

## In This Issue:

July 2009

The Ohio Supreme Court has determined that the state's prevailing wage law only applies when a public authority spends public funds to construct a public improvement - and not when private projects are funded by both private and public funds.

## Ohio Supreme Court Restricts the Application of Ohio's Prevailing Wage Law

By Thomas M. Metzger and Wendy K. Clary

Ohio's prevailing wage law requires contractors for public improvement projects to pay workers the so-called prevailing wage in the locality where the project is to be performed. In order for a project to qualify as a *public improvement*, it must be constructed by or benefit a *public authority*. Examples of public improvements include roads, streets, buildings, water works, and any other project or structure constructed by or for a public authority.

### **Factual Background: *Northwestern Ohio Building & Construction Trades Council v. Ottawa County Improvement Corporation***

The Ohio Supreme Court recently considered the scope of Ohio's prevailing wage law in connection with a project by Fellhauer Mechanical Systems, Inc. ("Fellhauer"). Fellhauer is a private entity with a variety of operations, including a contracting business as well as a retail business. In its retail business, Fellhauer sells security systems, audio and video equipment, and related products.

For its retail business, Fellhauer sought to purchase a piece of property and office equipment, and also planned to renovate a portion of the building on the property. Fellhauer eventually secured both private and public funds to finance the project. Specifically, Fellhauer applied for public funding through Ottawa County, Ohio, which in turn filed an application for federal funds on behalf of Fellhauer from the Ohio Department of Development. Fellhauer ultimately received \$300,000 in public funding from the Ohio Department of Development, which was to be used to purchase the building, real property, and office equipment. In addition, Fellhauer received \$36,750 from the Ottawa County Improvement Corporation to finance the purchase. Fellhauer also secured private funding, a portion of which was used to finance renovation of the building, while the remainder was applied to the balance of the acquisition costs. Therefore, Fellhauer used public and private funds to finance the purchase of the property and equipment, and only used private funds to renovate the building.

The prevailing wage was not paid in connection with this project, and a dispute ensued. Specifically, Northwestern Ohio Building & Construction Trades Council, and Kevin J. Flagg (a state taxpayer), instituted an action seeking preliminary and permanent injunctive relief. The complaint asked the court to require the prevailing wage to be paid on the Fellhauer project.

### **The Decision from the Supreme Court of Ohio**

Before the case ultimately reached the Supreme Court of Ohio, both the trial court and the court of appeals held that the prevailing wage did not apply to the Fellhauer project. On appeal to the Supreme Court of Ohio, those arguing that the prevailing wage should apply to the project asserted that the prevailing wage requirements are triggered once an institution spends public funds to finance a project, regardless of whether there is construction of a public improvement.

The Supreme Court rejected this argument. Instead, the Supreme Court held that the prevailing wage obligation only applies to projects where a public authority, including an institution, uses public funds to construct a public improvement, which must be constructed by or benefit a public authority. Therefore, the Supreme Court held that the prevailing wage law did not apply to the Fellhauer project. In particular, the Fellhauer project did not involve a construction of a public improvement by or for a public authority. The funds benefited a private company, not a public authority, and the only part of the project that arguably involved construction was the renovation, which was paid for by private funds. In the end, the Fellhauer project was a private project paid for by private and public funds, and this was insufficient to trigger the obligations under the prevailing wage law. In the end, the Ohio Supreme Court explained that, if companies were required to pay the prevailing wage on private projects for which public funds were used, such a requirement would “unjustifiably expand the scope of the prevailing wage to include projects that are not public improvements, that are not constructed by a public authority, or that do not benefit a public authority.”

### **Implication of the Court’s Holding**

The Supreme Court has clarified that the prevailing wage law does not apply to private projects - even when those projects are partially supported with public funds. Significantly, this decision reverses Governor Ted Strickland’s September 2008 determination that all contractors using state funds should pay the prevailing wage. It is now clear that prevailing wages need not be paid in connection with private projects, even when some public funds were used for the project. Moreover, this clarification of Ohio law should encourage private development because it is now clear to developers that private projects will not be subject to the prevailing wage simply because they receive public funding for a portion of the project.

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