



STATE OF KANSAS

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September 7, 1977

ATTORNEY GENERAL OPINION NO. 77-298

The Honorable Donald L. Allegrucci
State Senator
Rural Route #4
Pittsburg, Kansas 66762

Re: Contracts--Public Works--Wages

Synopsis: K.S.A. 44-201 requires that under all contracts by the State of Kansas, counties, cities, townships, and other municipal corporations for public works, all laborers, workmen and mechanics employed thereon by the contractor or subcontractors shall be paid not less than the "current rate of per diem wages" prevailing in the locality, as defined in that section, and it is the obligation of the contracting political subdivision to assure through its contracting process in the letting of such contracts that prospective bidders are advised of the minimum wage requirements which must be paid under the contract for which bids are solicited.

* * *

Dear Senator Allegrucci:

You inquire concerning the obligations of cities, counties and other political subdivisions to obtain and enforce compliance with the wage and hour requirements of K.S.A. 44-201 by contractors, subcontractors and other persons having contracts with such cities, counties and other political subdivisions.

The second paragraph of K.S.A. 44-201 sets forth the basic wage and hour requirements of the section:

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"Eight hours shall constitute a day's work for all laborers and other persons employed by or on behalf of the state of Kansas or any municipality of said state, except in cases of extraordinary emergency which may arise, in time of war, or in cases where it may be necessary to work more than eight hours per calendar day for the protection of property or human life. Laborers or other persons so employed, working to exceed eight hours per calendar day, shall be paid on the basis of eight hours constituting a day's work. Not 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." [Emphasis supplied.]

For the purposes of this act, the "current rate of per diem wages" is defined 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 'locality' for the purpose of this act shall be the county wherein the physical work is being performed: Provided, That where cities of the first or second class are located in said counties, each such city shall be considered a locality."

The wage and hour requirements extend not only to public employees, for

"laborers and other persons employed by contractors or subcontractors in the execution of any contract or contracts with the state

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of Kansas or any municipality thereof shall be deemed to be employed by or on behalf of the state or such municipality so far as the hours of work and compensation herein provided are concerned."

The question is raised what obligation, if any, has the contracting political subdivision to assure compliance with the provisions of this act. K.S.A. 44-202, a penalty provision, provides that any "officer of . . . any municipality . . . having charge or control over any such public work who shall violate the provision of the next preceding section" shall upon conviction be deemed guilty of a misdemeanor. In State v. Blaser, 138 Kan. 447, 26 P.2d 593 (1933), the court held that this penal sanction applied only to violations of the requirement respecting hours of labor, and did not apply to violations respecting payment of the "current rate of per diem wage." Even if the penalty provision were applicable to the wage requirement, prosecution is effectively barred by Connally v. General Construction Co., 269 U.S. 385, 70 L. Ed. 322 (1926), in which the Court held that an Oklahoma statute which was virtually identical to K.S.A. 44-201 was not sufficiently explicit to satisfy the constitutional due process requirements for a criminal prosecution. In State v. Blaser, supra, the court quoted at some length from a decision of the Court of Appeals of New York in Campbell v. City of New York, 244 N.Y. 317, 155 N.E. 628, 50 A.L.R. 1473 (1927), in which the Court, in an opinion by Chief Judge Cardozo, indicated that notwithstanding the probable infirmities of a New York statute comparable to our own as a basis for criminal prosecution, the claimed ambiguities and uncertainties which rendered it unsatisfactory as a basis for criminal prosecution did not vitiate its effectiveness as a civilly enforceable contractual requirement.

Lacking any criminal tool for enforcement, however, the statute provides its own vehicle for enforcement of the contractor's mandatory statutory obligation. It is important to note that the wage obligations of the contractor are not merely contractual, but are mandated by statute. However, to enforce that obligation, K.S.A. 44-201 requires that any public works contract made by or on behalf of the State of Kansas or any county, city, township or other municipality which may involve the employment of laborers, workmen or mechanics, shall include a stipulation providing for an eight-hour day, and 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," i.e., the rate of wages paid to the greater

number of workmen, laborers, or mechanics in the same trade, occupation or work of a similar nature in the locality as defined in the act. Thus, it remains for the contracting political subdivision to enforce these requirements through its contracting process. It is the purpose of advertised specifications for contracts, for example, to notify all prospective bidders of the terms and conditions of the contract for which an award will be made. It is a mandatory term of any such public works contract that all persons employed thereon shall be paid the "current rate of per diem wages," as defined by K.S.A. 44-201, and thus, it is incumbent upon the contracting political subdivision to include in its advertised specifications notice of the requirement that all bidders must agree to pay the "current rate of per diem wages" as defined in the act to all persons employed thereon. This rate appears to be substantially identical to the prevailing wage which is determined by the United States Secretary of Labor in the administration of the Davis-Bacon Act, 40 U.S.C. § 276a. That section requires that specified federal public works contracts include a stipulation requiring that

"the minimum wages to be paid various classes of laborers and mechanics . . . 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"

A bid is not responsive to the specifications which does not indicate the bidder's agreement to pay the "current rate of per diem wages" as defined by K.S.A. 44-201. To avoid misleading prospective bidders, and to notify all such parties of the rates of wages which are to be required under the contract, it is highly preferable that the specifications prescribe the minimum prevailing rates of wage for the various classes of work to be required for the contract. Failure to prescribe the exact wage rates, however, does not relieve the contracting party or subcontracting entity from its statutory and contractual obligation to pay wages at rates which are not less than the prevailing rate, or the "current rate of per diem wages in the locality" for all laborers,

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workmen and mechanics employed by the contractor and all subcontractors on such projects.

Yours truly,


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