

Public/Private Partnership Prevailing Wage Guidelines

Ohio law requires that the “prevailing wage” be paid when public funds are used to pay for all or part of a construction project as long as the overall project costs exceed a statutorily set threshold. O.R.C. 4115.032 and 4115.034. Although the vast majority of projects triggering the prevailing wage law are traditional public construction (e.g. – roads) and public works projects (e.g. – sewers), whenever a public entity contributes funding or other direct support (e.g. – public land) to a project, even an otherwise privately-financed project, prevailing wage must be paid to the workers on that project. O.R.C. 4115.03.

Ohio law also makes it clear that publicly-supported projects must not be subdivided into a publicly-supported project (triggering prevailing wage) and a privately-financed project (on which prevailing wage would not be paid) unless the projects are “conceptually separate and unrelated to each other” or “encompass independent and unrelated needs.” O.R.C. 4115.033. There has been confusion, inconsistency, and, in some cases, misapplication of the law in the specific circumstance of publicly-supported construction activity which facilitates privately-funded construction activity. In particular, without any specific guidance from the Commerce Department, it has been unclear to affected parties whether publicly-supported environmental remediation or access roads which facilitate private construction, or publicly paid for machinery or equipment to be installed in a new privately-constructed facility, are all part of one project or are separate projects.

As a result, public authorities, contractors, workers, and developers have faced uncertainty and inconsistency as to whether certain projects require the payment of prevailing wage. The following guidelines are designed to clarify the Department of Commerce’s position on when prevailing wage applies to construction projects where there is a combination of public and private funding. Finally, these guidelines are subject to clarification and updating as additional questions in this area arise. Stakeholders are encouraged to make suggestions which would improve these guidelines.

Key Principles

In determining when prevailing wage is triggered on privately-funded construction activity as a part of a “public improvement project,” the following principles, along with any other relevant information, will be applied by the Department to all commitments of public funds after October 15, 2008:

- 1) When the primary purpose for publicly-supported construction activity is to facilitate the use of privately-funded construction within six months of the completion of the public construction, all such construction will be presumed to comprise a single “public improvement project” subject to prevailing wage.

- 2) The primary purpose for publicly-supported construction activity will be presumptively established by the facts and circumstances at the time public funds are committed by the public entity.

Several common scenarios illuminate the question of when the law requires the payment of prevailing wage when privately-funded construction activity is part of a public improvement project. The following section identifies several of these common scenarios and seeks to explain, through discussion and examples, the application of the law and the above guiding principles in these scenarios.

Because the Department of Commerce understands that the application of the prevailing wage is inherently fact-specific, the Department will issue an early determination to any public authority seeking one regarding the applicability of prevailing wage to any project.

Interpretation & Application

- 1) **Early Determination.** Any political subdivision or state officer, board or commission may request, and the Department of Commerce will provide within 30 days, a determination as to whether prevailing wage applies to a given project. The Department will make that determination based upon information provided at the time of the submission and the project developer may rely on that determination as long as there are no fundamental substantive changes with respect to the use of public funds in support of the project after the determination is provided. The Prevailing Wage Request Form is available at <http://www.com.ohio.gov/laws/>.
- 2) **Outreach and Training.** In the 30 days following the issuance of these guidelines, the Department will engage in a concerted outreach and training program aimed at informing state and local government entities, developers and other affected business entities, and worker organizations about these guidelines.
- 3) **Common Scenarios.** When public funds are used to support . . .
 - a) When public funds are used to support **. . . infrastructure improvements on public land or easements granted to a public authority**, that construction is covered by prevailing wage, but **privately-funded construction or renovation on adjacent private land is presumptively not covered by prevailing wage**. Public roads and sidewalks are presumed to have a range of public purposes independent of any support or assistance they may provide to private construction on adjacent land and therefore those roads and sidewalks are presumptively separate projects from the adjacent private construction.
 - **Example:** Company Z wants to build a new headquarters building, but will only do so if the local municipality agrees to build a new public road which will facilitate access to the building. Even though the new road is helpful to Company Z, its

construction (which is subject to PW) does not trigger PW for the construction of the headquarters because the primary purpose for the public road is for public traffic use (including access to the Company Z's new headquarters). PW would not apply to the construction of the headquarters.

- **Example:** Developer Y is developing an office park that will utilize public streets, water and sewage hookups but in order to meet tenant timelines, has arranged with City X to build the streets and requisite utility hookups and be repaid by City X for those costs. Developer Y must pay PW for the construction of the streets and utility hookups, but adjacent private construction by companies Z and ZZ would not be subject to PW requirements.
- **Example:** City X has an easement from Company Z to build sidewalks on Company Z's property. The sidewalk construction is subject to payment of PW, but that construction does not subject Company Z's entire private development to PW.
- **Example:** City X has established a TIF to obtain revenue to reconstruct a local road and add a turn lane in an old commercial portion of the City. Several new businesses have agreed to locate along the newly renovated commercial strip. While the public roadway improvements using TIF revenue would be subject to PW, just like any other public expenditure on a public infrastructure improvement, the new commercial construction would not be subject to PW unless there were other direct public contributions to any of that construction.

b) When public funds are used to support ... infrastructure improvements on private land which are provided within six months of privately-funded construction or renovation activity, the publicly-supported infrastructure improvements that primarily facilitate use of privately-funded construction are presumptively part of the same project as the private construction, making the entire project subject to prevailing wage.

- **Example:** The State of Ohio pays for a rail spur from the main rail line onto the private property of Company Z, leading up to Company Z's warehouse constructed within six months of the rail spur. The rail spur is presumptively part of the same project of the construction of the warehouse, making the entire project subject to PW.
- **Example:** City X provides for the demolition of the existing structure on the property as well as the sewer and water infrastructure under Company Y's property to support Company Y's new building which is under construction. All construction is subject to payment of PW.
- **Example:** Company Y is considering moving its manufacturing plant to Arizona. City X agrees to build a new access road to replace the crumbling one built with the plant

in 1998 if Company Y agrees to stay in City X. The construction of the access road with public funds would be subject to PW, but that would have no retroactive effect on the private construction of the plant 10 years ago without PW.

- c) When public funds are used to support **... remediation of environmental hazards when a developer or end-user has been identified** at the time public funds are committed, the remediation and renovation or construction on that site for that developer or end-user are presumed to be all one project, triggering PW for the entire project.
- **Example:** If City X provides Developer Y funds for asbestos removal from a building with the understanding that Developer Y will renovate the building into condominiums, the remediation of the asbestos and renovation of the building are presumptively deemed to be a single project for which Developer Y will have to pay PW.
 - **Example:** City X decides to remediate a brownfield in hopes of attracting development on that site, but has no identified developer or end-user for the site. Three months after the remediation has begun, using public funds (and the payment of PW), a developer steps forward to build a new warehouse on that site for Company Y. Even though only three months have passed, Company Y's warehouse is presumptively a separate project from the remediation because Company Y's interest in the site was not known at the time public funds were committed to the project. As long as no other public support is provided in conjunction with the construction of the warehouse, PW would not apply.
- d) When public funds are used to support **... remediation of environmental hazards when no developer or end-user has been identified** at the time public funds are committed, the remediation is subject to prevailing wage but any future construction on that site is presumptively not subject to prevailing wage.
- **Example:** If the State of Ohio uses Clean Ohio money to remove contaminated soil from a corner lot in City X's business district, but has no developer or end-user identified for the lot, the soil clean-up is subject to PW. When City X persuades a national retailer to build a warehouse on the lot, that construction would not be subject to PW.
 - **Example:** In the situation above, if City X or the State were to provide funds to help support the construction of the new store, the construction of that store would be subject to PW, but not because of the public funds provided for the removal of the storage tank.
- e) When public funds are used to support **... machinery and/or equipment** being installed in a newly constructed or remodeled private structure, the machinery or equipment

which exist to facilitate use of the newly constructed building are presumptively deemed part of that new structure and therefore, the building and the machinery or equipment being installed within in it are considered to all be part of a single project subject to PW. O.R.C. 166.01(N), 166.02(E) and OAC 4101:9-4-19(B). Publicly-funded machinery or equipment that is not clearly associated with privately-funded construction or renovation of a building will trigger PW for its installation, but will not trigger PW for the building in which it is being installed.

- **Example:** The State of Ohio provides \$500,000 for M&E to be installed in a newly-constructed manufacturing plant. The machinery is deemed to be part of the plant's construction, therefore triggering PW for the overall project.
- **Example:** Company Z builds a new manufacturing plant in City X with private funds. Two years later, Company Z's business is struggling and the State of Ohio provides public funds to replace a key machine at Company Z's plant. The installation of the machine, itself, would trigger PW for the actual installation activity but there would be no effect on Company Z's original construction of its plant without PW.

4) **Multiple buildings.** When multiple buildings are being constructed on the same general site, if one privately-funded building is sufficiently benefited by public funding to trigger prevailing wage, all other privately-funded construction on that site within six months of the construction triggering prevailing wage will also be subject to prevailing wage if that construction is similarly benefited by the public funding. Privately-funded construction on that site, not within six months of the publicly-funded construction subject to prevailing wage or not similarly benefited by the contribution of public funds, is presumptively independent from the activity for which public funds were provided and therefore, not subject to prevailing wage.

- **Example:** If Company Z accepts a loan from Public Entity Y for new construction on Company Z's South Campus and, at the same time, Company Z begins an addition on its Headquarters Building on its North Campus, construction of the South Campus building would be subject to PW, but the main campus construction, which is not benefited by the loan in support of the South Campus construction, would not be subject to PW.
- **Example:** If Company Z accepts a technology grant from Public Entity Y specifically for a state-of-the-art piece of equipment and renovations are necessary to install the equipment, and the construction costs exceed the PW threshold, all renovations associated with the installation of the new equipment are subject to payment of PW. If, in that scenario, Company Z begins construction on another building unrelated to the renovations, then presumably the new construction would not be subject to PW.
- **Example:** If the State of Ohio provides funds to construct all of the access roads on Company Y's planned multi-building corporate campus, all of the buildings would be similarly benefited by the public funds expended to build the internal private roads on

the campus and therefore all of the buildings constructed within six months of the public investment in the internal road system would be subject to PW.

- **Example:** If City X builds a small tourist booth next to the Applebee's in the parking lot of a new privately developed retail shopping center, the public construction on that general site in no way triggers PW for any of the other purely private construction on that site because that construction is not similarly benefited by the public investment in the tourist booth.
- **Example:** If City X agrees to pave the joint parking lot of Company Y and Company Z (to which PW would apply) in order to discourage Company Z from relocating to another city or state, and 3 months later, Company Y decides to expand its offices on that site, Company Y's construction would presumptively not trigger PW. Even though Company Y is benefited by the new parking lot, because Company Y did not seek the paving of the parking lot and was presumptively not similarly benefited by that publicly-funded construction activity.

- 5) **Public Contributions.** Prevailing wage is triggered when there is an actual public contribution to a privately-funded construction project. Accordingly, prevailing wage is triggered when the relevant public entity provides a construction, machinery or equipment grant or loan, issuance of bonds, donation or loan of public property, or a lease or sale of public property at below market rate. Prevailing wage is not triggered by a tax abatement or credit, a job training grant, or a lease or sale of property at market rate.
- 6) **Timing.** The above principles will be applied to all commitments of public support to private projects on or after October 15, 2008. Expectations established prior to the announcement of these principles will be respected. Accordingly, applications for public funds filed with the State of Ohio before October 15 will utilize any pre-existing interpretations of the application of the prevailing wage law upon which applicants may have relied. For all public contribution commitments to private projects made prior to October 15, 2008, prevailing wage will apply in accordance with any express representations in that regard made by the State of Ohio. If no such representations were made, prevailing wage will apply in accordance with the express or implied intent of the public entity providing the funds, as determined by the Ohio Department of Commerce. In the absence of evidence of the intent of the public entity providing the funds to the initiative, the above principles will be applied. A public entity will have been deemed to have committed public funds to a project when it offers those funds, in writing, to a private entity and those funds cannot, unless rejected or returned by the private entity, be used for another project. A legislative earmark for a specific project, as opposed to a general programmatic appropriation, will be deemed a commitment of public funds.

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