here, although GAPS will own the project site and the site work part of the project and the building will be owned by CAP, there is no physical separation of the project structures because there is only one building being built. Likewise, the project involves the construction of a single building. Any site work done will be in preparation for and to support construction of the building. The timing of the project is such that the building will be started once the site work is completed. GAPS and CAP have yet to finalize a lease, but contemplate that the lease proposed by CAP to GAPS will include nominal rent and will include a reciprocal lease for limited use of the building during school hours, when not in use by CAP. Also, it is contemplated that GAPS may have approval rights of a successor if CAP ceases to operate and that if there is no successor, ownership of the building may transfer to GAPS. Finally, the combined improvements or structures will have an overall purpose of providing a building for CAP use and for limited GAPS use. Although CAP and GAPS each have separate funding sources and each will have separate contracts for construction, these facts alone are not enough to weigh in favor of dividing the project.

- 3. The Oak Grove auxiliary building site prep & Oak Grove CAP facility project contract price is estimated to be approximately \$457,306; therefore, the exemption for projects for which the contract price does not exceed \$50,000 will not apply. Likewise, the project will use approximately \$87,337 in funds of a public agency; therefore, the exemption for projects for which no funds of a public agency are used will not apply. ORS 279C.810(2)(a), (b).

DETERMINATION:

Based on the foregoing, the Oak Grove building project may not be divided into public and private portions.

The Prevailing Wage Rate laws, ORS 279C.800 to ORS 279C.870, and OAR Chapter 839, Division 025, will apply to the proposed construction, reconstruction, major renovation and/or painting of the Oak Grove auxiliary building site prep and Oak Grove CAP facility project.

This determination is based on the agency's file as of the date of this determination. The commissioner may make a different determination if any of the project information is incorrect, or if the project or project documents are modified or supplemented after the date of this determination.

REQUEST FOR RECONSIDERATION:

After the commissioner issues a determination, the requestor or any public agency served with a copy of the determination may request that the commissioner reconsider the determination. A request for reconsideration must be submitted in writing to the Prevailing Wage Rate Unit, must include the reason or reasons for the request and any documents in support of the request, and must be received within 15 calendar days of the date the determination was mailed. A request for reconsideration does not toll the time period for requesting a contested case hearing on the determination.

RIGHT TO A HEARING:

The requestor and any person adversely affected or aggrieved by this determination are entitled to a hearing as provided by the Administrative Procedures Act (ORS 183.413 to 183.470) and ORS 279C.817. If you want a hearing, the Bureau of Labor and Industries, Wage and Hour Division, must receive your written request for hearing within 21 days from the date this notice was mailed. Hearing requests should be addressed and delivered to:

Administrator
Wage and Hour Division
Bureau of Labor and Industries
800 NE Oregon St., Suite 1045
Portland, OR 97232

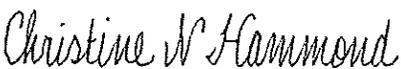
If a written request for hearing is not received within this 21-day period, your right to a hearing shall be considered waived.

If you request a hearing, you will be notified of the date, time and place of the hearing. You have the right to be represented by legal counsel at a hearing. However, if you are a government agency, corporation, partnership, or unincorporated association, you must be represented by either legal counsel or an authorized representative. If you request a hearing, you will receive information on Contested Case Rights and Procedures before the hearing. After the hearing, an order confirming, modifying or reversing this determination will be issued. This determination shall remain in effect until the final order is issued.

If you request a hearing, but fail to appear at any scheduled hearing, you will have waived your right to hearing, and the commissioner may issue a final order by default. If the commissioner issues a final order by default, the agency file on this matter shall serve as the record for purposes of proving a prima facie case. You are not entitled to judicial review of this determination order unless you have made a timely request for a hearing.

Date: January 9, 2012

BRAD AVAKIAN, Commissioner
Bureau of Labor and Industries



CHRISTINE N. HAMMOND,
Administrator
Wage and Hour Division
Bureau of Labor and Industries

Certificate of Service

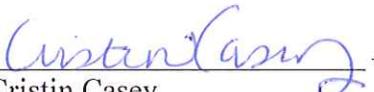
On January 10, 2012, I mailed the Prevailing Wage Rate Determination for the Oak Grove auxiliary building site prep / Oak Grove CAP facility project to the requestor, as follows:

Andrew J. Bean
Community Before & After School
Child Care Program (CAP)
250 Broadalbin Street, Suite 2B
PO Box 1717
Albany, OR 97321

Certified Mail – Return Receipt Requested
Article #: 7011 2000 0000 5450 9534

Russell Allen
Greater Albany Public School Dist.
718 Seventh Ave. SW
Albany, OR 97321

Certified Mail – Return Receipt Requested
Article #: 7011 2000 0000 5450 9527


Cristin Casey
Compliance Specialist
Wage and Hour Division
Bureau of Labor and Industries