

Sean O'Day, Deputy City Manager
City of Salem
555 Liberty St SE, Room 220
Salem, OR 97301-3503

Re: *Determination Whether Project is Subject to Prevailing Wage Rate*
Project: Interactive Spray Fountain
Requested by: City of Salem

Dear Mr. O'Day:

On December 16, 2008, you submitted a request on behalf of the City of Salem ("City") asking whether a proposed project is subject to the Prevailing Wage Rate law. Sufficient information to make a determination was received on January 6, 2009, and therefore, the commissioner issues the following determination:

FINDINGS OF FACT

1. A private donor ("Donor") plans to purchase and install an interactive spray fountain in the City's Riverfront Park. The spray fountain feature is estimated to cost less than \$150,000, but in any case, the Donor's expenses for the project will not exceed \$150,000.
2. The purpose of the draft Donation Agreement between the Donor and the City "is to set forth the terms under which Donor will donate and City will accept the Donation, and not bind or obligate Donor to make the Donation." The Donation Agreement "does not obligate Donor to donate any materials or Work as described in this Agreement"
3. The City has already paid \$12,000 for conceptual drawings, fountain design, and landscaping design for the project. This money came from a grant from the Urban Renewal Agency of the City of Salem.
4. The landscaping for this project will be paid for and contracted for by the Donor, unless, after reviewing the designs for the project, the Donor decides the cost of the project will be in excess of \$150,000.
5. If the Donor decides the cost of the project will be in excess of \$150,000, the City will purchase the supplies and materials necessary for the landscaping work, and will perform the landscaping work with its Parks, Recreation and Community Development Department staff.

CONCLUSIONS OF LAW

1. The interactive spray fountain will be constructed on public property and will be publicly owned. Therefore, the definition of “public works” under ORS 279C.800(6)(a)(A) needs to be considered for applicability to this project.
2. The draft Donation Agreement is not a binding agreement for construction, and therefore the project is not being “contracted for” by a public agency. Based on the information in the draft Donation Agreement, the City is not exercising substantial control over the project, and therefore the project is not being “carried on” by a public agency. As such, the project does not meet the definition of “public works” under ORS 279C.800(6)(a)(A).
3. If the project does not meet the definition of “public works” under ORS 279C.800(6)(a)(A), the question of whether or not funds of a public agency will be used on the project is irrelevant.

DETERMINATION

Based on the foregoing, the Prevailing Wage Rate laws, ORS 279C.800 to ORS 279C.870, and OAR Chapter 839, Division 025, do not apply to the construction of the proposed interactive spray fountain.

This determination is based on the agency’s file as of the date of this determination. The commissioner may make a different determination if any of the project information is incorrect, or if the project or project documents are modified or supplemented after the date of this determination.

Additionally, if the City contracts out for landscaping work, or is a party to any other construction-related agreement associated with this project, this determination will no longer be applicable to this project.

REQUEST FOR A RECONSIDERATION

After the commissioner issues a determination, the requestor or any public agency served with a copy of the determination may request that the commissioner reconsider the determination. A request for reconsideration must be submitted in writing to the Prevailing Wage Rate Unit, must include the reason or reasons for the request and any documents in support of the request, and must be received within 15 calendar days of the date the determination was mailed. A request for reconsideration does not toll the time period for requesting a contested case hearing on the determination.

RIGHT TO A HEARING

The requestor and any person adversely affected or aggrieved by this determination are entitled to a hearing as provided by the Administrative Procedures Act (ORS 183.413 to 183.470) and ORS 279C.817. If you want a hearing, the Bureau of Labor and Industries, Wage and Hour Division must receive your written request for hearing within 21 days from the date this notice was mailed. Hearing requests should be addressed and delivered to:

Administrator
Wage and Hour Division
Bureau of Labor and Industries
800 NE Oregon St., Suite 1045
Portland, Oregon 97232

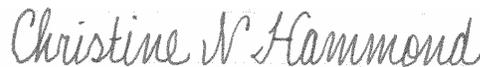
If a written request for hearing is not received within this 21-day period, your right to a hearing shall be considered waived.

If you request a hearing, you will be notified of the date, time and place of the hearing. You have the right to be represented by legal counsel at a hearing. However, if you are a government agency, corporation, partnership, or unincorporated association, you must be represented by either legal counsel or an authorized representative. If you request a hearing, you will receive information on Contested Case Rights and Procedures before the hearing. After the hearing, an order confirming, modifying, or reversing this determination will be issued. This determination shall remain in effect until the final order is issued.

If you request a hearing but fail to appear at any scheduled hearing, you will have waived your right to hearing and the commissioner may issue a final order by default. If the commissioner issues a final order by default, the agency file on this matter shall serve as the record for purposes of proving a prima facie case. You are not entitled to judicial review of this determination order unless you have made a timely request for a hearing.

Date: January 15, 2009

Brad Avakian, Commissioner
Bureau of Labor and Industries



Christine N. Hammond, Administrator
Wage and Hour Division
Bureau of Labor and Industries

Certificate of Service

On January 15, 2009, I mailed, by certified mail, the Prevailing Wage Rate Determination for the Interactive Spray Fountain project to the requestor/public agency associated with this project, as follows:

Sean O'Day
City of Salem
555 Liberty St SE, Room 200
Salem, OR 97301-3503

Susan Wooley, PWR Technical
Assistance Coordinator
Wage and Hour Division
Bureau of Labor and Industries