

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, 10th Floor
San Francisco, CA 94102

ADDRESS REPLY TO:

P.O. Box 420603
San Francisco CA 94142-0603



**NOTICE OF PUBLIC FORUMS ON
OFF-SITE FABRICATION AND PREVAILING WAGES**

May 1, 2003

To: Interested Parties

On March 4, 2003, the Acting Director of the Department of Industrial Relations issued precedential public works coverage determinations in Public Works Case No. 2000-027, Cuesta College/Offsite Fabrication of Sheet Metal Work, and Public Works Case No. 2002-064, City of San Jose/SJSU Joint Library Project, Off-Site Fabrication by Helix Electric. Both determinations have been administratively appealed. The Acting Director has stayed implementation of the tests set forth in the above determinations concerning public works coverage of off-site fabrication until resolution of the appeals. Meanwhile, questions have also arisen as to whether a similar test should be applied to off-site fabrication in other crafts in the building industry.

Please take notice that the Acting Director will hold the following public forums to receive public comment on issues pertaining to prevailing wage coverage of off-site fabrication:

June 2, 2003 9:00 a.m.-5:00 p.m.	Auditorium Elihu Harris State Building 1515 Clay Street Oakland, California
June 5, 2003 9:00 a.m.-5:00 p.m.	Auditorium Junipero Serra State Building 320 West Fourth Street Los Angeles, California
June 6, 2003 9:00 a.m.-5:00 p.m.	Silver Room San Diego Concourse 202 "C" Street San Diego, California

Interested parties are invited to attend and comment, and/or to submit written comments. Due to the anticipated volume of comments, a time limit for speakers is expected to be necessary. Individuals will be limited to five minutes, and organizational representatives will be limited to fifteen minutes. These limits may be relaxed if time permits.

Written comments may be submitted at the forums, or to Wynn Norona, Office of the Director Legal Unit, P. O. Box 420603, San Francisco, California 94142-0603, no later than June 15, 2003.

Doors will open at 8:00 a.m. at each forum. Persons wishing to speak must fill out a speaker's card. Speakers will be recognized in the order their cards are received. There will be a lunch break from noon to 1:00 p.m., and brief recesses in mid-morning and mid-afternoon.

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050



April 16, 2003

IMPORTANT NOTICE**TO AWARDING BODIES AND OTHER INTERESTED PARTIES CONCERNING THE
APPLICATION AND SCOPE OF COVERAGE DETERMINATIONS:**

**PW CASE NO. 2000-027
CUESTA COLLEGE
OFF-SITE FABRICATION OF SHEET METAL**

AND

**PW CASE NO. 2002-064
CITY OF SAN JOSE/SJSU JOINT LIBRARY PROJECT
OFF-SITE FABRICATION OF ELECTRICAL COMPONENTS**

Dear Public Officials/Other Interested Parties:

On March 4, 2003, the Director of the Department of Industrial Relations issued the above-referenced precedential public works coverage determinations. These determinations have been appealed pursuant to 8 California Code of Regulations, section 16002.5. Until the resolution of these administrative appeals, the implementation of the public works coverage test enunciated in those determinations regarding off-site fabrication is stayed effective March 4, 2003.

This replaces Important Notice dated April 10, 2003, concerning these determinations.

Sincerely,

A handwritten signature in cursive script that reads "Chuck Cake".

Chuck Cake
Acting Director

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue
San Francisco, CA 94102



March 4, 2003

Mark S. Renner, Esq.
Wylie, McBride, Jesinger, Sure & Platten
2125 Canoas Garden Avenue, Suite 120
San Jose, California 95125

Re: Public Works Case No. 2000-027
Cuesta College/Offsite Fabrication of Sheet Metal Work

Dear Mr. Renner:

This letter constitutes the determination of the Director of the Department of Industrial Relations regarding coverage of the above-named project under the public works laws and is made pursuant to Title 8, California Code of Regulations ("CCR"), section 16000(a). Based upon my review of the information submitted and the applicable laws and regulations, it is my determination that the workers employed by J.R. Barto Heating, Air Conditioning, Sheet Metal, Inc. ("Barto") to perform certain off-site fabrication in conjunction with the construction of the Air/Music Laboratories Addition and the Classroom/High Tech Learning Center at Cuesta College in San Luis Obispo ("Project") are deemed to be employed upon public work. This determination, however, shall not be enforced retroactively on this or other applicable projects advertised for bid prior to the date this determination is posted on the Department's web site.

Facts

Barto is the subcontractor responsible for the installation of the heating, ventilation and air conditioning ("HVAC") systems on the Project. Section 15500, paragraph 102 of the bid specifications for the HVAC work defines the scope of work as follows:

The work includes the furnishing of all labor, materials, appliances and tools necessary for the installation, in complete working order, of the Heating, Ventilating and Air Conditioning System as herein specified and as indicated on the drawings. The items of work shall include, but shall not be limited to, the following principle [sic] items:

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1. Equipment including, boilers, pumps, air-conditioning units, tempered make-up air unit, kitchen hood exhaust and make-up units, exhaust fans, etc. as indicated on the drawings.
2. Air distribution system, including ductwork, diffusers, registers, dampers, etc.
3. Hot Water piping system including valves, fittings, and expansion tanks.
4. Refrigerant piping system including valves, sight glasses and fittings.
5. Insulation for ductwork and piping.
6. Condensate drain piping from air-conditioning units to drain receptors
7. Exhaust systems including fans, drives, ductwork, registers, etc.
8. Miscellaneous hangers, supports, sleeves, inserts, isolators, flexible connections, seismic bracings, and other auxiliary equipment for all systems under this section.
9. Equipment identification, operations, and maintenance instructions.

Paragraph 1.04 of the specifications states: "Names of selected manufacturers have been specified for all items of equipment and materials. Bids shall be based on the use of the product of one of the selected manufacturers, and only such products may be submitted for approval." The specifications consist of many pages detailing the manufacturers and product numbers of particular equipment and materials to be used.

Ductwork is to be fabricated to field measurements established by the Contractor on the job, and ducts are to be in sizes and configurations shown on the drawings. (Paragraph 3.03.B.) If necessary duct dimensions are omitted from the drawings, the Contractor is required to notify the Architect, who is to supply the dimensions, whereupon the Contractor is required to construct the ducts in accordance with those dimensions at no extra charge. (Paragraph 3.03.D.)

Barto has done off-site fabrication in its own shop since 1988. The shop, located in Lompoc, was not established for this particular project, but rather is utilized for various residential, commercial and public works projects. The shop fabricates materials not only for Barto's own projects, but also

for sale to other contractors, and occasionally for the general public. (Joseph R. Barto Letter of January 17, 2001.) Barto states that off-site fabrication is approximately 17% of the total dollar value of the project. Of the off-site fabrication, 15% is fabricated by Barto and 85% is fabricated by three sheet metal production shops. (*Id.*)

Positions of the Parties

Union

In support of the proposition that the off-site sheet metal fabrication for the Project is public work, Sheetmetal Workers Union Local 273 ("Union") argues the Director has discretion to determine that off-site fabrication work is covered under the prevailing wage laws. Such coverage need not be limited to the facts of *O.G. Sansone v. Department of Transportation* (1976) 55 Cal.App.3d 434 ("*Sansone*").

The Union asserts the work performed by a mechanical ("HVAC") contractor is unique in the relationship between work on and off the site of construction. The material fabricated for an HVAC system must be made specifically for that particular job, rather than purchased "off the shelf." The prevailing practice in the industry is for the mechanical contractor to have its own employees perform both the off-site fabrication of the sheet metal and the on-site installation of it. Moreover, if the fabricated material does not meet the requirements of the job, the material may be taken back to the shop to rework the fabrication. Thus, "the relationship between the on- and off-site work, the communication between the employees performing those two portions of the work, and the continuous nature of the work flow all comprise one integrated process" (Letter of November 29, 2000, from Mark S. Renner to Director Stephen Smith, p.4.)

Barto

Barto contends because it performs off-site fabrication in a permanent shop, which is not dedicated exclusively to the public works job, the fabrication should not be covered in light of the *Sansone* case. Barto further argues if the Union's position were adopted, the off-site work of other trades, including plumbing, electrical and carpentry work, would also have to be examined.

The Department invited several organizations with varied interests to comment. Below is a summary of the responses received:

CAL SMACNA

The California Association of Sheet Metal and Air Conditioning Contractors ("CAL SMACNA") is an association of local chapters, contractor member firms, and associate members. The member firms are contractors signatory to Union agreements. CAL SMACNA submitted a brief response stating a general consensus of its chapters in support of coverage of off-site fabrication, contingent on a fair and consistent policy for enforcement.

Tri-Counties SMACNA

The SMACNA chapter located in Ventura, Santa Barbara and San Luis Obispo Counties submitted a detailed response that generally paralleled the Union's position. Tri-Counties SMACNA agrees with the Union's contention that an HVAC contractor is engaged "in the execution of" a public works contract within the meaning of Labor Code section 1772,¹ whether the work is performed on- or off-site.

Tri-Counties SMACNA states, "Although it is generally possible to purchase any type of material needed to complete a construction project, an HVAC contractor is substantially different than other contractors Unlike electrical, drywall or roofing contractors that purchase from standard materials catalogs, an HVAC contractor fabricates his material specifically for the project. This is not to say that all items required for a project's completion will be fabricated in the HVAC contractor's off-site facility, he may also purchase standard catalog items from a material supplier."

Additionally, Tri-Counties SMACNA states: "Unfortunately, the need to 'rework' material provided to the job-site is a reality on all construction projects, public or private. Material not meeting the job requirements must be returned to the fabrication facility for modification and returned to the job-site. There is a high degree of communication required between the job-site and the off-site shop facility. The continuing relationship between the two locations requires a unique relationship to ensure a continuous flow of work consistent with the on-site needs."

¹ All statutory section references are to the Labor Code.

Construction Employers' Association²

The Construction Employers' Association ("CEA") urges the Director to approach the issue with caution, contending that the determination requested by the Union would affect all contractors and public entities in California, and would "create chaos on all public works projects." CEA suggests that at minimum the Director should conduct a public hearing before issuing a determination. It then presents a comprehensive response to the Union's contentions.

CEA first contends, while the Director has broad discretion, the expansion of the prevailing wage law to cover off-site work is more appropriately a job for the Legislature. It argues what the Union is seeking is not just a determination for this specific project, but a rule of general application which would affect hundreds, if not thousands, of contractors and public entities. As such, it would amount to a regulation subject to the requirements of the Administrative Procedure Act ("APA"), Gov. Code sections 11340 et seq. CEA asserts the determination sought by the Union would have an adverse impact on all contractors who perform work off-site, most of whom are small businesses.

CEA further asserts the Director's discretion is limited by the language of the relevant statutes and regulations. It contends under section 16002 of the regulations, the Director's authority to make coverage determinations is limited to "crafts, classifications or types of workers employed in public works as set forth in Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code." Section 16000 of the regulations defines "public works" by reference to sections 1720, 1720.2, 1720.3 and 1771 of the Labor Code. None of these sections mentions off-site fabrication of materials. Moreover, Labor Code section 1772 is not one of the sections listed in CCR sections 16000 and 16002. Therefore, the Director lacks authority to issue a determination that the work is covered.

CEA cites *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 4 Cal.Rptr.2d 837, 851-852, for the proposition that in interpreting the prevailing wage law, courts "look at the statutory scheme as a whole in order to harmonize the various elements." CEA asserts that the statutory scheme contemplates

² Associated Builders and Contractors, Inc., Golden Gate Chapter ("ABC") and its Apprenticeship and Training Program submitted a letter taking a position similar to that of CEA. Due to this similarity, ABC's position does not require separate discussion. It should also be noted that the Department attempted unsuccessfully to contact the Air Conditioning Trades Association ("ACTA"), an organization of non-signatory contractors.

coverage be limited to on-site work, noting for example that section 1773.2 requires awarding bodies to post a copy of the prevailing wage determination "at each job site." While an awarding body can easily do such posting at a public works site it controls, the same cannot be said of an off-site shop.

CEA contends that Sansone is controlling authority, noting it has been relied upon in precedential determinations such as Alameda Corridor Project, PW 99-037, April 10, 2000. Applying the Sansone criteria, CEA asserts that in the sheet metal industry the fabrication work is not done at shops created for each project, the location of the shop is unrelated to the location of the project, and materials fabricated in the shop may be sold to others.

Discussion

It is appropriate to address at the outset CEA's contention that this subject matter should be addressed through the rulemaking process rather than through a coverage determination. The determination whether a project is a public work is entrusted to the Director of Industrial Relations. That determination is quasi-legislative and is part of the overall worker classification and rate setting function of the Department.³ More specifically, the determination whether a particular project is covered is essential to the worker and rate determinations and does not require regulations. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 127, 174 Cal.Rptr. 744. In *Winzler*, the Court clearly and explicitly held that:

Labor Code section 1773 provides the method to be used by the Director in determining general prevailing rates. In this determination the Director shall fix the rate for each craft, classification or type of work. Thus, the determination of the classification or type of work covered is an essential step in the wage determination process and a rate cannot be fixed without such a determination. As the wage determination process is exempted from the prior hearing requirements of the APA, coverage

³ For a full description of these functions, see *Independent Roofing v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345, 351-353, 28 Cal.Rptr.2d 550.

determination, as an integral part of that process, is also exempted.

The Director's determination in this matter is therefore not required to comply with the Administrative Procedure Act. (See also, *Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345, 352, 28 Cal.Rptr.2d 550, 554.)

What is now Section 1720(a)(1) generally defines "public works" to include construction "done under contract and paid for in whole or in part out of public funds." Section 1772 provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." A threshold issue in this case is whether the *Sansone* decision limits the coverage under section 1772 of off-site fabrication of the HVAC materials for the Project. For the reasons discussed below, it does not.

In *Sansone*, trucking companies hauled sub-base material to a state highway construction project from locations adjacent to and established exclusively for the highway project. The material was purchased by the prime contractor, which then contracted with trucking firms to haul the sub-base to the project. The material was dumped directly onto a roadbed, where workers on the project incorporated the material into the roadbed. The trucking companies were found to be subcontractors for two principal reasons. First, the materials they delivered were acquired from third party locations adjacent to and established exclusively for the project site, and, second, the trucking companies were hired by the prime contractor to perform an integral part of the prime contractor's obligation under the prime contract.

In analyzing whether the trucking company was a subcontractor, the court adopted the United States Secretary of Labor's administrative interpretations of the Davis-Bacon Act's exclusion of material suppliers from statutory coverage. The court set forth three principal criteria for the denomination of material supplier. First, a material supplier must be in the business of selling supplies to the general public. Second, the plant from which the material is obtained must not be established specially for the particular contract. Third, the plant may not be located at the site of the work. Additionally, the court quoted with approval a Wisconsin case: "However, if the materials hauled were immediately utilized on the improvement, the drivers were covered regardless of the source of the material." (55 Cal.App.3d at 444, quoting *Green v. Jones*, 128 N.W.2d 1, 6.)

In *Sansone*, the issue decided was whether the trucking company was a material supplier. In this case, however, the work is done by a company which also does on-site work on the Project and is clearly a subcontractor. Additionally, *Sansone* relies on federal cases construing the Davis-Bacon Act, which has language not found in the Labor Code expressly limiting its application to the construction site. Since *Sansone* held the work in question to be covered under the more restrictive federal standard, it was unnecessary for the court to address the differences in language of the federal and state statutes. For similar reasons, the Department has occasionally followed *Sansone* in finding off-site fabrication covered.⁴ However, neither *Sansone* nor the Department's determinations constitute precedent for the proposition that off-site fabrication by an acknowledged subcontractor is not covered unless done in a temporary or specially set up facility. Indeed, a recent precedential determination extended coverage to off-site work in a permanent general-use facility, although the work did not entail fabrication.⁵

The question whether state prevailing wage laws must be construed in conformity with the Davis-Bacon Act, particularly with regard to language similar to Section 1772, has not been directly addressed by the California courts, but has been decided in several other states. For example, *Sharifi v. Young Brothers, Inc.* (Tex.App. 1992) 835 S.W.2d 221 ("*Sharifi*"), held the Texas prevailing wage law covered truck drivers delivering materials from a contractor's storage facility to a highway construction site. The case is particularly instructive because the relevant statute, Tex. Rev. Civ. Stat. Ann. Art. 5159a, section 1, contains language virtually identical to California Labor Code sections 1771 and 1772:

Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed, and not less than the general prevailing rate of per diem wages for legal holiday and overtime work, shall be paid to all laborers, workmen and mechanics . . . engaged in the construction of public works, exclusive of maintenance work. *Laborers, workmen,*

⁴ *San Diego City Schools, Construction of Portable Classrooms*, PW 99-032 (June 23, 2000).

⁵ *Sacramento State Capitol Exterior Painting Project, Restoration and Hauling of Decorative Cast Iron Elements*, PW 2002-034 (July 18, 2002).

and mechanics employed by contractors or subcontractors in the execution of any contract or contracts for public works . . . shall be deemed to be employed upon public works. (Emphasis added).

The court rejected the contractor's argument the state statute should be interpreted in the same manner as the Davis-Bacon Act:

The intention of the legislature must be ascertained from the language of the statute, if possible. . . .

The problem lies in the legislature's failure to define the phrase "in the execution of any contract," which is the provision limiting the statute's coverage. Because it did not define the term "execution," a word of common usage, we must give it its ordinary and common meaning. [Citation omitted.] Black's Law Dictionary defines "execution" as "the completion, fulfillment, or perfecting of anything, or carrying it into operation and effect." BLACK'S LAW DICTIONARY 510 (5th ed. 1979). Based on this definition, we conclude that the legislature intended that employees delivering materials to a Texas public-works construction site be included within the coverage of the Act. Young Brothers' construction contracts could not have been completed without materials being delivered to the work site. Sharifi's work was as directly related to and as essential to completion and fulfillment of the contracts as the work of employees using the materials at the job site. Young Brothers asserts, however, that article 5159a should be construed in the same manner as the federal Davis-Bacon Act, which requires contractors to pay prevailing wage rates to employees "employed directly upon the site of the work." See 40 U.S.C. section 276a(a) (West 1986). . . .

When a federal statute is adopted in a statute of this state, a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts. [Citation omitted.] This rule of construction is applicable, however, only if the state and federal acts are substantially similar

and the state statute does not reflect a contrary legislative intent. [Citations omitted.]

After comparing the two statutes, we conclude that their coverage provisions are not substantially similar and that the legislature clearly intended to broaden the coverage of article 5159a when it selected the phrase "in the execution of any contract" rather than the phrase "employed directly upon the site of the work" found in the federal Act. The federal Act is by its plain language more restrictive in its coverage than the Texas Act. Under the circumstances, we must determine and follow the intent of the legislature when it adopted a statute with obviously broader coverage. (*Sharifi, supra*, 835 S.W.2d at 222-223.)

In *Everett Concrete Products, Inc. v. Department of Labor and Industries* (1988) 748 P.2d 1112, 109 Wn.2d ("Everett Concrete"), the Washington Supreme Court used a similar analysis in holding its state's prevailing wage law applied to off-site fabrication of products "specially made" for a particular public works project. The project in question was the construction of a tunnel for an interstate highway in Seattle. Because the earth at the tunnel site was loose and could not be excavated by traditional methods, the prime contractor designed and utilized concrete tunnel liners to provide a supportive ring in the tunnel during excavation. The prime contractor contracted Everett Concrete Products ("ECP") to manufacture the tunnel liners. ECP agreed to manufacture 30,000 lineal feet of liners in accordance with measurements specified by the prime contractor and the Department of Transportation. ECP manufactured the liners on special forms built to meet the size and measurement requirements of the tunnel. The liners were manufactured at ECP's plant in Everett, and were delivered to the project site by trucking companies contracted by the prime contractor. (*Everett Concrete, supra*, 748 P.2d at 1112-1113.)

Upon inquiry by a labor organization, the Department of Labor and Industries determined that the prevailing wage law applied to the work done by ECP. ECP challenged the determination, which was upheld by an administrative law judge. ECP appealed directly to the State Supreme Court. The court engaged in *de novo* review, while according substantial weight to the agency interpretation. (*Id.* at 1113.)

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The relevant statute, RCW 39.12.020, provided in part: "The hourly wages to be paid to laborers, workmen or mechanics, upon all public works . . . shall be not less than the prevailing rate of wage . . ." (Emphasis supplied.) The court began its analysis by recognizing that the prevailing wage law was remedial and should be construed liberally to carry into effect the purpose of the statute. The court found the purpose, as with the Davis-Bacon Act, was "to provide protection to local craftsmen who were losing work because contractors engaged in the practice of recruiting labor from distant cheap labor areas." (Everett Concrete, *supra*, 748 P.2d. at 1114, quoting *Southeastern Washington Building & Construction Trades Council v. Dept. of Labor & Industry* (1978) 586 P.2d 486, 91 Wash.2d 411, 415.) The court held: "This purpose will be served by extending the application of RCW 39.12 to off-site manufacturers involved in public works by preventing contractors from parceling out portions of the work to various off-site manufacturers as a means of avoiding the prevailing wage requirement." (*Ibid.*)

The court also recognized the cannon of construction that "when the legislature of a state adopts a statute which is identical or similar to one in effect in another state or country, the courts of the adopting state usually adopt the construction placed on the statute in the jurisdiction in which it originated." (*Ibid.*, quoting 2A N. Singer, *Statutory Construction* 52.02 (4th ed. 1984).) While noting that Washington's prevailing wage law is based on the Davis-Bacon Act, the court also noted that the state law was not identical to Davis-Bacon in that it did not contain the phrase "mechanics and laborers employed directly upon the site of the work" found in 40 U.S.C. 276a." (Everett Concrete, *supra*, 748 P.2d at 1115, emphasis provided by the court.) The court therefore concluded that it "need not adopt the construction placed on a similar statute in another state if the language of the statute in the adopting state is substantially different from the language in the original statute." (*Ibid.*, citing Singer, *supra*.) "[A] provision of the federal statute cannot be engrafted onto the state statute where the Legislature saw fit not to include such provision." (*Ibid.*, quoting *Nucleonics Alliance, Local 1-269 v. WPPSS* (1984) 677 P.2d 108, 101 Wn.2d 24, 34.) The court held the omission of the word "directly" from the state statute "leads to the conclusion that the Legislature intended the scope of the state prevailing wage law to be broader than that of the Davis-Bacon Act."

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The court quoted with approval a 1967 Attorney General's opinion, which stated:

The requirement of chapter 39.12 RCW that the "prevailing rate of wage" be paid to laborers, workmen or mechanics upon all public works of the state, or any county, municipality or political subdivision, is applicable to labor performed in an off-the-job-site prefabrication by employees of the prime contractor, subcontractor, or other persons doing or contracting to do the whole or any part of the work contemplated by the contract, provided that the prefabricated "item or member" is produced specially for the particular public works project and not merely as a standard item for sale on the general market. (*Ibid.*, quoting AGO 15, at 10.)

The court concluded:

RCW 39.12.020 provides that prevailing wages must be paid to workers "upon all public works." This language must be construed to require application of the prevailing wage requirement to off site manufacturers, when they are producing nonstandard items specifically for a public works project. In this way the use of cheap labor from distant areas is avoided and the purpose of RCW 39.12 is not circumvented. (*Everett Concrete, supra*, 748 P.2d. at 1118.)

The Montana Attorney General has similarly concluded off-site fabrication is covered by that state's prevailing wage law. The Commissioner of Labor and Industry had determined "the Montana prevailing wage statute has the same geographical scope of work coverage as the Secretary of Labor's regulations defining the term 'site of the work' under the Davis-Bacon Act." (47 Opinions of the Montana Attorney General, Opinion No. 12 (March 31, 1998).) In a scholarly opinion, the Attorney General rejected that interpretation:

The 1931 Montana statute was comparable to the Davis-Bacon Act in its original form insofar as the state law used the terms "construction, repair and maintenance" in describing the general scope of the public contracts covered and did not limit the employees covered to those performing work directly on the project site. The legislature has never adopted the "employed directly upon the site of the

work" language added to the federal act in 1935. A 1975 amendment to the Montana statute does require employers to post statements of prevailing wages "in a prominent and accessible site on the project or work area," but, as the disjunctive "or" suggests, the term "work area" may include areas other than a construction project itself. 1975 Mont. Laws ch. 531, § 1 (codified at Mont. Code Ann. § 18-2-406).

. . . .

As presently codified in § 18-2-403(2), the prevailing wage requirement extends to any "public works contract" without the limiting site-specific language of the Davis-Bacon Act. Although the 1931 legislature may have intended the state statute to have the same general scope as the federal act, both laws have undergone substantial modification over the nearly 70 years since their enactments and now bear little resemblance to one another except to the extent each is directed at requiring that certain minimum wage levels be paid for work under particular classes of government contracts. . . .

I recognize that the Commissioner of Labor and Industry has concluded the prevailing wage requirement extends only to construction services performed at the job site or nearby property. The Commissioner's interpretation of a statute committed to her agency's enforcement often is entitled to substantial deference. . . . Nevertheless, here a literal reading of § 18-2-403(2) does not support a job-situs limitation, and I therefore decline to defer to the Commissioner's construction of § 18-2-403(2)(b). . . . I cannot supply a restriction unsupported by the language of the law itself. . . .

Finally, no reasonable dispute exists that a contractor's off-site fabrication of items for on-site installation constitutes "construction" within the scope of the term "construction services." Even on the most basic definitional level, such activity involves "[t]he process or art of constructing; the act of building; erection; the act of devising and forming; fabrication; composition." Webster's II:

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New Riverside Univ. Dictionary (1988)
<<http://www.nbc-med.org/dictionary.html>>. (Id.)

For these reasons, the opinion concluded:

The prevailing wage requirements in Mont. Code Ann. § 18-2-403(2)(b) apply to fabrication of materials performed off-site by a contractor for installation or use at the site of construction under a public works contract. The prevailing wage district with respect to such off-site services is the district where the on-site construction occurs. (Id.)⁶

⁶ There is also a federal case in accord with the above state opinions. In *Griffin v. Reich* (D.R.I. 1997) 956 F.Supp. 98 ("*Griffin*"), the court addressed the scope of coverage under the Housing Act of 1937, 42 U.S.C. sections 1437 et seq. 42 U.S.C. section 1437j provides that Davis-Bacon prevailing wages "shall be paid to all laborers and mechanics employed in the development of the project." (Emphasis supplied.) The Housing Act thus does not expressly limit coverage to work directly on the site of the public work, as does Davis-Bacon.

In *Griffin*, Phoenix-Griffin Group II, Ltd. and the Providence Housing Authority entered into a contract for the construction of 92 units of scattered site, low-income housing. Phoenix-Griffin contracted with a subcontractor, who used an off-site facility to construct sections of the housing units being built, which were then transported to the scattered sites for installation. The Housing Authority, on the advice of HUD, took the view that the off-site work was not covered so long as it was not performed at "a temporary plant set up elsewhere to supply the needs of the project and dedicated exclusively, or nearly so, to the performance of the contract or project." (Id. at 101.)

Subsequently, the Wage and Hour Division of the Department of Labor determined that prevailing wages should have been paid for the off-site work and issued findings of violations, which were the subject of a hearing before an administrative law judge ("ALJ"). The ALJ upheld the Wage and Hour Division's determinations, finding that the off-site work was subject to prevailing wages, in part because the workers were "employed in the development of the project" within the meaning of the statute. The Wage Appeals Board later affirmed that part of the ALJ's decision. The matter was appealed to the federal district court, which held that:

[B]y statute, the Department of Labor is the final arbiter of the Housing Act's interpretation with respect to Davis-Bacon coverage. See Reorg. Plan No. 12 of 1950; 42 U.S.C. 1437(j) (1994). The interpretation of the Department of Labor, which is based on the plain language of the Housing Act, does not contravene clear Congressional intent. Moreover, even if the statute were viewed as somehow unclear, such an interpretation is not "impermissible." Therefore, the interpretation set forth by the Department of Labor is the controlling one. (Id. at 105.)

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Sharifi, Everett Concrete and the Montana Attorney General Opinion provide persuasive authority for the proposition that coverage of off-site fabrication under California law cannot be limited to the scope of the Davis-Bacon Act. All three adhere to the literal language of their states' prevailing wage laws in concluding that coverage is not limited to the site of the public works project. All conclude that the state law cannot be limited to the scope of Davis-Bacon when the state language is more inclusive. The Montana Attorney General went so far as to reject the interpretation of the Commissioner of Labor and Industry, even while acknowledging that her interpretation of a statute committed to her agency's enforcement was entitled to substantial deference, because he could not supply a restriction not supported by the language of the statute.

California courts have similarly recognized they must accord substantial deference to the Director of Department of Industrial Relations in interpreting the California prevailing wage law. See *International Brotherhood of Electrical Workers v. Aubry* (1996) 41 Cal.4th 1632, 1638, 49 Cal.Rptr.2d 759. However, here as in Montana, such deference does not extend to importing into the statute a restriction that is not supported by its language. The California law, like those of Texas, Washington and Montana, does not limit coverage to the site of the public works project, and it would be erroneous to construe it as doing so.⁷ Here, as in Texas, under section 1772, coverage extends to workers employed by contractors or subcontractors in the execution of a contract for public work, and is not limited to the site of the public works project.

Here as in Washington, one of the purposes of the prevailing wage law is to "protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas." *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987, 4 Cal.Rptr.2d 837. Here as in Washington, that purpose is served by requiring payment of prevailing wages for off-site fabrication performed in the execution of a contract for public work.

⁷ Additionally, in 2000, the Legislature amended section 1720(a) to provide that: "For purposes of this subdivision, 'construction' includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work." This amendment is further evidence of a legislative intent that the state prevailing wage law be broader in its coverage than the federal Davis-Bacon Act.

Everett Concrete articulated a reasonable test for coverage of off-site fabrication: The work is covered if the prefabricated item or member is produced specially for the public works project; it is not covered if the item fabricated is merely a standard product for sale on the general market. Such a test fits well with the language of section 1772.

Accordingly, the following test for coverage under section 1772 is adopted: Workers employed by contractors or subcontractors are employed in the execution of a contract for public work when they are engaged in the off-site fabrication of items produced specially for the public works project and not for sale on the general market. Where a contractor is producing products both for its own projects and for sale on the general market, the test for whether a prefabricated item is specially made for the public works project turns on factors such as whether the item was produced in accordance with the plans and specifications of the architects and/or engineers for that project and/or on shop drawings based thereon such that the item differs from a standard, generic item. Even standard, generic items would be considered to be produced specially for the public works project if they were modified to meet the specific requirements of that project. In this case, there is no question that some of the items prefabricated by Barto employees were produced specially for this project.

When off-site employees specially produce fabricated or prefabricated products for use in a public works project, section 1772 requires that they be paid prevailing wages.⁸ This is in accord with the proposition recognized in California that prevailing wage laws are to be liberally construed in furtherance of their purposes. (*Walker v. County of Los Angeles* (1961) 55 Cal.2d 626, 634-635; *Cassaretto v. San Francisco* (1936) 18 Cal.App.2d 8, 10.)

While the project in question has long since been completed, this determination issues to clarify the test for whether off-site fabrication is covered by the prevailing wage law. Accordingly, it will not be enforced retrospectively on this or other applicable projects advertised for bid prior to the date this determination is posted on the Department's web site.

⁸ No determination was requested regarding the question of whether prevailing wages would be required where the contractor obtains specially fabricated items from another firm. However, the logic of the above analysis suggests that under those circumstances, the firm doing the fabrication would be deemed a subcontractor of Barto and its employees would be entitled to prevailing wages.

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Conclusion

For the foregoing reasons, prevailing wages must be paid to the employees of contractors and subcontractors engaged in the off-site fabrication or prefabrication of items specially produced for public works projects advertised for bid after the date this determination is posted on the Department's website.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Chuck Cake
Acting Director

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