2006 WL 6151642 (Or.Cir.) (Trial Order)
Circuit Court of Oregon.
Lane County
EUGENE SCHOOL DISTRICT NO. 4J, a common school district of the State of Oregon, Plaintiff,
v.
State of Oregon, acting through Dan Gardner, Commissioner of the Bureau of Labor and Industries, McKenzie Commercial Contractors, Inc., a corporation, and Chambers Construction Company, a corporation, Defendant;
State of Oregon, acting through Dan Gardner, Commissioner of the Oregon Bureau of Labor and Industries, Cross-claim Plaintiff,
v.
McKenzie Commercial Contractors, Inc; Chambers Construction Company, Cross-claim Defendants.
No. 16-05-21332.
October 12, 2006.

Opinion and Order
Karsten H. Rasmussen, Circuit Judge.

SUMMARY

This case requires the court to determine the prevailing wage rates applicable to contracts for the construction and redevelopment of four public schools. The court must reconcile competing interpretations of OAR 839-016-0020(2) toward this end. Rules of interpretation bind and inform the court's analysis. Ultimately, the court rules that the prevailing wage rates effective January 2002 and July 2002 were applicable to the contracts at issue. The court finds the interpretations of OAR 839-016-0020(2) proffered by the Plaintiff and Cross-Claim Defendants to be true to the rule's text and context. Conversely, the court finds the interpretations alleged by the Defendant to be inconsistent with the same and thus erroneous as a matter of law.

DISCUSSION

I. Factual and Procedural Background

Plaintiff Eugene School District No. 4J (District) initiated this lawsuit against the State of Oregon, acting by and through the Bureau of Labor and Industries (BOLI), to obtain declaratory relief in order to determine the prevailing wage rates (PWRs) applicable to contracts for construction and redevelopment of four public schools. BOLI filed cross claims against the construction managers/general contractors (the CM/GCs) on these projects, alleging that the CM/GCs failed to pay the applicable PWRs and seeking to recover the wages due to the effected workers. The District was statutorily required to include the applicable PWRs in its contracts with the CM/GCs and thus has agreed to indemnify those parties. Both BOLI and the CM/GCs have filed motions for summary judgment. There is no factual dispute between the parties in this posture and thus all agree that the court may properly dispose of this case on summary judgment.

The contracts at issue proceeded in two phases. The first phase was the design phase, during which the District and Cross-Claim Defendants CM/GCs designed and planned the construction activities for the schools. The second phase was the construction phase, during which the CM/GCs and various subcontractors performed the actual construction work. Both of these phases were preceded by invitations to bid. These invitations were issued at three different times when different PWRs were in effect.

The invitations to bid that preceded the design phase were the District's advertisement of requests for proposals (RFPs) for construction and general contracting services for the four schools. On April 18, 2002, the District advertised its RFPs for the two elementary school projects. These RFPs included the PWRs in effect as of January 1, 2002. On December 20, 2002, the District advertised its RFPs for the two high school projects. These latter RFPs included the PWRs in effect as of July 1, 2002.

The invitations to bid that preceded the construction phase were those advertised by the CM/GCs to subcontractors on May 13, 2003, for the high school projects, and on June 13, 2003, and June 16, 2003, for the elementary school projects. The PWRs in effect at the time of these three invitations were those set by BOLI on February 14, 2003.

Ultimately, the construction activities on the four schools were successfully completed. The workers on the projects were paid the PWRs in effect when the District advertised its RFPs, not the PWRs in effect when the CM/GCs advertised their invitations to bid to subcontractors. Thus, the workers on the elementary school projects were paid the PWRs set in January 2002; the workers on the high school projects were paid the PWRs set in July 2002; and neither group of workers was paid the PWRs set in February 2003.

II. Legal Analysis

This case requires the court to determine which of the two invitations to bid triggered the PWRs: (1) the District's advertisement of its RFPs to the CM/GCs, or (2) the CM/GCs' advertisement of invitations to bid to subcontractors. As noted above, the court's interpretation of OAR 839-016-0020(2) controls this determination.

A. Relevant Law

The court's decision is governed by the statutory provisions and administrative rules in effect during the period when the various invitations to bid were advertised: 2002-2003. Those governing provisions, which constitute Oregon's prevailing wage rate law, mandate that workers employed under public works contracts are to be paid the applicable prevailing rate of wage. Three provisions frame the court's analysis.

OAR 839-016-0040(2) defines “public works contract”:

“ ‘Public works contract’ or ‘contract’ means any contract, agreement, or understanding, written or oral, into which a public agency enters into for any public work.”

Two features of this rule are noteworthy. First, the definition of "contract" is broad, encompassing "any contract, agreement, or understanding." Second, the rule identifies public agencies as indispensable parties to public works contracts.
ORS 279.352(1) provides in relevant part:

"The specifications of every contract for a public work shall contain a provision stating the existing prevailing rate of wage which may be paid to workers ... required for such public work ...."
Two features of this provision also must be noted. First, the text suggests that the existing PWR is one among multiple "specifications" in a public works contract. Second, the provision merely instructs that the applicable PWR for a project is the "existing" one.
OAR 839-016-0020(2) illuminates the temporal gap in the statute, providing:

"The specifications for every public works contract must contain a provision stating the existing prevailing rate of wage in effect at the time the initial specifications were first advertised for bid solicitations."

Thus, this rule identifies the triggering event as the time at which "the initial specifications [are] first advertised for bid solicitations." Notably, the first part of this rule mirrors the statute and thus suggests that "specifications" include the existing PWR.

B. Rules of Interpretation

Because the disposition of this case turns on an interpretation of OAR 839-016-0020(2), the court's analysis is guided by rules of interpretation set forth in the case law.

1. *PGE v. BOLI* Analysis

PGE v. BOLI dictates that the Oregon courts must interpret statutes and regulations by first looking at the text and context of the provision.[1] "If the legislature's intent is clear from the ... inquiry into text and context, further inquiry is unnecessary."[2] The context of the provision consists of other provisions of the same regulation and other related regulations and statutes.[3] "The court utilizes rules of construction that bear directly on the interpretation of the [regulation] in context," including the rule that "use of the same term throughout a [regulation] indicates that the term has the same meaning throughout the [regulation]."[4]

2. Deference

Oregon law requires the court to afford proper deference to an agency's interpretation of its own rule. The court is "authorized to overrule an agency's interpretation of a rule if an agency has 'erroneously interpreted a provision of law.' "[5] However, where "the agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, there is no basis on which this court can assert that the rule has been interpreted erroneously."[6] "Inconsistency" is the operative word under this standard.

C. Analysis of Parties' Arguments

BOLl contends that the PWRs set in February 2003 were applicable to the four contracts at issue. It argues that the triggering event was the CM/GCs' advertisement of invitations to bid to subcontractors during May and June 2003. The District and CM/GCs assert that the PWRs set in January and July 2002 apply, claiming that the triggering event was the District's advertisement of its RFPs to the CM/GCs during April and December 2002. The parties' arguments rest on competing interpretations of the terms "public works contract" and "specifications" as those appear within OAR 839-016-0020(2). In both instances, the text and context of the rule support the interpretations asserted by the District and the CM/GCs. The interpretations alleged by BOLI are inconsistent with the rule's text and context and thus erroneous as a matter of law.

1. "Public Works Contract"

BOLl argues that, under OAR 839-016-0020(2), an enforceable public works contract must exist in order for the PWRs to be triggered. The agency contends that the contracts between the CM/GCs and subcontractors were enforceable public works contracts, while the contracts between the District and the CM/GCs were not. BOLI asserts that public works contracts were not formed until after the District and the CM/GCs agreed to a guaranteed maximum price at the end of the design phase. The agency alleges that the illusory promises doctrine undermined contract formation prior this point because the District could have refused to agree to a guaranteed maximum price.

The District and CM/GCs dispute that OAR 839-016-0020(2) requires a public works contract to have been formed precedent to application of the PWRs. Alternatively, even if a public works contract must exist, these parties argue that (1) public works contracts were formed between the District and CM/GCs prior to their agreeing to a guaranteed maximum price, and (2) public works contracts were not formed between the CM/GCs and subcontractors because neither party is a public agency.

Even assuming that OAR 839-016-0020(2) requires an enforceable public works contract to have been formed in order for the PWRs to apply,[7] there are at least two deficiencies in BOLl's arguments. Both deficiencies are based on inconsistencies between the agency's interpretations and the definition of "public works contract" in OAR 839-016-0040(2):

"[A]ny contract, *agreement,* or *understanding* ... into which *a public agency* enters into for any public work." (Emphasis added.)

The plain text of OAR 839-016-0040(2) precludes ruling that the contracts between the CM/GCs and subcontractors were public works contracts. A "public works contract" expressly contemplates a public agency as an indispensable contracting party. A contract existing solely between two private parties-even one involving a public works project lacks this requisite feature. The CM/GCs and subcontractors are private parties. Thus, the contracts formed between these parties were not public works contracts.[8]

The contracts between the District and the CM/GCs fit squarely within the definition of "public works contracts" in OAR 839-016-0040(2). The District fills the shoes of the requisite public agency. Moreover, the contracts fall within the rule's broad definition of "contract" as "any contract, agreement, or understanding." Notwithstanding BOLI's argument that the illusory promises doctrine undermined formal contract formation,[9] the court finds that the sequential and cooperative structure of the contracts, as well as the progressive dealings between the District and the CM/GCs during the design phase, evidence an "agreement" or "understanding" sufficient to constitute a public works contract under OAR 839-016-0040(2).

2. "Specifications"

BOLI argues that the PWRs were triggered when the CM/GCs advertised invitations to bid to the subcontractors, because this was the time at which "specifications were first advertised" within the meaning of OAR 839-016-0020(2). The agency asserts that "specifications" should be interpreted as "construction specifications," which the agency alleges are details related to specific information that describes how construction work is to be done. BOLI contends that the invitations to bid issued by the CM/GCs to the subcontractors contained construction specifications, but that the RFPs issued by the District to the CM/GCs did not. The agency does not consider the PWRs "specifications" and thus disputes that the inclusion of the PWRs in the RFPs was a triggering event.

The District and CM/GCs argue that "specifications were first advertised" under the rule when the District advertised the RFPs to the CM/GCs. These parties argue that BOLI's interpretation of "specifications" as "construction specifications" is inconsistent with OAR 839-016-0020(2), ORS 279.352(1), and other provisions that comprise the context of the regulation. These parties contend that the PWRs are "specifications" such that their inclusion in the RFPs was a triggering event. In the alternative, even assuming that "construction specifications" is a proper interpretation, the District and CM/GCs argue that the RFPs contained sufficient construction specifications for the PWRs to be triggered upon their advertisement.[10]

The court finds BOLI's alleged interpretation to be erroneous on at least three grounds. Like above, inconsistencies exist between an interpretation of "specifications" as "construction specifications" and the text and context of OAR 839-016-0020(2).

The plain text of OAR 839-016-0020(2) and ORS 279.352(1) indicates that the PWRs are triggered by the first advertisement of "specifications" for *a public works contract.* As described in the preceding section, the contracts between the CM/GCs and subcontractors were not public works contracts under the definition contained in OAR 839-016-0040(2). Thus, the CM/GCs' advertisement of specifications in their invitations to bid cannot be considered a triggering event because those specifications were for private contracts. Furthermore, it would be contrary to the rules of construction to interpret the first usage of "specifications" in OAR 839-016-0020(2) as referring to those for a public works contract, while interpreting the second usage as referring to those for a different contract.

In addition, OAR 839-016-0020(2) and adjacent subsections indicate that the PWRs are themselves specifications for public works contracts. The text of OAR 839-016-0020(2) is inclusive in nature: "[t]he specifications for every public works contract must contain a provision stating the existing prevailing rate of wage." This language suggests that the PWR provision is one among several specifications included within a public works contract. This reading is supported by the text of OAR 839-016-0020(3): "The provision described in subsection (2) must be included in all specifications for each contract awarded on a project." The text of OAR 839-016-0020(1)(e) and (f) further compel the same interpretation. Like OAR 839-016-0020(2), both subsections use the term "provision" to describe a specification for a public works contract. Subsection (e) requires public works contracts to include a "provision" mandating that workers are to be paid the prevailing rate of wage. Subsection (f) requires the inclusion of a "provision" governing the fee to be paid to the commissioner by contractors. Taken together, the text of these provisions compels the court to conclude that the PWRs are specifications within the meaning of OAR 839-016-0020(2). Accordingly, because the RFPs contained the PWRs, the triggering event was the District's advertisement of the RFPs to the CM/GCs.

Although the disposition of this case rests on the two preceding grounds, it is worth noting that the definition of "specifications" alleged by BOLI does not find support in OAR 839-016-0020(2) and adjacent subsections. As noted above, the agency would have the court define "specifications" as details related to specific information that describes how construction work is to be done. However, the specifications enumerated in OAR 839-016-0020 are plainly not construction-specific in nature. Subsection (1)(a) contains a specification that addresses indemnification. Subsection (1)(b) describes a specification that governs maximum weekly hours and overtime compensation. The specification in subsection (1)(c) imposes notice requirements on employers. Subsection (I)(d) includes a specification that provides for payment of medical services rendered to employees. The specifications contained in subsections (1)(e) and (f), (2), and (3) are all identified above. Finally. like subsection (1)(f), subsection (4) contains a specification that addresses the fee owed by contractors to the commissioner. In sum, the specifications contained in OAR 839-016-0020(2) are unanimously contrary to the construction-specific definition of "specifications" proffered by BOLI.

CONCLUSION

OAR 839-016-0020(2) is dispositive of this case. The Plaintiff's and Cross-Claim Defendants' interpretations of the operative terms "public works contract" and "specifications" comport with the text and context of the rule. Accordingly, the PWRs applicable to the contracts at issue were those in effect at the time Plaintiff initially advertised RFPs to the Cross-Claim Defendants: (1) the PWRs effective January 2002 applied to the elementary school projects, and (2) the PWRs effective July 2002 applied to the high school projects.

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (OJIN 37) is DENIED.

IT IS FURTHER ORDERED that Cross-Claim Defendants' Motion for Summary Judgment (OJIN 26) is GRANTED.

Mr. Jacobs shall prepare the judgment, which shall incorporate by reference this Opinion and Order.
Dated: October 12, 2006.

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Karsten H. Rasmussen, Circuit Judge

Footnotes

1 *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 610-13, 859 P2d 1143 (1993).

2 *Id.* at 611.

3 *Id.*

4 *Id.*

5 *Don't Waste Or. Comm. v. Energy Facility Siting Council,* 320 Or 132, 142, 881 P2d 119 (1994) *cited in ONRC Action v. Columbia Plywood. Inc.*, 332 Or 216, 221, 26 P3d 142 (2001).

6 *Id.* (internal quotations omitted).

7 Because the court concludes that public works contracts were formed between the District and the CM/GCs, the court refrains from addressing the arguments of those parties that the PWRs are triggered by an agency's solicitation for a public works contract rather than by formation of the contract itself.

8 The court's ruling in this case would remain unaltered even if the contracts between the CM/GCs and subcontractors were deemed to be public works contracts. In that event, the specifications for the contracts between the District and the CM/GCs would still have been advertised prior to those for the contracts between the CM/GCs and subcontractors. The PWRs would have applied upon the earlier advertisement.

9 Because the court concludes that public works contracts were formed between the District and the CM/GCs based on the text of OAR 839-016-0040(2), the court refrains from addressing the parties arguments regarding the applicability of the illusory promises doctrine to these contracts.

10 Because the court concludes that an interpretation of "specifications" as "construction specifications" is contrary to the text and context of OAR 839-016-0020(2), the court does not reach the argument posed by the District and the CM/GCs that the RFPs contained construction specifications to trigger the PWRs.