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Memorandum

TO: File
FROM: Rodney J. Bieker
DATE: February 19, 1980

Offi
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This opinion was denounced and held erroneous in Anderson Constr. Co. v. Weltmer, 224 Kan. 191 (1978).

Curt T. Schneider
Attorney General

ATTORNEY GENERAL OPINION NO. 78- 42

Mr. W. Keith Weltmer
Secretary of Administration
Department of Administration
2nd Floor - State Capitol
Topeka, Kansas 66612

Re: Contracts--Public Agencies--Wage Rates

Synopsis: It is the obligation of the contracting public agency to assure that its contractor pays the wages required by K.S.A. 44-201 by prescribing the applicable wage rates at the outset of the contracting process, announcing those wage determinations in specifications seeking competitive bids, and to incorporate those rates in the final contract documents.

* * *

Dear Secretary Weltmer:

Pursuant to conversations between Mr. McNeil of your office and my staff, I write concerning the responsibilities of the Division of Architectural Services in the letting of contracts which are subject to K.S.A. 44-201. I enclose to you a copy of Opinion No. 77-298, which addresses this question in a general way. More recently, however, the question has arisen concerning a particular project, Honey Bee Lodge and Hospital Care Facility at the Kansas Neurological Institute, Project No. A-3171. I understand that specifications have been issued soliciting bids for this project, and that sealed bids have been received therefor. At our suggestion, the opening has been deferred, and the bids remain sealed, pending further advice from this office.

In Opinion No. 77-298, we pointed out that although no criminal prosecution would lie under K.S.A. 44-202 for violation of the act, it remains civilly enforceable.

The act applies to all

> "contracts hereafter made by or on behalf of the state of Kansas or by or on behalf of any county, city, township or other municipality of said state with any corporation, person or persons which may involve the employment of laborers, workmen or mechanics . . . ."

The act directs that "[n]ot less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers or other persons so employed" on such contracts, and each such contract

> "shall contain a provision that each laborer, workman or mechanic employed by such contractor, subcontractor or other person about or upon such public work shall be paid the wages herein provided . . . ."

The "current rate of per diem wages" is defined for the purposes of this act to be

> "the rate of wage paid in the locality as hereinafter refined to the greater number of workmen, laborers or mechanics in the same trade, occupation or work of a similar nature. In the event that it be determined that there is not a greater number in the same trade, occupation or on similar work paid at the same rate, then the average rate paid to such laborers, workmen or mechanics in the same trade, occupation or work shall be the current rate."

The act goes on to refine the definition of the term "locality," a question which is not material here.

The question is raised whether the contracting public agency has any responsibility for the enforcement of this act and, if so, what that responsibility entails. At the outset, it is my opinion that responsibility for assuring that the "current rate of per diem wages" is paid to workmen, laborers and mechanics under the act rests with the contracting public agency. The law requires, first, that "[n]ot less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers or other persons so employed," and the state, county, city, township or other municipality which executes a contract must include therein provisions obligating the contractor to pay those wages. Unless, of course, the contracting municipality determines at the outset of the contracting process the "current rate of per diem wages" which is applicable to the workers employed on the project, it has no means of defining in the contract the measure of the contractor's wage obligations under both the statute and the contract. Stated more simply, if the contracting municipality does not tell its prospective bidders what wage rates the successful contractor will be obligated both by statute and by contract to pay its workmen on the project, those prospective bidders have no basis on which to calculate their labor costs to be included in the bid.

The act was passed, at least in important part, for the protection of workmen and others employed under public contracts. That protection is both statutory and contractual, and it is the obligation of the contracting public agency to make specific provision for payment of the required wages in each contract to which the section applies.

Much has been made of the alleged difficulty of defining the wage rate which the statute required to be paid. As Chief Judge Cardozo wrote in *Campbell v. City of New York*, 244 N.Y. 317, 155 N.E. 628, 50 A.L.R. 1473, "One finds it hard to believe that a cliche ['the prevailing rate of wages'] so inveterate is devoid of meaning altogether."

Title 40, U.S.C.A. § 267a(a) of the Davis-Bacon Act, requires in pertinent part thus:

> "The advertised specifications for every contract in excess of $2,000 to which the United States . . . is a party, for construction, alteration, and/or repair . . . of public buildings or public works . . . which requires or involves the employment of mechanics

> and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village or other civil subdivision of the State, in which the work is to be performed . . . ."

Certainly, for all practical intents and purposes, it is difficult to discern any substantial difference between the "current rate of per diem wages" as defined by K.S.A. 44-701 as the rate of wages paid in the locality to the greater number of workmen in the same trade or occupation, and the rate of wage which is prevailing in the locality for that trade or occupation.

If, as K.S.A. 44-201 plainly requires, the contracting public agency is to require its contractor to pay the "current rate of per diem wages" to its workers and laborers, the public agency has got at the outset of the contracting process to determine what those rates of wages are for the various classes of labor employed on the project not only in order to define the contractor's obligation, but in order to enforce that obligation if the contractor should neglect or refuse to pay the prescribed wages. If the contractual process entails a competitive bidding process, the contracting public agency must make its determinations of the "current rate of per diem wages" at the outset, and announce those rates in the specifications made available to prospective bidders, on the basis of which interested contractors may prepare and calculate their bids.

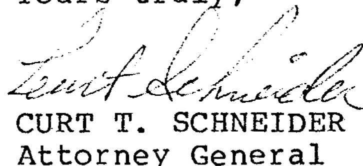
This statute applies not only to the state, but also to counties, cities, school districts and other political subdivisions of the state. For the most part, these bodies will not have resources available to them to enable them to make independent determinations of the "current rate of per diem wages" in their respective localities prior to the letting of each contract. As stated above, there appears to be little difference between the Davis-Bacon "prevailing wage" and the "current rate of per diem wage" as defined in K.S.A. 44-201, and as a result, contracting public agencies are free to adopt the prevailing wages in their respective areas as published by the U.S. Department of Labor for incorporation

in specifications soliciting bids on projects under their jurisdiction. Whatever method of determination is followed, whether through the taking of independent surveys, adoption of Davis-Bacon rates, or some other method, clearly the contracting public agency cannot satisfy its statutory obligation to the contractor's employees, and the contractual obligation of the contractor itself cannot be defined unless the public agency makes a determination of the rates applicable to the contract prior to letting and incorporates those in the contract document itself as defining the wage obligation of the contractor.

Thus, in my opinion, it is the obligation of the Director of Architectural Services, prior to the letting of any further contracts which are subject to K.S.A. 44-201, to determine the "current rate of per diem wages" which is applicable to the classes of labor and work employed on said contract, to announce those determinations to eligible bidders for their use in computing their bids on such projects, and to incorporate those rates in the final contract documents. It is likewise the obligation of every other public contracting agency to proceed similarly. Failure to properly determine the current rate of per diem wages applicable to a contract, and to define those rates in the contract itself, raises obvious serious questions of the contractor's exposure to subsequent liability for wage underpayments.

It may doubtless be objected that enforcement of the statute will increase the costs of public projects. This statute was originally enacted in 1891, and reflects a purposeful legislative determination that the wage obligations of contractors on public projects should not be exploitative, but rather, should reflect the rates prevailing in the community where the work is undertaken. If compliance with the statute does in fact result in increased public construction and other costs, the appropriate remedy lies with and only with the legislature. It is further suggested that because the statute may have been widely neglected in the past, that it should be regarded as effectively abandoned. The annotation in the Kansas Statutes Annotated reflects fourteen cases decided by the Kansas Supreme Court under this act over the last eight decades. The act remains in force, and any past neglect, through inadvertence, unawareness of its provisions of whatever other reason, does not justify purposeful and deliberate flouting of its requirements.

Yours truly,



CURT T. SCHNEIDER
Attorney General

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