

MEMORANDUM

DRAFT

October 5, 2007

TO: CPARB – Industry-wide Subcommittee

FROM: Task Force on Offsite Prefabrication – In State & Out-of-State

SUBJECT: **Suggested Legislative Approaches to Prevailing Wage Coverage**

This memo speaks to the issue of items that are custom fabricated for installation on a Washington Public Works Project, when those items are prefabricated at an off-site location. Fabricators located outside of the State of WA are too often able to underbid in-state fabricators because the Washington companies are required to pay prevailing wage, and the law does not extend to include facilities that are located in other States.

Companies in cities that border on Idaho and Oregon often move out of state or set up facilities out of state for the purpose of bidding on WA public work because they have the advantage of not having to meet the requirement that prevailing wage requirements.

Washington is losing business revenue, tax-revenue, and family wage job opportunities. The Davis-Bacon Act and its related State law 39.12 RCW were established to prevent the loss of work to from out-of-area cheap labor forces. Clearly, this aspect of the intent of the law is not served when Washington taxes pay for out-of-state work resulting from the unfair bidding advantage currently available to out-of-state contractors.

Current law references offsite prefabrication as follows:

RCW 39.04.010 Definitions (2nd Par.) The term **public work shall include all work**, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein. **All public works**, including maintenance when performed by contract **shall comply with the provisions of RCW 39.12.020**. [Emphasis added].¹

RCW 39.04.260 Private construction performed pursuant to contract for rental, lease, or purchase by state – Must comply with prevailing wage law. **Any work**, construction, alteration, repair, or improvement, other than ordinary maintenance, that the state or a municipality causes to be performed by a private party through a contract to rent lease, or purchase at least fifty percent of the project by one or more state agencies or municipalities shall comply with chapter 39.12 RCW.² [Emphases added].

¹ Under Everett Concrete, this is interpreted to mean that off-site prefabrication is public work and, therefore, is subject to the prevailing wage requirements of RCW 39.12.020. We are recommending an amendment to this definition, covering the inclusion of off-site prefabrication, to clearly codify Everett Concrete and establish direct authority for coverage under the WACs.

² This statute, otherwise called the “Turnkey” law, is interpreted as specific to the physical space that is to be occupied by public agencies. However; as written, the language requires compliance with 39.12 RCW for purchase of certain types of items like modular buildings which are covered in-state but are increasingly being used and can be easily manufactured out-of-state.

RCW 39.12.030 Contract specifications must state minimum hourly rate – Stipulation for payment. The specifications for every contract for the construction, reconstruction, maintenance or repair of any public work to which the state or any county, municipality, or political subdivision created by its laws is a party, shall contain a provision stating the hourly minimum rate of wage, not less than the prevailing rate of wage, which may be paid to laborers, workers, or mechanics in each trade or occupation required for such public work employed in the performance of the contract either by the contractor, subcontractor or other person doing or contracting to do the whole or any part of the work contemplated by the contract, and the contract shall contain a stipulation that such laborers, workers, or mechanics shall be paid not less than such specified hourly minimum rate of wage.

RCW 39.12.010 Definitions. (2) provides that “The ‘locality’ for the purposes of this chapter shall be the largest city in the county wherein the physical work is being performed.

Actual references to the fabrication and manufacture of non-standard items appears in **WAC 296-127-010(7)(a)(vi)**, which states that the term public work shall include: “The fabrication and/or manufacture of nonstandard items produced by contract specifically for a public works project as defined by (A)(i) through (v) of this subsection.

The second reference in the administrative code is found in **WAC 296-127-020(3)** which defines locality by stating that: “The definition of ‘locality’ in RCW 39.12.010(2) contains the phrase ‘wherein the physical work is being performed.’ The department interprets this phrase to mean the actual work site. For example, if non-standard items specifically produced for public works projects are prefabricated in a county other than the county wherein the public works project is to be completed, the wage for the off-site prefabrication shall be the applicable prevailing wage for the county in which the actual prefabrication takes place. Workers who deliver such nonstandard items, as well as materials pursuant to the terms of WAC 296-127-018 [gravel, concrete, asphalt, etc.] shall be paid the applicable prevailing wage for the county in which the public works project is located.

SUGGESTED OPTIONS

Payment of prevailing wages for off-site fabricators of non-standard items

1. **Require Prevailing Wage as a standard part of the Contract:**

Establish a law [amend RCW 39.12.030 and revise WAC 296-127-020(3)?] which would require that all contracts for public construction to contain a phrase that requires payment of the established prevailing wage rates for the locality in which the project is being construction, irrespective of the location of the contracting or fabricating entity. By accepting the contract, the contractor is bound by the agreement to pay the prevailing wages as it currently is provided for material suppliers. Out of state contractors would in no way be penalized or prohibited from bidding on WA public work and the contractual agreement would be enforceable, if not by L&I, then by the Owner (or General) as a breach of contract, if the subcontractor or fabricator, is located out of state.

The Seattle Office of Housing, which is a government agency lending monies to private developers for housing construction (not public work subject to PW), requires as part of all of its contracts, irrespective of the contractor’s location, that the residential prevailing wage rates for the locality be paid. SOH has its own Statement of Intent and Affidavit of Wages Paid Forms, and even has an FTE dedicated to monitoring compliance with this aspect of its contracts. These private contractual requirements are enforceable simply as the term of a contractual agreement.

2. Establish WA Law as Enforceable in Other Jurisdictions:

Revise the law as previously suggested, under Everett Concrete and with the support of the Bostain Decision, establishing that WA law can be enforced out-of-state. This option would augment the definition of “locality” to include out-of state contractors, and it would base the prevailing wage rate for out-of-state fabricators on the county in which the project is being built, as it is now.

Currently, while the wages for Material Suppliers, (sand and gravel, etc.) are tied to the location of the construction, the wages for off-site prefabrication, as per the WAC supra, are tied to the location of the fabrication facility. This option would leave that distinction intact. WA fabricators would bid against each other as they do now, utilizing wages that are based on the location of the fabrication facility. This would require no change in the definition section of the WAC.

3. Option 2 supra with Revisions to “Locality” Definition:

Revise the law as with Option 2, but redefine locality so that all wages are tied to the location in which the project is being constructed. This would conform the wage requirement for offsite fabricators to those of material suppliers so that the wages for both sets of workers would be tied to the location of the public construction. Out-of-state facilities would also be tied to this “same” rate. Out-of-state contractors would have the same opportunities to obtaining WA Sate public works contracts as in-state fabricators.

4. Draft and Adopt a “Buy Washington” Law:

This type of law is currently utilized by the State of Alaska and by WA State Ferries (See SHB 1635). If adopted, it would guarantee that, whenever practicable, all off-site fabrication for WA public works projects would be required to be performed in Washington. The question of the definition of applicable “locality” could remain in its current form, or it could be revised to apply the same “locality of project construction” rate to all. Tying the rate to the locality of the constructed project results in a more level the playing field for bidders. Out-of-state contractors would be permitted to bid on projects when the State determines that in-state fabrication is not, for some reason, practicable.

5. Establish a Washington State Preferential Bidding Law:

Review the preferential bidding laws for all states and establish a Washington Preferential Bidding Law that attaches a percentage to bids received from Out-of State contractors to provide an advantage to in-state contractors on public work. This would somewhat “weed-out” contractors whose bids were too low. It would create no prohibition on bidding for our-of-state fabricators and, because so many states already have such laws, it would be difficult to oppose it on legal grounds.

RCW 43.19.700 already establishes In-State Preference laws. “Chapter 183, Laws 1983 is intended to promote fairness in state government procurement by requiring that, when appropriate, Washington exercise reciprocity with those state having in-state preferences, and it shall be liberally construed to that effect.”

WAC 296-48-085, however, fully clarifies that that the in-state preference applies to state purchasing practices only as they relate to only goods and services. In fact, the preference applies only to formal invitations for bid and requests for proposals solicited in accordance with Chapter 43.19. Public construction projects are not subject to any in-state preference or protection at all.

After review of all five options, we believe that a contractual requirement to pay the prevailing wage, irrespective of the location of the fabrication facility, based on the location of the construction project, presents the solution that would best and most fully resolve the issues faced by Washington businesses and workers, protect

PROPOSED NECESSARY STATUTORY REVISIONS:

- 1. Codify the Everett Concrete Decision in statute – RCW 39.04.010 2nd Par.:**
The term public work shall include all work, construction, alteration, repair, offsite prefabrication of non-standard, project specific items, or improvement other than ordinary maintenance....
- 2. Standardize Offsite Wages by tying all offsite work to the “locality” of the physical Project Construction Site – as with Material Suppliers – RCW 39.12.010(2):**
The “locality” for the purposes of this chapter shall be the largest city in the county wherein the physical work is being performed. For the off-site prefabrication of non-standard, project specific items, irrespective of the location of the fabrication facility, the “locality” shall be the largest city in the county wherein the physical work of the on-site installation of the item is being performed.
- 3. Conform WAC definition of “locality” to revised statute - WAC 296-127-020(3):**
which defines locality by stating that: “The definition of ‘locality’ in RCW 39.12.010(2) contains the phrase ‘wherein the physical work is being performed.’ The department interprets this phrase to mean the actual public works project construction site. For example, if non-standard items specifically produced for public works projects are prefabricated in a county other than the county wherein the public works project is to be completed, the wage for the off-site prefabrication shall be the applicable prevailing wage for the county in which the ~~actual prefabrication takes place~~ public works project is located. Workers who deliver such nonstandard items, as well as materials pursuant to the terms of WAC 296-127-018 [gravel, concrete, asphalt, etc.] shall be paid the applicable prevailing wage for the county in which the public works project is located.
- 4. Clarify Prevailing Wage requirement for offsite prefabrication – RCW 39.12.020:**
The hourly wages to be paid to laborers, workers, ~~or~~ mechanics, and workers engaged in the offsite prefabrication of project specific non-standard items, upon all public works and under all public building service maintenance contracts of the state or any county, municipality or political subdivision created by its laws, shall not be less than the prevailing rate of wage for an hour’s work in the same trade or occupation in the locality ~~within the state where such labor is performed~~ as defined by RCW 39.12.010(2).
- 5. Require the payment of prevailing wage in public works contracts - RCW 39.12.030: Contract specifications must state minimum hourly rate – Stipulation for payment.**
The specifications for every contract for the construction, reconstruction, maintenance or repair of any public work to which the state or any county, municipality, or political subdivision created by its laws is a party, shall contain a provision stating the hourly minimum rate of wage, not less than the prevailing rate of wage, which ~~may~~ **must** be paid to laborers, workers, or mechanics in each trade or occupation required for such public work employed in the performance of the contract either by the contractor, subcontractor or other person doing or contracting to do the whole or any part of the work contemplated by the contract, and the contract shall contain a stipulation that such laborers, workers, or mechanics shall be paid not less than such specified hourly minimum rate of wage.