



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
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MEMORANDUM

DATE: March 13, 2012

TO: Parties interested in prevailing wage filing and wage rate determination requirements for multiple project maintenance and repair contracts

FROM: L. Ann Selover *LAS*
Industrial Statistician/Program Manager

RE: Proposed prevailing wage filing and wage rate determination requirements by contract type

About a year and a half ago the prevailing wage program (the program) revised Intent and Affidavit filing requirements for certain "on-call" or "multiple project" maintenance and repair contracts that led to much customer concern. The September 28, 2010 message that communicated the revision is attached at the end of this memo.

Prior to adopting the new requirements on September 28, 2010, the program had a process in place for filing Intents and Affidavits for work performed under such contracts that required the filing of one Intent at the beginning of the year and one Affidavit at the close of the year. According to prior procedures, for multiple year contracts of this nature, each year the filing process started anew, and required a wage update for the second and each following year. A number of awarding agencies objected to this annual filing and wage update requirement, questioning the program's authority for imposing such provisions. Their thinking was that the only types of contracts that require annual filing and wage updates are janitorial contracts, as addressed in WAC 296-127-023. Filing requirements for all other contracts, they asserted, must strictly follow the law that required only one Intent at the beginning of the contract and one Affidavit at the completion of the multiyear contract regardless of the number of years or "call outs" covered by the contract.

In August 2010, the program met with a number of public agencies, reviewed their concerns and concluded that the assertion that only one Intent and one Affidavit was required for a contract, even if that contract had a term of five, seven, or more years, did not portray a complete view of the law. We concluded that it is correct that one Intent will suffice for the contract; however, the law's language on the Affidavit provides for filing *by project*, and requires an Affidavit for the completion of each project or "call out" under the contract. This could involve many Affidavits on a multi-year, on-call or multiple projects contract. On September 28, 2010 the program

announced new filing requirements for such contracts (see below), summarizing the basis of the approach as follows:

The Intent is for the contract. One Intent may cover the entire contract with that contractor, even if the contract is for multiple years. The Affidavit is for each project completed. One contract may have one or may have many projects. For example, a one year contract for quarterly work (four projects) would have one Intent for the entire contract and one Affidavit for each project completion (four Affidavits).

In considering why the program felt multiple year contracts are a matter of concern, it is important to note the types and extent of problems we encountered in reviewing them. During routine processing of Intents and Affidavits filed by one contractor for work performed for a city awarding agency, we learned that the contractor filed Intents and Affidavits for what appeared to be multi-year contracts, yet there were no annual filings that we could use to verify what work was performed and whether there had been an update for wages. Upon further inquiry, we learned that the awarding agency had issued two "blanket" five-year contracts for what was termed "time and materials." Further research indicated that: (1) the contracts were not for maintenance, but were for various types of construction projects, "including but not limited to cable moves, repair, maintenance, testing, and major installations or renovations"; (2) for the work performed under the contracts the wrong scopes of work classifications were used and it appeared that workers had been severely underpaid for several years; and (3) the proper Intent and Affidavit forms had not been filed for the project. This is the most egregious situation we found. However, there were/are many instances in which multi-year contracts are entered into which provide for various types of work to be performed at locations "to be determined," with no wage update requirements. These types of contracts present challenging enforcement issues.

In order for the program to comply with its prevailing wage enforcement responsibilities, it is critical for it to know when public work is performed, where it is performed, who is performing it, and the nature of the tasks performed. The filing of the Intent provides notice regarding these factors to affected workers, to the awarding agency, to the program, to "watchdog" organizations, and to the public, all of whom have an interest in compliance. The filing of the Affidavit is a confirmation that the requirements to pay prevailing wage for the work performed have been met. The filing of the forms permits us to confirm whether wage rates listed on the form are consistent with the indicated scopes of work.

The program currently lacks a way to ensure the annual wage updates for multiple-project or recurring work (except janitorial work covered by the specific rule referenced above). Contractors, public contract awarding agencies, and the program are faced with a significant amount of paperwork in following the current process which requires the filing of an Intent at the beginning of the contract and an Affidavit upon completion of each project or "call out." The program felt that it had adequately addressed both these concerns in applying its pre-September 2010 filing requirements for such contracts, but as referenced earlier, that process has been set aside because of objections from public agencies.

The filing requirements for various types of "multiple projects" contracts are again under review. Attached is a draft prepared for the purpose of developing a policy that will more closely meet the needs of public agencies and contractors than current requirements, while providing the program with information critical to its enforcement responsibilities and protection of worker

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wages. Among other things, it attempts to better characterize the various types of contracts awarded by public agencies and set forth the filing and wage determination requirements based on the type of contract under consideration. Because many of you are interested in this process, and your input is important to the program, I'm sharing this draft with you for comment.

Please take the time to review the document and provide me with your comments, via email to Sela235@Lni.wa.gov, or in whatever other format is most workable for you. I very much look forward to your participation in this endeavor, and would appreciate it if you could respond by April 2, 2012.

Thank you.

Please see on the following page a document outlining the current filing procedures for “on-call” or “multiple project” contracts.

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From: Soma, David (LNI)
Sent: Tuesday, September 28, 2010 4:08 PM
To: Goss, Amanda (ATG); 'Aron Moon'; 'Bob Dick'; 'Bret Lancaster'; 'Debra Bridgman'; 'Duane Leonard'; 'Jim Worsdale'; 'John Carpita'; 'Judy Gasperecz'; 'Judy Giniger'; Nyrop, Karin (ATG/UW); 'Kelly L. Iverson'; 'Ken Matthews'; Selover, Ann (LNI); 'Maura Donoghue'; 'Nancy Locke'; Christensen-Russell, Ramona (LNI); Sandstrom, Anastasia (ATG)
Cc: Soma, David (LNI); Gast, Dawn V (LNI)
Subject: "On-Call" contracts

Participants,

I reviewed everyone's comments. As suggested in those comments, I went back to the statute and the rules for a strict reading of them as they pertain to building service maintenance and other contracts. Based on that review, I agree it is appropriate to modify the approach I outlined at our August 23 meeting. I would appreciate your feedback on the new approach I will describe here.

Participants who said I did not have authority to require yearly wage updates for any but building service maintenance contracts were correct. I also agree with the comment that there are only two types of contracts contemplated by chapter 39.12 RCW: (1) building service maintenance (janitorial) contracts, and (2) all other contracts for public works. This means that the so-called "on-call" contracts that many of you have been using are, in fact, just contracts to do public work.

The statute, RCW 39.12.040, says that for any contract there needs to be only one intent, even for a multi-project contract. However, .040 goes on to say that there must be an Affidavit for each project.

Contrary to my previous statement, "on"-call public works contracts may provide for work to be performed by subcontractors. The contractors and each subcontractor will have to file an Intent for their first work under the contract (for instance the first call-out for the subcontractor). To further meet the requirements in statute, an Affidavit must be filed by each and every contractor and subcontractor following completion of each project (meaning following completion of each and every work order or call-out).

If the contract is a building service maintenance (janitorial) contract (see WAC 296-127-023 for definition), the requirements remain unchanged. The annual updates required by rule must be applied and an Intent and Affidavit must be filed for each contract year.

Hopefully, this reflects more closely your interpretation of the statute and rules as it is, as requested, a strict reading and application of the statutes and rules. As stated above, I would appreciate your thoughts on this revised process.

Dave

David J. Soma
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