

Attorney General of Missouri

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January 14, 1981

OPINION LETTER NO. 63

The Honorable Morris Westfall
Representative, District 133
Route 2
Halfway, Missouri 65663

Dear Mr. Westfall:

This letter is in response to your question asking:

Do the acts of tuckpointing and water-proofing an existing brick building constitute construction or maintenance work for the purpose of applying prevailing wage requirements under Section 290.230 RSMo?

You also state:

A contract was let by the Bolivar R-I School District to Tadlock Construction Company for the purpose of having the exterior of an existing brick building tuckpointed and waterproofed, the building having been built in the 1930's. Tuckpointing is where rotten or loose mortar is removed from between bricks and replaced with new mortar, and a solution then applied to the wall to prevent water penetration.

At the time of letting the contract, no request was made for a prevailing wage determination and those working on the project were not paid the prevailing wage.

Subsection 1 of § 290.230, RSMo, provides:

Not less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work

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is performed, and not less than the prevailing hourly rate of wages for legal holiday and overtime work, shall be paid to all workmen employed by or on behalf of any public body engaged in the construction of public works, exclusive of maintenance work. Only such workmen as are directly employed by contractors or subcontractors in actual construction work on the site of the building or construction job shall be deemed to be employed upon public works.

As can readily be seen, the quoted provision of subsection 1 of § 290.230 contains an exception for maintenance work. Maintenance work is defined in subsection (4) of Section 290.210, RSMo, thusly:

(4) 'Maintenance work' means the repair, but not the replacement, of existing facilities when the size, type or extent of the existing facilities is not thereby changed or increased.

Subsection (1) of § 290.210 also defines "construction" as follows: "'Construction' includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair."

It seems clear that tuckpointing work and waterproofing is normally maintenance work and therefore not within the requirements of § 290.230 relating to prevailing wages. However, the definition of "construction" in subsection (1) of § 290.210 includes "major repair." Therefore, if such work is in fact major repair work, it would come within the definition of construction.

The resolution of such a factual question however is within the jurisdiction of the Department of Labor and Industrial Relations under § 290.240, RSMo.

We also enclose four prior opinions on this subject, listed below, which may be of interest to you.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosures
Att'y Gen. Ops. Nos.
33-1958; 56-1968; 388-1966
and 32-1970

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March 4, 1981

Addendum to Opinion Letter No. 63

The Honorable Morris Westfall
Representative, District 133
Route 2
Halfway, Missouri 65663

Dear Representative Westfall:

This office has learned that some confusion may have been created by Opinion Letter No. 63, written in response to your question concerning the applicability of the prevailing wage law to projects involving tuckpointing and waterproofing of an existing brick building. In that letter, as you may recall, we concluded that the answer to your question turned on whether the work constituted "major repair" pursuant to § 290.210(1), RSMo 1978. We further stated that the resolution of such a factual question was within the jurisdiction of the Department of Labor and Industrial Relations under § 290.240, RSMo 1978. The referred-to confusion apparently arose from this latter statement because that sentence did not set out which agency within the Department of Labor and Industrial Relations was responsible for making the factual determination.

Section 290.240 generally provides that the Department of Labor and Industrial Relations shall enforce the prevailing wage statutes. That section also provides that the Department may establish rules and regulations for carrying out the provisions of §§ 290.210 to 290.340. The Department has promulgated such a rule, 8 CSR 30-3.010, in which it has placed responsibility for enforcing prevailing wage provisions with

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the Division of Labor Standards. Thus, the Division of Labor Standards is the entity within the Department of Labor and Industrial Relations which makes the determination as to whether a particular public project constitutes "major repair" pursuant to § 290.210(1) or "maintenance work" pursuant to § 290.210(4).

We are enclosing a copy of 8 CSR 30-3.010 for your perusal. We hope this additional information helps to clarify the position expressed in Opinion Letter No. 63.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

**Title 8—DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS**
Division 30—Division of Labor Standards
Chapter 3—Prevailing Wage Law Rules

8 CSR 30-3.010 Prevailing Wage Rates for Public Funded Projects

PURPOSE: This rule sets forth prevailing wage requirements relative to work performed by workmen on public funded projects.

- (1) All public bodies of the state of Mo. contemplating construction work must obtain from the division a determination of the prevailing hourly rate of wages in the locality (wage determination) which is applicable to such construction. The rates so determined shall be incorporated in the contract specifications and made a part thereof, except that construction contracts of the State Highway Commission need not list specific wage rates to apply, but may refer to the wage rates contained in the appropriate General Wage Orders issued by the division, as applicable.
- (2) Request for wage determinations shall be initiated at least thirty calendar days before advertisement of the specifications for the contract for which the determination is sought. An exception from this provision will be made by the division only upon a proper showing of extenuating circumstances. The division has prepared and printed Form No. PW-1, for use in making a request. Said form may be secured by writing Division of Labor Standards, P. O. Box 449, Jefferson City, Mo.
- (3) A separate request must be filed for each separate project by the public body, except the State Highway Commission, which will be furnished prevailing wage determinations under General Wage Orders. One public body cannot use the wage determinations made by this department for another public body even though both public bodies are located in the same county. Special wage determinations issued by the division only apply to the public body and its project described in the special wage determination.
- (4) Any contract awarded for a project must be awarded for completion of the project within 120 calendar days from the date of the original determination. If the determination becomes void the public body must request a new wage determination before proceeding with the project. This provision shall not apply to the General Wage Order issued by the division for the State Highway Commission.
- (5) It should be understood by all interested parties that the certified prevailing wage rates determined by the division are minimum wage rates. The contractor may not pay less than the prevailing wage rates determined by the division for the project or contract awarded to him as set forth in the proposal on which he submitted his bid. Employees are free to bargain for a higher rate of pay, and employers are free to pay a higher rate of pay.
- (6) Where classification of workmen, not included in the original contract, are desired, the public body shall request the division to issue a determination of the prevailing hourly rate of wages in the appropriate localities. In such cases, it shall be the responsibility of the public body to make such an arrangement with the contractor as would result in compliance with such wage determinations, as though they were a part of the original contract.
- (7) The public body shall make such examination of the payrolls and other records of each contractor or subcontractor as may be necessary to assure compliance with the provisions of the law. In connection with such examinations, particular attention should be given to the correctness of classifications, and any disproportionate employment of any workmen. Such examinations shall be of such frequency as may be necessary to assure conformity with the provisions of the law. An examination shall be made after the project has been substantially completed, but prior to the acceptance of the affidavit as required by section 290.290 RSMo. If any violation of sections 290.210 to 290.340 RSMo is discovered by the inspecting public body, it is their duty under section 290.250 RSMo to withhold and retain from payments to the contractor all sums and amounts due and owing as a result of any violation. Any violation shall be immediately reported to the Division of Labor Standards at P. O. Box 449, Jefferson City, Mo. 65101 or by telephone.