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Missouri Supreme Court Decision Provides Reminder Of Breadth Of Prevailing Wage Requirements On Construction Contracts

By Richard Siegel

On March 1, 2011, the Supreme Court of Missouri issued a unanimous opinion holding that a contractor's "care and maintenance" of the water storage tank and tower for the city of Monroe City, Missouri, was "construction" and thereby covered under the Missouri Prevailing Wage Act, Mo. Rev. Stat. §§ 290.210, *et seq.* (the "Act").

The company's contract with the city provided that the company would, among other things, annually inspect and service the tank, maintain and repair the tank and tower, and clean and repair the tank. The contractor sought a written statement from the Missouri Department of Labor and Industrial Relations (the "Department") as to whether the work outlined by the contract was covered under the Act. The company took the position that the work was exempt from the Act because it constituted "maintenance work," which Missouri law defines to "mean[] 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." Mo. Rev. Stat. § 290.210(4). The Department instead concluded that the work constituted "construction," which is covered under the Act. The company sought review of this determination.

The Supreme Court of Missouri agreed with the Department. The Court held that because the Act was "a remedial statute intended to prevent payment of substandard wages for work on public works projects," exceptions from the Act should be read narrowly. The Court thereby disagreed with a lower court's prior determination that exempt "maintenance work" was work that did not "change or increase . . . the size, type, or extent of the existing facility." Instead, the Court focused on the types of work that are defined as "construction," under the Act, namely "construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair." Mo. Rev. Stat. § 290.210(1).

Specifically, the Court held, for example, that because "reconstruction" was covered under the Act, and because reconstruction is defined as reassembling "into its original form or appearance," the lower court's standard could not survive because that standard would result in expressly-covered work (reconstruction) being not covered since it would not "change or increase . . . the size, type, or extent of the existing facility." The Court further concluded that the various work expressly required by the contract fell under dictionary definitions of

reconstruction, improvement, alteration, painting, and major repairs, and that, therefore, the contract was subject to the Act's requirements.

The Missouri Court's ruling brings the Act to a similar posture as to the federal Davis-Bacon Act ("DBA"). Similar to the Missouri statute, the DBA only expressly covers "construction, alteration, or repair, including painting and decorating." 40 U.S.C. § 3142(a). However, United States Department of Labor regulations, promulgated at 29 C.F.R. § 5.2(j), define these terms to include all of the following:

- Altering, remodeling, installation (where appropriate) on the construction site of items fabricated off-site;
- Painting and decorating;
- Manufacturing or furnishing of materials. articles, supplies or equipment on the construction site; and
- Certain limited transportation

Under the DBA, and similar to the Missouri Court's determination, "servicing and maintenance work" are exempted from the Act's requirements. However, given the broad view of what constitutes "construction, alteration, or repair" under the DOL's regulations, it should not be surprising that agencies have taken a very narrow view as to what constitutes "maintenance work." For example, NASA's policy statement on the DBA and the Service Contract Act ("SCA") defines "maintenance work" as "work required to keep a facility in an effective and usable working condition, which includes preventative maintenance measures, which are normally performed on an annual or more frequent basis." (*see* http://osi.hq.nasa.gov/labor/DBA-SCA-Policy-FINAL-Revision.pdf). Likewise, the Department of Energy's Acquisition Guide defines maintenance as "includ[ing] the routine, recurring kind of work that is necessary to keep a facility in an efficient operating condition." (*see* http://management.energy.gov/policy_guidance/1340.htm).

The Missouri Court's decision should provide an important reminder to companies that contract with state and local governments, as well as the federal government, of the breadth of work that is subject to prevailing wage requirements under both the DBA as well as under state laws. It is important to remember that *even if a federal contract is purely a maintenance contract not subject to the DBA's prevailing wage requirements, it is almost certainly a service contract subject to the SCA's prevailing wage requirements*. Additionally, contractors ought not ignore the possibility that severable construction work required by a maintenance or service contract may still be subject to the DBA's requirements.

The Missouri decision should also remind contractors of the need to familiarize themselves with state laws (and city/county regulations, where applicable), and the ways that they differ from their federal counterparts, when pursuing contracts with state and/or local governments.

The Supreme Court of Missouri's decision in *Utility Service Co., Inc. v. Department of Labor and Industrial Relations, et al.*, case no. SC 90963, can be found at http://www.courts.mo.gov/file.jsp?id=44941.

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