47 Op. Att'y Gen. No. 12

CONTRACTS - Site-specific nature of prevailing wage requirements applicable to public contracts;
COUNTIES - Site-specific nature of prevailing wage requirements applicable to public contracts;
LABOR RELATIONS - Site-specific nature of prevailing wage requirements applicable to public contracts;
PREVAILING WAGE - Site-specific nature of prevailing wage requirements applicable to public contracts;
ADMINISTRATIVE RULES OF MONTANA - Section 24.16.9002;
CODE OF FEDERAL REGULATIONS - 25 C.F.R. § 5.2(l) (1997);
MONTANA CODE ANNOTATED (1997) - Sections 18-1-102, 18-2-201, -401, -403, -406, -411, -421, -422, -431, -432;
MONTANA CODE ANNOTATED (1995) - Section 18-2-401;
MONTANA LAWS OF 1997 - Chapter 522;
MONTANA LAWS OF 1975 - Chapter 531;
MONTANA LAWS OF 1931 - Chapter 102;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 60 (1988);
UNITED STATES CODE - 25 U.S.C. § 276; 40 U.S.C. §§ 270a to 270f, 276a to 276a-7;
UNITED STATES CONSTITUTION - Article I, section 8, clause 3;
UNITED STATES STATUTES AT LARGE - 46 Stat. 1494, 48 Stat. 1011.

HELD:

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.

March 31, 1998

Mr. Robert L. "Dusty" Deschamps III
Missoula County Attorney
200 West Broadway, Courthouse
Missoula, MT 59802

Dear Mr. Deschamps:

You have requested my opinion concerning a question which I have phrased as follows:

Does the prevailing wage requirement in Mont. Code Ann. § 18-2-403 with respect to public works contracts apply to a construction contractor's off-site fabrication of items to be installed or used on-site by the contractor and, if so, are the prevailing wage rates those established for the district where the site is located or for the location where the off-site fabrication occurs?

I conclude that the prevailing wage requirements in § 18-2-403(2) apply to all "construction services" performed by the contractor under a "public works contract" regardless of whether carried out on or off the site of the involved construction and that the appropriate prevailing wage rate is the rate applicable in the prevailing wage district where the project is located.

I.

Missoula County routinely enters into construction contracts within the scope of the term "public works contracts" as defined in Mont. Code Ann. § 18-2-401(8). Such contracts are subject to the prevailing wage rate requirements in Mont. Code Ann. § 18-2-403(2):

All public works contracts under subsection (1) . . . must contain a provision requiring the contractor to pay:

(a) the travel allowance that is in effect and applicable to the district in which the work is being performed; and

(b) the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions, that:

(i) meets the requirements of the Employee Retirement Income Security Act of 1974 and other bona fide programs approved by the United States department of labor; and

(ii) is in effect and applicable to the district in which the work is being performed.

Consistent with its obligations under that section and Mont. Code Ann. § 18-2-422, the county includes within a project's bid specifications and contract a provision requiring the contractor to pay prevailing wages. The Commissioner of Labor and Industry has established ten prevailing wage districts, with Missoula County located in District 2. Mont. Admin. R. 24.16.9002(6); see Mont. Code Ann. § 18-2-411(1) (requiring Commissioner to divide state into at least ten districts).

Among the contract documents prepared by Missoula County in connection with public works contracts is a "proposal for construction" describing generally the work to be performed and including a bid form on which the bidders must assign costs to discrete tasks identified by the county as necessary to complete the project. The completed proposal for construction is submitted under seal to the county. The county ordinarily must then award the contract to the lowest responsible bidder. Mont. Code Ann. § 18-1-102(1)(a)(i).

Construction contractors on occasion fabricate off-site items necessary to complete the work included within the bid. The off-site fabrication location will vary and may be outside the prevailing wage district within which the site itself is located or, conceivably, even outside Montana. The Commissioner of Labor and Industry has not adopted rules addressing this situation but has indicated her position that the Montana 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. See 25 C.F.R. § 5.2(l) (1997). Under those rules, Davis-Bacon prevailing wage requirements apply to "the physical place or places where the construction called for in the contract will remain when work on it has been completed and . . . any other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the site." Id. § 5.2(l); but see L.P. Cavett Co. v. United States Dep't of Labor, 101 F.3d 1111, 1114-15 (6th Cir. 1996) (refusing to defer to Department of Labor's regulations concerning "site of work" requirement insofar as they extend prevailing wage requirements to areas other than the actual project location); Ball, Ball & Brosamer, Inc. v. Reich, 24 F.3d 1447, 1452-53 (D.C. Cir. 1994) (same). You have concluded, in contrast, that the prevailing wage rates apply to all work which the involved contractor has agreed to undertake under a public works contract. You further believe the wages of employees performing such work must be determined by the rates established for the district in which the construction project itself is located.

II.

The current prevailing wage provisions in title 18, chapter 2, part 4 derive from 1931 Montana Laws chapter 102, which is known as Montana's "Little Davis-Bacon Act." Hunter v. City of Bozeman, 216 Mont. 251, 253, 700 P.2d 184, 185-86 (1985); 42 Op. Att'y Gen. No. 60 at 232, 233 (1988). The Davis-Bacon Act itself now applies expressly to the "construction, alteration, and/or repair, including painting and decorating, of public buildings or public works," by "mechanics and laborers employed directly upon the site of the work" (25 U.S.C. § 276a(a)) but, as initially enacted in 1931, described its scope of coverage as all contracts exceeding $5000 for "the construction, alteration, and/or repair of any [federal] public buildings" (Act of Mar. 3, 1931, ch. 411, 46 Stat. 1494). In 1935 the federal statute was extended to "public works" and the phrase "employed directly upon the site of the work" was added. Act of Aug. 30, 1935, ch. 825, 48 Stat. 1011; see Ball, 24 F.3d at 1452 n.3. The 1935 amendments were designed to expand the federal law's scope by including all public works, not merely public buildings, where contracts exceeding $2000 were let and expressly extending the federal law's reach to "painting and decorating." S. Rep. No. 1155, 74th Cong., 1st Sess. (1935); H.R. Rep. No. 1756, 74th Cong., 1st Sess. (1935). The amendments resulted from an investigation by the Senate Committee on Education and Labor that found

substantial noncompliance with the Davis-Bacon Act and a need not only to clarify its coverage but also to strengthen its enforcement mechanisms. 79 Cong. Rec. 12,073 (1935) (statement of Sen. Walsh).

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).

There is a second difference between the 1931 federal and state statutes relevant to the question whether the latter's prevailing wage requirement is limited to work on the job site. The 1931 Montana law defined the term "labor" to include "all services performed in the construction, repair or maintenance of all state, county, municipal and school work" and not to include "engineering, municipal, superintendence, management, or office or clerical work." 1931 Mont. Laws ch. 102, § 2. This definition was carried forward with little change until 1997. Mont. Code Ann. § 18-2-401(6) (1995) ("'[l]abor means all services in excess of $25,000 performed in the construction, maintenance, or remodeling work in a state, county, municipal, school district, or political subdivision project and does not include engineering, management, or office or clerical work'"). The term "labor" did not appear elsewhere in the statute and was deleted in 1997 Montana Laws chapter 522. The substance of the definition nonetheless was retained under the 1997 amendments through addition of definitions for the terms "construction services," "nonconstruction services," and "public works contract." 1997 Mont. Laws ch. 522, § 1 (excluding from the definition of "construction services," inter alia, "engineering, superintendence, management, office, or clerical work on a public works contract"; excluding from the definition of "nonconstruction services," inter alia, "management, office, or clerical work"; and defining "public works contract" as "a contract for construction services or nonconstruction services let by the state, county, municipality, school district, or political subdivision in which the total cost of the contract is in excess of $25,000").

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. The 1997 amendments to the Montana statute, moreover, support a conclusion that the prevailing wage requirement has no work-situs limitation, since in defining "construction services" the amendments include "work performed by an individual in construction, heavy construction, highway construction, and remodeling work" without imposing such a restriction.

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. See Reno v. Koray, 515 U.S. 50, 60-61 (1995). 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). See Dole v. United Steelworkers, 494 U.S. 26, 42 (1990) (deference not accorded agency interpretation where statute, read as a whole, indicated a contrary congressional intent). I cannot supply a restriction unsupported by the language of the law itself. Farmers Alliance Mut. Ins. Co. v. Holeman, 278 Mont. 274, 287, 924 P.2d 1315, 1323 (1996).

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: New Riverside Univ. Dictionary (1988) <http://www.nbc-med.org/dictionary.html>. It nonetheless must be emphasized that this opinion does not address the proper interpretation of the term "construction services" except in this specific context. I note that the definition of "construction services" excludes, inter alia, "contracts with

commercial suppliers for goods and supplies" and that the term "subcontractor" as used in Mont. Code Ann. §§ 18-2-421, -422 and -432 is not defined. Questions over the reach of "construction services" in other situations may well demand careful factual analysis of the particular facts and the statute's language and purpose. Cf. J.M. Bateson Co. v. United States ex rel. Bd. of Trustees, 434 U.S. 586, 591-92 (1978) (the term "subcontractor" under the Miller Act, 40 U.S.C. §§ 270a-270f, encompasses only entities or persons having a direct contractual relationship with the prime contractor); F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116, 123-24 (1974) (scope of term "subcontractor" under the Miller Act); United States ex rel. Conveyor Rental & Sales Co. v. Aetna Cas. & Surety Co., 981 F.2d 448, 451-52 (9th Cir. 1992) (identifying factors to be considered in distinguishing "subcontractors" from "materialmen" under the Miller Act); Robintech, Inc. v. White & McNeil Excavating, Inc., 218 Mont. 404, 407-08, 709 P.2d 631, 633 (1985) (rejecting contention that claimant was not "subcontractor" under bond issued pursuant to Mont. Code Ann. § 18-2-201 merely because it did not perform on-site work).

III.

The remaining aspect of your question requires interpretation of the term "work" in the phrase "the district in which the work is being performed." Mont. Code Ann. § 18-2-403(2)(b)(ii). Although it is possible to construe that term as referring to the services performed by individual employees, the more plausible interpretation is that it refers to the location of the project, or "work," to which the public works contract itself relates. Cf. Gaston v. Cooperative Farm Chem. Ass'n, 450 S.W.2d 174, 179 (Mo. 1970) ("[i]n considering the word 'work' as used in the statute we are concerned here with the work of installing a urea plant and are not considering it in the narrow sense of the particular phase of the work being done"); Bone v. Hackett, 185 P. 131, 132 (Ariz. 1919) ("[t]he words 'work,' 'all work,' 'such work,' and 'said work' doubtless have reference to the whole program of construction or improvement"). This interpretation is supported textually, since the legislature in the 1997 amendments chose to refer to the specific labor of individual employees in the definitions of "construction services" and "nonconstruction services" but left unchanged the term "work" in subsection (2)(b)(ii); i.e., had the legislature intended the location of a particular employee's work to be controlling, it presumably would have used the terms "construction services" and "nonconstruction services" in that subsection. Adopting a contrary interpretation additionally would raise the specter of different prevailing wage rates for similar job classifications under the same public works contract--a result not only increasing the administrative burden on the contracting parties and the Department but also potentially leading to labor unrest or conflict.

Your opinion request also inquires concerning whether the Montana prevailing wage statute may be applied to work performed outside this state. The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, prohibits "a statute that directly controls commerce occurring wholly outside the boundaries of [that] State" (Healy v. Beer Institute, 491 U.S. 324, 336 (1989)), but this prohibition conceivably may not apply in a situation where, for example, a contractor or a subcontractor performs work under the public works contract both within and without Montana. The involved contract also may make the prevailing wage provisions applicable as a matter of private agreement, and such a consensual adjustment of the parties' rights and obligations ordinarily will be given effect. E.g., C.A. May Marine Supply Co. v. Brunswick Corp., 557 F.2d 1163, 1167 (5th Cir. 1977) ("[w]hen . . . parties to a contract have contact with more than one state, the parties are expected, and encouraged, to stipulate which state's substantive law will govern"); cf. Lix v. Kenney, 246 Mont. 426, 428-29, 804 P.2d 391, 392-93 (1991) (regardless of whether the Commissioner of Labor and Industry had adopted prevailing wage rates properly, employer was bound contractually to pay those rates). Because of the possible factual variation and its effect on any determination concerning application of the prevailing wage provisions as to work performed outside Montana, the extraterritoriality issue is inappropriate for resolution in this opinion.

THEREFORE, IT IS MY OPINION:

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.

Sincerely,

JOSEPH P. MAZUREK

Attorney General

jpm/crs/dm