




TO: Mayor and Council

FROM: Rosie Truelove, Director, Contract Management Department

DATE: September 19, 2012 

SUBJECT: September 27th Council Item regarding Prevailing Wage

An item will be placed on the September 27, 2012 City Council Agenda that requests Council to make an initial determination of whether good cause exists to believe that prevailing wage violations have occurred on several City of Austin construction contracts in accordance with Section 2258.052 of the Texas Government Code. The purpose of this memo is to provide you with contextual information regarding that item.

CMD's Prevailing Wage Program

The basic premise of the prevailing wage program is that workers should be paid no less than the prevailing wage for their designated job classification on public work projects established by Council and as specified in the contract with the City. Any federally funded construction performed by the City of Austin falls under the purview of the Davis Bacon Act. Non-federally funded projects are governed by City ordinance in accordance with chapter 2258 of the Texas Government Code (State Statute). In 2003 the City Council adopted by ordinance the Department of Labor wage rate schedule for locally funded Heavy and Highway, Utilities, and Building construction projects and this schedule, as it has been amended over time, is what remains in use today. Section 00830 of the City's Standard Construction Front End documents outline the requirements of this program and the wages to be used for each contract and each worker.

The Contract Management Department (CMD) manages the Prevailing Wage Program (Program) for the City's construction projects. The Program achieves contractor compliance for wage violations through voluntary actions on the part of the contractors and subcontractors to pay prevailing wage to workers when deficiencies are noted through random risk based audits, observation-based audits, or from complaints that are generated from workers. CMD notifies prime contractors of their violation in the form of a Voluntary Corrective Action Plan (VCAP) and are given a set amount of time to remedy the situation. CMD then follows up to ensure corrective actions occurred.

We have had much success with our Program in ensuring education and compliance with the prevailing wage requirements while fostering partnerships with contractors and subcontractors. Because of the extraordinarily high percentage of compliance, CMD has not had to refer

complaints to the City Council as prescribed in State Statute and has been successful at returning an average of \$50,000-\$55,000 in back wages to workers a year over the past three years.

Statutory Requirements

State Statute calls for workers to be paid “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...”. State Statute requires the City to investigate wage rate complaints and that the initial determination of a wage violation be made by the public body, the City Council. After Council makes its initial determination, if the contractor or subcontractor and any affected worker do not resolve the issue by agreement within the timeframe specified in the statute, the issue shall be submitted to binding arbitration. The arbitrator may rule on issues related to an alleged violation of the wage rate requirements, including a penalty owed to a public body of \$60 per worker per day. The City is not a party in the arbitration. Further, if any funds are not yet paid, the City must retain any amount due under the contract pending the arbitrator’s final determination of the violation. The \$60 per worker per day penalty is truly mandatory only on a final determination by an arbitrator that a violation has occurred.

Allegations Requiring an Initial Determination

Recently CMD received a complaint from the Equal Justice Center on behalf of former employees of Phoenix Mechanical Corporation, a company which performed subcontracting work on multiple City of Austin construction projects. An additional complaint was submitted by Michael A. Murphy of Glenda Pittman & Associates, P.C., Attorneys at Law, on behalf of former employees of Bomax Contractors LLC, a company which performed subcontracting work on multiple City of Austin construction projects. CMD reviewed the complaints and after communicating the findings to the Equal Justice Center and Mr. Murphy, the complainants specifically requested that the City process the wage rate complaints as noted in State Statute, notably taking the complaints to Council for an Initial Determination.

The September 27th Item requests that Council approve a resolution making an Initial Determination whether good cause exists that alleged wage violations occurred in accordance with Section 2258.052 of the Texas Government Code for the prevailing wage complaints received on City of Austin construction projects, as recommended by staff on the following projects: 1) North West Recreation Center Expansion and Improvements; 2) Dittmar Gym Enclosure Rebid; and 3) Austin Resource Center for the Homeless (ARCH) Shower Renovations.

The Contract Management Department Prevailing Wage Compliance staff performed a compliance review of each project and recommends Council adopt the following findings and makes the necessary initial determinations as outlined below.

1. North West Recreation Center Expansion and Improvements (Complaint received 04/30/2012, contract closed on 11/18/2011)
 - a. Prime Contractor: Fazzone Construction Co.
 - b. Subcontractor: Phoenix Mechanical Corporation
 - c. Allegation: The complaint received after contract closeout alleges that seven individuals were employed on this project by Phoenix Mechanical, and were paid below the prevailing wage for performing Sheet Metal work. Additionally, a

subset of the seven individuals was allegedly not paid for additional work hours that were not identified on the payroll.

- d. Findings: The certified payroll indicates that all employees in the complaint were classified as HVAC Mechanics and were paid the proper prevailing wage for that classification. One employee received back wages during a previous wage audit for performing Sheet Metal work at less than the prevailing wage for a short period of time. No evidence was found or provided that substantiated the claims that these employees performed Sheet Metal work on the project or did not receive payment for additional hours worked that did not appear on the payroll.
 - e. Initial Determination: **Based on a review of the City records and documents presented, the evidence does not support an initial determination of the existence of good cause that the alleged wage violations occurred or that wages are owed to the workers.**
2. Dittmar Gym Enclosure Rebid (Complaint received 04/30/2012, contract closed on 7/14/2011)
- a. Prime Contractor: Barecky Construction Co.
 - b. Subcontractor: Phoenix Mechanical Corporation (Out of business)
 - c. Allegation: The complaint received after contract closeout alleges that eight individuals were employed on this project by Phoenix Mechanical, and were paid below the prevailing wage for performing Sheet Metal work and/or were not paid for additional hours worked that were not identified on the payroll.
 - d. Findings: One individual was paid below the prevailing wage for some declared Sheet Metal work on the certified payroll, and is entitled to back wages of \$205.12. He was classified as an HVAC Mechanic for the remainder of his time on the payroll and was paid the proper wages for that classification. Another individual was underpaid for some declared Sheet Metal work on the certified payroll and is entitled to back wages of \$1.94. Again, the remainder of his time on the payroll he was classified as an HVAC Mechanic and paid the proper wages. Besides these two cases, no evidence was found or provided that substantiated the remaining claims that these employees performed Sheet Metal work on the project, or did not receive payment for additional hours worked that did not appear on the payroll.
 - e. Initial Determination: **Good cause does exist to make the initial determination that two workers are owed back wages in the amounts specified above. The Prime Contractor has agreed to pay the wages for the two workers identified in subsection d. above. However, for the remaining six individuals, based on a review of the City records and documents presented, the evidence does not support an initial determination of the existence of good cause that the alleged wage violations occurred or that wages are owed to the workers.**
3. Austin Resource Center for the Homeless (ARCH) Shower Renovations (Complaint was received on 8/1/2012)
- a. Prime Contractor: Kellogg, Brown and Root (KBR)
 - b. Subcontractor: Bomax Contractors LLC
 - c. Allegation: The complaint received after the sub contractor's project scope was complete alleges that seven individuals were employed on this project by Bomax and were paid below the prevailing wage for performing Carpentry work.

- d. Findings: Only two of these employees are listed on the certified payroll provided to the City. These individuals were listed as being paid the rate of \$26 per hour which is above the prevailing wage for Carpenters on this project. However, a review of the corresponding pay stubs for these two employees indicated that they were actually paid at a rate of \$15 per hour. Therefore, they are each entitled to back wages of \$849.60 for the two weeks they worked on the project. Due to the discrepancies discovered in the review of the payroll, staff expanded their audit to request pay stubs for all weeks that Bomax performed subcontractor work on the project. However, the Prime Contractor was unable to obtain the additional records from Bomax.
 - e. Initial Determination: **Good cause does exist to make the initial determination that two workers are owed back wages.**
4. African American Cultural & Heritage Facility (Complaint received 8/1/2012)
- a. Prime Contractor: Barecky Construction Company
 - b. Subcontractor: Bomax Contractors LLC
 - c. Allegation: The complaint received alleges that nine individuals were employed on this project by Bomax and were paid below the prevailing wage for performing Carpentry work.
 - d. Findings: Payments were not made on a weekly basis. Certified payrolls did not include the gross amount earned for all jobs worked for the week. The complainant provided information on payments for employees that were not reflected on the submitted certified payroll for that week. The information on payments submitted included payments to construction companies instead of an employee. Further, evidence of payment was not submitted for all employees and/or pay periods. Based on the documentation submitted, one of the individuals named in the allegation is owed back wages in the amount of \$312 for performing Carpentry work. Additionally, during our review, the submitted documentation reflects that a separate employee (not one of the nine complainants), who was classified as a Carpenter, is owed back wages in the amount of \$568.48.
 - e. Initial Determination: **Good cause does exist to make the initial determination that two workers are owed back wages.**

Please let me know if you have any questions. Thank you.

Cc: Marc A. Ott, City Manager
 Anthony J. Snipes, Interim Assistant City Manager
 Rolando Fernandez, Assistant Director, CMD
 Frank Mays, Division Manager, Contract Administration
 Karen Kennard, City Attorney