

## OFFSITE MANUFACTURER NOT REQUIRED TO PAY PREVAILING WAGE EVEN THOUGH ITS ONSITE SUBCONTRACTING WORK WAS SUBJECT TO PREVAILING WAGE

By Timothy E. Salter, Esq.  
*Procopio, Cory, Hargreaves & Savitch LLP*

**THE ISSUE:** Does an offsite manufacturer for a public works project have to be paid a prevailing wage if the manufacturer is also a subcontractor on the public works project?

**THE ANSWER:** No. The California Department of Industrial Relations (“DIR”) recently determined that if the subcontractor’s offsite manufacturing takes place in a *permanent* offsite shop, it is *not* beholden to prevailing wages under Labor Code section 1772, even though it was required to pay prevailing wages for its onsite activities. Subcontractors that are otherwise subject to prevailing wage requirements for a public works project may not be required to pay prevailing wage for their offsite manufacturing activities at a permanent facility even when those materials are assembled by the subcontractor onsite. (Decision on Administrative Appeal Re: Public Works Case No. PW 2007-008).

### CASE HISTORY

There is usually a clear distinction between the payment classification for on-site subcontractors for a public works project and for off-site material suppliers. According to the California Prevailing Wage Law (“CPWL”) under Labor Code section 1772, subcontractors who operate temporarily on-site for a public works project are compensated by prevailing wage requirements, while those who fabricate and supply materials to the general public from permanent off-site facilities are not



TIMOTHY E. SALTER, ESQ.

required to be paid at prevailing wages. The idea is that an entity operating independently of the public works project should not be subjected to the project’s prevailing wage requirements.

But the onsite/offsite distinction is not always so stark, as seen in the case of Russ Will Mechanical, Inc. (“RWM”).

RWM was a subcontractor on a community college project, required to both fabricate and install deck work, which made it both a subcontractor *and* material supplier for the project. RWM performed the off-site fabrication in its own permanent off-site shop. Although RWM did not produce products for the general public, this off-site shop was not established specially for the project, either.

In November of 2008, the DIR issued a public works coverage determination finding that off-site fabrication by RWM was subject to prevailing wages. The determination found that the all of RWM’s work, including its off-site fabrication, was done in the execution of its contract

for public work, thereby subjecting it to prevailing wages. Naturally, RWM looked to appeal this decision.

RWM argued that its off-site manufacturing was separate from its on-site subcontractor activities and should not be subject to prevailing wages. It insisted that the DIR’s determination was contrary to longstanding policy under the CPWL that prevailing wages are limited strictly to on-site construction work. In opposition to RWM’s appeal, the Local Union No. 104 of the Sheet Metal Workers’ International Association argued that the DIR was correct in finding broad coverage of prevailing wages under the CPWL.

In its Decision on Appeal in May of 2010, the DIR first had to determine whether RWM was a subcontractor within the meaning of the labor code. The DIR rejected an argument by RWM that it was simply a material supplier since RWM clearly performed on-site work, did not sell its products to an on-site contractor, and did not sell its products to the general public. Thus, RWM did not qualify for a material supplier exemption under the CPWL.

But the fact that RWM was found to technically be a subcontractor did not necessarily mean that RWM’s off-site fabrication was subject to prevailing wage requirements. So the DIR consulted its prior determinations for guidance.

The DIR noted in its prior rulings that it required prevailing wages to be paid in limited circumstances when the work did not qualify for the material supplier exemption. In past determinations, off-site fabrication performed at a temporary yard

established specially for a public works project, rather than in the subcontractor's own permanent shop, was subject to prevailing wages. (PW 92-036, *Imperial Prison II, South* (April 5, 1994).) On the other hand, off-site work done by a bona fide material supplier is not subject to prevailing wage requirements. (*Russell Mechanical, Inc.* (September 17, 1984).)

The problem here, however, is that RWM's circumstances do not align neatly with any of the preceding determinations. The DIR has never had to address the issue of whether fabrication is subject to prevailing wage requirements when done in the permanent off-site shop of a subcontractor who is not selling materials to the general public. To answer this question, DIR had to look beyond its own determinations and state court precedents and to rely on federal regulations.

The federal Davis-Bacon Act requires prevailing wages for "all mechanics and laborers employed directly upon the site of the work...." (40 U.S.C. § 3142(c)(1).) As recognized by the California Supreme Court, "that federal law generally confines its

prevailing wage law to situations involving actual construction activity...." (*City of Long Beach v. Dept. of Industrial Relations* (2004) 34 Cal.4th 942, 954.) But excluded from prevailing wages, under the Davis-Bacon Act, "are permanent ... fabrication plants ... of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project." (C.F.R., title 29, § 5.2.) Essentially, the federal regulation says that to be exempt from coverage, the work must be done away from the public works site at a *permanent* facility.

In light of the federal regulations, the DIR concluded RWM's off-site fabrication was, in fact, *not* done in the execution of the contract for public work within the meaning of Labor Code section 1772. Instead, since RWM's off-site fabrication was performed in a *permanent* facility, it would not be subject to prevailing wage requirements.

#### **THE IMPACT**

When subcontracting out a material supplier for a public works project, it

is crucial that the contractor finds out where the supplies are going to be fabricated. Even if the supplier does not sell products to the general public, it may still be exempt from prevailing wage requirements if it has a permanent off-site facility.

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*Timothy E. Salter is a partner and member of the firm's litigation team, focusing his practice on construction litigation matters. Over his 22 years of practice, he has represented sureties, general contractors and subcontractors in a variety of complex construction litigation matters, including claims for delay, disruption and acceleration.*

*Reach him at 619.525.3862 or [tim.salter@procopio.com](mailto:tim.salter@procopio.com).*