MISSOURI SUPREME COURT HANDS MUNICIPALITIES A SETBACK IN PREVAILING WAGE ACT CASE

by Joseph G. Lauber

The Missouri Supreme Court recently handed down a unanimous opinion that many will agree is a setback for municipalities and other public entities providing water service, and which may have even longer-reaching effects.[1] The opinion addressed the issue of payment of prevailing wages for work done in accordance with infrastructure maintenance contracts. In the immediate past, circuit courts and the Missouri Court of Appeals had consistently held that most work conducted on existing public facilities qualified as "maintenance" work, which is exempt from the payment of prevailing wages.[2] The Missouri Supreme Court, however, reversed this trend, unanimously reinforcing the Department of Labor and Industrial Relations' authority as the administrative agency charged with enforcing these regulations to call the shots when it comes to the applicability of the prevailing wage law to public works projects.

This recent case, *Utility Service Co., Inc. v. The Department of Labor and Industrial Relations, et al*,[3] arose from a dispute between the parties about whether work in accordance with a water tower maintenance agreement entered into between Utility Service Co., Inc. (USC) and the City of Monroe City (City) was "construction" or "maintenance" for purposes of making a prevailing wage determination. USC sought a written statement from the Department of Labor and Industrial Relations (Department) regarding the applicability of prevailing wages to the work contemplated under the contract. This work included annual inspections and service to the City's tank; draining, inspecting, and cleaning of the tank; if identified by the inspection, specialized services needed to repair and maintain the tank, including steel replacement, expansion joints, water level indicators, sway rod adjustments, manhole covers and gaskets, and other component parts; cleaning and repainting of

the interior and exterior of the tank as needed; installation of an anti-climb device on the tank's ladder; and installation of a lock on the tank's roof hatch.

Those familiar with Missouri's Prevailing Wage Act (§§ 290.210 to 290.340, RSMo), will recall that "[n]ot less than the prevailing hourly rate of wages ... 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."[4] According to the Act's definition section, "'construction' includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair."[5] "Maintenance work," on the other hand, is "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."[6]

Applying these definitions to the facts in *Utility Service Co.*, the Court noted that "no statute provides a guide for assessing the magnitude of work that requires payment of prevailing wages for 'construction' work under section 290.210(1)."[7] Absent such statutory guidance, the Court deferred to the Department's interpretation and construction of the Prevailing Wage Act in making its holding. The Court looked to 8 C.S.R. 30-3.020, which includes the Department's Division of Labor Standards' definition of the term "construction of public works," which:

> Generally includes construction activity, as distinguished from manufacturing, furnishing or materials or servicing and maintenance work ... includes, without limitation, the construction of buildings, structures, and improvements of all types ... [and] also means all work done in the construction or development of a public works project, including without limitation, altering, remodeling, demolishing existing structures, installation on the site of construction of items fabricated off-site, [and] painting and decorating ...[8]

The Court found the Department's use of the phrase "including, without limitation" particularly "instructive" in finding that "any work that is encompassed in the plain meaning of the language defining 'construction' under section 290.210(1) is work that requires payment of prevailing wages, regardless of whether the work changes the size, type, or extent of an existing facility," thus cutting off a practitioner's ability to utilize the definition of "maintenance" to come to a clearer understanding of what constitutes "construction."[9]

In so doing, the Court also called into question a portion of *State Dept. of Labor and Indus. Relations v. Bd. of Public Utils. of City of Springfield*,[10] a case that for 15 years had added some clarity to the confusion between "construction" and "maintenance."[11] In *Board of Public Utilities*, the Missouri Court of Appeals stated that any repair of existing facilities is work excluded from the payment

of prevailing wages, so long as the repair does not change or increase the size, type, or extent of the existing facilities.[12] Thus, prior to the recent decision, the test appeared to be: (a) if there are no existing facilities, there can be no "maintenance," so prevailing wages apply;[13] and (b) if there are existing facilities, prevailing wages will not apply, unless they constitute a "major repair" or increase the size, type, or extent of the existing facilities.[14] In *Utility Service Co.*, however, the Supreme Court noted that it "disagrees with *Public Utilities's* [sic] suggestion that work on an existing facility is 'maintenance work' unless it changes the size, type, or extent of the facility."[15]

Having disposed of the possibility that "maintenance" could assist in determining the meaning of "construction," the Court went to work analyzing the water tower maintenance contract between USC and the City using the § 290.210(1) definition of "construction" and with the help of Webster's Dictionary.[16] The Court found that if an annual inspection on the water tower indicated that work was needed to adjust sway rods or repair expansion joints, water level indicators, manhole covers and gaskets, such work would fit the definition of "reconstruction."[17] They also found that the installation of an anti-climb device on the tower's ladder would constitute an "improvement;" that the replacement of major parts would constitute both an "improvement" and an "alteration;" and that the contract contemplated replacement of major component parts, which constitute "major repairs."[18] Most damning of all, however, the Court specifically held that complete repainting of the interior/exterior of the tank and tower is "construction," and therefore subject to the payment of prevailing wages.[19]

Throughout the case, the Missouri Supreme Court repeatedly indicated that it was just "playing the cards it had been dealt;" less than subtly suggesting that legislative remedies are in order if the effect of the opinion is ill-received. Examples of these statements include:

- " ... it is not the Court's role to provide quantitative boundaries for applying the Act"[20]
- "Contractor makes a valid point that the current statutory language and regulations cause confusion. Particularly it faults the Department for failing to promulgate bright-line tests for applying the Act. The Court, however, cannot create the Department's regulations or rewrite the statutes enacted by the legislature. Many of Contractor's arguments in the case raise 'slippery slope' concerns that are best remedied through actions of the other branches of government."[21]
- " ... the quantity of work that transforms painting from minor touch-up painting to 'painting' within the definition of section 290.210(1) is a question that is left to the Department's regulations and discretion, as nothing in the statutes provides a magnitude test for what amount of 'painting' is 'construction.' It is not the Court's role to create a standard setting the number of brush strokes that requires the application of prevailing wages."[22]

With the Supreme Court reemphasizing the Department of Labor's authority to interpret and enforce the Prevailing Wage Act, it makes sense for municipalities to seek legislative change to clear up some of the am-

biguities and which promote a less financially burdensome application of that law. At the time of this writing H.B. 828 had been introduced in the House and was voted "do pass" out of committee. If approved, this bill would amend the definition of "construction" to include "new construction, enlargement, or major alteration." Section 2 of H.B. 828 specifically states the General Assembly's intent to abrogate the Missouri Supreme Court's holding in *Utility Service Co.* Other bills under consideration include S.B. 176, which would make numerous changes to the Prevailing Wage Act, including the removal of wage rates set in collective bargaining agreements when determining prevailing wages, and H.B. 320, which is virtually identical to S.B. 176.

Without a legislative amendment, *Utility Service Co.* represents a change in how the prevailing wage law may apply to public works contracts, especially the long-term maintenance contracts that are commonly used for water tanks and towers. According to the Court, if work meets the Prevailing Wage Act's definition of "construction" prevailing wages will apply, regardless of whether the work is done on new construction or an existing facility. Additionally, the Court reemphasized the Department of Labor's authority as the state's administrative agency charged with promulgating regulations and enforcement of the Prevailing Wage Act; in other words, the Department's determinations of applicability will be given great weight. Consequently, municipal administrative staff members should take heed and familiarize themselves with this issue and review their entity's view on the applicability of prevailing wages to projects that had been considered "maintenance" in the past.❑

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(Endnotes)

1 § 290.260.1, RSMo, currently requires the Department of Labor and Industrial Relations to ascertain and consider the applicable wage rates established by collective bargaining agreements in making a determination of the prevailing wage for a locality. An opinion by the Missouri Supreme Court that broadens the definition of "construction" work, to which the Prevailing Wage Act applies, will cause additional expense for public works projects of municipalities that are already cash-strapped due to declining property tax and sales tax revenues.

2 See e.g., *Dodson v. Pemiscot County Memorial Hospital*, ___ S.W.3d. ___, 2009 WL 5126644 (*transferred* to Missouri Supreme Court SC90660); *Utility Service Co., Inc. v. The Dep't of Labor and Indust'l Relations*, ___ S.W.3d. ___, 2011 WL 1027457 (Mo. App. W.D. 2010)(*rev'd*, 2011 WL 795867 (Mo. banc 2011)).

3 *Utility Service Co., Inc. v. The Dep't of Labor and Indust'l Relations*, ___ S.W.3d. ___, 2011 WL 795867 (Mo. banc 2011).

4 § 290.230.1, RSMo.

5 § 290.210(1), RSMo.

6 § 290.210(4), RSMo.

7 *Utility Service Co.*, 2011 WL 795867 at *4.

8 *Id.* (quoting 8 C.S.R. 30-3.020(1)).

9 *Id.* At *5.

10 910 S.W2d 737 (Mo. App. S.D. 1995).

11 *Utility Service Co.*, 2011 WL 795867 at *5.

12 *Bd. of Public Utilities*, 910 S.W.2d at 744.

13 See *Chester Bross Construction Co. v. Mo. Dept. of Labor and Indust'l Rel.*, 111 S.W.3d 425, 427-28 (Mo. App. E.D. 2003).

14 See *Bd. of Public Utilities*, 910 S.W.2d at 745.

15 *Utility Service Co.*, 2011 WL 795867 at *5.

16 *Id* .at *6.

17 *Id.*

18 *Id.* While it did not arise in the circuit court, it appears that there may have been an argument that the question of applicability of the Prevailing Wage Act was not yet ripe, as certain of the items in the scope of work in the maintenance contract would only arise if identified in the annual inspection of the tower. Perhaps there is a way to sever those "conditional" elements of the scope of work which are more likely to constitute "construction" from the routine inspections and minimal maintenance work necessary while those inspections are carried out.

19 *Id.*

20 *Id* .at *5.

21 *Utility Service Co.*, 2011 WL 795867 at *5, fn 6.

22 *Id* .at *6, fn 7.