



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
DEPARTMENT OF LABOR STANDARDS

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DIRECTOR

March 27, 2024

Dear Ms. Burke:

Re: Chilmark Preschool Project

This letter responds to your request for a determination from the Department of Labor Standards (“DLS”) regarding the applicability of the Prevailing Wage Act to a proposed construction of a preschool in Chilmark, MA (“Town”).

The Massachusetts prevailing wage law applies to the construction of public works by the Commonwealth, or by a county, town, authority, or district. G.L. c. 149, §§ 26, 27. Thus, the prevailing wage statute applies to a particular project if: (1) the project is “construction”, as defined in M.G.L. c. 149, § 27D; (2) the project is a “public work”; and (3) the project is being undertaken by a public entity subject to the prevailing wage law.

As the agency charged with interpreting the prevailing wage law, DLS applies a “totality of the circumstances” analysis that is based on both its past precedent and relevant case law when determining the applicability of the prevailing wage law to projects with public and private components. In evaluating whether the project is a “public work” being undertaken by a public entity, DLS considers: (1) whether the property and any structures involved are owned by a public entity; (2) whether any public funds will be used to cover the construction costs; (3) whether any involved structure will be used for a public purpose and be operated and maintained by the public entity; (4) the degree of control which the public entity maintains over the design and construction process, including approval of plans, oversight of construction, and approval of requisitions for payment; (5) who will own any improvements to the property or its structures; and (6) any other relevant factors.

According to the information provided to DLS, the Town issued an RFP seeking a non-profit group to construct and operate a private preschool with a specified number of spaces on Town-owned land. The non-profit will control and oversee the design and construction of this preschool; the Town will not be involved beyond regular regulatory approvals, and no public funds will be used. The Town will lease the land to the non-profit for 30 years, although no rent or lease payments will be made. The nonprofit will be responsible for all control, repairs, and maintenance during the lease and at the end of the 30-year lease, the Town will own and control the improvements. If Massachusetts state law changes during

the 30-year lease so as to require the Town to provide preschool education, the Town has the right to terminate the lease and take over the improvements.

DLS determines, based on the totality of the circumstances, that the proposed construction of the preschool is subject to the prevailing wage statute. The project described above constitutes construction as defined by its own terms. Additionally, DLS determines that the project is a public work being undertaken by a public entity subject to the prevailing wage law. By limiting the entities who can bid on the RFP to non-profits willing to build a preschool with a specified number of spaces (and that follows the Martha's Vineyard school calendar), the Town has predetermined the operation of a specific service to the public benefit on publicly owned land. Indeed, the RFP specifically states that the lease is being done "for the promotion of the public purpose of the construction and operation of an enlarged preschool." It is thus the actions of the Town that have brought rise to the construction at issue, and not the unrequested actions of a third party. That no public funds are being used on the proposed construction and that the non-profit will design the preschool is not sufficient to bring this project outside the scope of Massachusetts' prevailing wage law, especially given that the project is on Town-owned land, the Town has dictated that a preschool is what must be built, the Town will own all improvements after the lease is over (and potentially earlier if there is a law change), and the chosen non-profit will not be paying any rent to the Town.

Considering all the factors and intending to limit this decision to the specific facts of this project, it is therefore the determination of the Department of Labor Standards that prevailing wage law does apply to this project. Please note that this determination is based on the facts as presented to DLS; if those facts are incorrect or change, DLS' determination could change as well.

Thank you in advance for your cooperation regarding this matter. If you have any additional questions or concerns, please do not hesitate to contact me.

Regards,

A handwritten signature in cursive script that reads "Michael Flanagan". The signature is written in black ink and is positioned above the typed name.

Michael Flanagan, Director
Department Labor Standards