



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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Jim Ryan
ATTORNEY GENERAL

FILE NO. 97-014

LABOR:
Applicability of Prevailing Wage Act
to Construction by College Foundation

Ms. Shinae Chun
Director
Illinois Department of Labor
160 North LaSalle, Suite C-1300
Chicago, Illinois 60601-3150

Dear Ms. Chun:

I have your letter wherein you inquire whether the provisions of the Prevailing Wage Act (820 ILCS 130/0.01 et seq. (West 1996)) are applicable to the construction of a building on the campus of a community college by a community college foundation. For the reasons hereinafter stated, it is my opinion that the Prevailing Wage Act will be applicable in the circumstances described in your inquiry.

Your letter and the supplemental materials you have furnished indicate that the International Building, a classroom building located on the campus of Wabash Valley College, was built for the use of the College by the Wabash Valley Foundation.

Ms. Shinae Chun - 2.

Wabash Valley College is a community college which is part of the Illinois Eastern Community Colleges District No. 529. The Wabash Valley College Foundation was incorporated as a foundation in 1963, and is governed by a 30 member board of directors. Its sole corporate mission is to support the College, and, in furtherance thereof, it has provided student scholarships, equipment purchases, land, construction and repair of facilities to the College. All Foundation activities are funded privately.

The College and the Foundation do not, in general, share administrative or management personnel. One College employee does serve as secretary for the Foundation, devoting approximately three hours per month to those duties, and two College employees are authorized to collect rent for the Foundation at a Foundation-owned and operated dormitory where some students live. (Rent may also be paid directly to a Foundation officer.) Further, the College Booster Club uses privately raised funds to pay dormitory rent to the Foundation for athletes on athletic scholarships. Despite these instances, it is clear that the College and the Foundation are separate entities.

Turning to the events giving rise to your inquiry, the Foundation contracted with a construction company to build the International Building in 1993. Contract documents identify the Foundation as the owner, at the same address as the College, and name as owner representatives the president of the Foundation and the president of the College. The College transferred the land

Ms. Shinae Chun - 3.

upon which the building was constructed to the Foundation prior to construction. The College does not pay rent for the use of the building, but does pay utility expenses.

Pursuant to section 1 of the Prevailing Wage Act (820 ILCS 130/1 (West 1996)), not less than the generally prevailing rate of hourly wages must be paid to laborers, workers and mechanics who are employed by or on behalf of a public body which is engaged in the construction of public works. Section 2 of the Prevailing Wage Act (820 ILCS 130/2 (West 1996)) provides, in pertinent part:

"This Act applies to the wages of laborers, mechanics and other workers employed in any public works, as hereinafter defined, by any public body and to anyone under contracts for public works.

As used in this Act, unless the context indicates otherwise:

'Public works' means all fixed works constructed for public use by any public body, other than work done directly by any public utility company, whether or not done under public supervision or direction, or paid for wholly or in part out of public funds. * * *

* * *

'Public body' means the State or any officer, board or commission of the State or any political subdivision or department thereof, or any institution supported in whole or in part by public funds, authorized by law to construct public works or to enter into any contract for the construction of public works, and includes every county, city,

town, village, township, school district, irrigation, utility, reclamation improvement or other district and every other political subdivision, district or municipality of the state whether such political subdivision, municipality or district operates under a special charter or not.

* * *

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(Emphasis added.)

Clearly, Wabash Valley College, as part of a community college district, is a "public body" for purposes of the Act. Therefore, the construction of any building by the College for its own use would be subject to the requirements of the Act. Moreover, in People ex rel. Bernardi v. Illini Community Hospital (1987), 163 Ill. App. 3d 987, the Prevailing Wage Act was held to apply to a construction project undertaken by a not-for-profit nonsectarian hospital because a portion of the hospital's budget was met by county tax revenue, even though the construction project was paid for by private funds. Consequently, even if the Foundation had donated the necessary funds to the College to pay for the building, the construction would have been subject to the provisions of the Act.

Whether the Act is applicable when the construction is carried out by the Foundation, however, raises other issues. The Foundation does not appear to be a "public body", as defined in section 2 of the Act, because it receives no support from public funds. Nonetheless, it is clear that the project is being constructed for the use of a public body.

Ms. Shinae Chun - 5.

In other jurisdictions, the application of prevailing wage statutes has not been avoided through the use of a private entity to carry out construction of a public building. For example, in State ex inf. Webster v. Camdenton (Mo. App. 1989), 779 S.W.2d 312, the city conveyed real estate to a private builder pursuant to an agreement that the builder would construct a firehouse/police station on the property and lease it back to the city with an option to purchase. The court held that this was, in essence, a financing arrangement for the benefit of the city, and the workers were deemed to be employed on behalf of the city, for purposes of the Missouri prevailing wage statute.

Similarly, in Hardin Memorial Hospital, Inc. v. Land (Ky. App. 1983), 645 S.W.2d 711, the court held that the Kentucky prevailing wage statute was applicable to a hospital renovation project. The hospital had been a county hospital, managed by a board of trustees appointed by county authorities. After the certificate of need for renovation work had been acquired but before the work began, however, the county turned the hospital over to a not-for-profit corporation formed for the purpose of managing the hospital. The corporation completed the project without the use of tax money or bonds. The court examined the relationship between the corporation and the county, noting the significant control which the county retained over the hospital and the corporation, as well as the county's continued ownership of the realty involved, and concluded that the corporation was

Ms. Shinae Chun - 6.

merely a conduit or alter ego of the county for purposes of managing the hospital.

In the circumstances you have described, the Foundation is a private, not-for-profit entity with a board of directors and administration separate from that of the College. However, the Foundation does use the College's address for some purposes, and the two entities have a close relationship, since the Foundation exists solely to serve the needs of the College. The construction contract in question named the College president, as well as the Foundation president, as owner representatives.

Moreover, the College deeded to the Foundation the land upon which the building in question was constructed for a nominal payment. While a community college is authorized to sell real property "not needed for community college purposes" (110 ILCS 805/3-41 (West 1996)), like other units of local government in Illinois, it cannot constitutionally give away its property for private purposes (Ill. Const. 1970, art. VIII, sec. 1). The transfer was clearly made for the purposes of facilitating the construction of the building. The property for all practical purposes remains under the control and equitable ownership of the College.

Although the present circumstances are distinguishable in detail from those at issue in the cases discussed above, and there are minor differences in the pertinent statutory language, the general principles regarding the form and substance of the

Ms. Shinae Chun - 7.


transaction should be applied. In these circumstances, the Foundation built a structure for public use by a public body, upon land belonging to that public body (which was apparently transferred to the Foundation solely for construction convenience), to specifications meeting the needs of the public body. The plain language of section 2 provides that a project may be a public work subject to the prevailing wage requirements whether or not it is built under public supervision or direction. The Act would clearly have been applicable if the construction had been carried out by the College, even if the funds had been provided by the Foundation. To conclude that the Prevailing Wage Act would not apply would serve only to sanction schemes for circumventing the intent and purpose of the law, and it is axiomatic that a public body cannot circumvent a statute by doing indirectly that which it could not do directly. (See Beling v. City of East Moline (1957), 14 Ill. App. 2d 263, 272-73.) In my opinion, therefore, it must be concluded that the Act is applicable in these circumstances even though the construction was carried out by the Foundation, rather than under the direct supervision of the College.

As a final matter, I would note that although my opinion was not sought on this question until after the construction of this building was completed, I have, nonetheless, elected to respond for the purpose of providing guidance for future use

Ms. Shinae Chun - 8.

to the Department and other entities which may be contemplating similar projects.

Sincerely,



JAMES E. RYAN
ATTORNEY GENERAL