Opinion No. 66-120

November 7, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General George Richard Schmitt, Assistant Attorney General

TO: Mr. John F. Otero, State Labor Commissioner, State Labor and Industrial Commission, 137 East De Vargas, Santa Fe, New Mexico, Attention: R. M. Montoya Assistant to the Commissioner

QUESTION

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1. Are utility companies such as water, gas, light and telephone companies subject to the New Mexico Public Works Minimum Wage Act?

2. Does a construction contract between a utility company and the State or a political subdivision thereof, which involves the replacement or relocation of the utility company's facilities, fall within the provisions of the New Mexico Public Works Minimum Wage Act?

CONCLUSIONS

1. Yes, providing their contracts are of the type specified under the Public Works Minimum Wage Act.

2. No.

OPINION

*{*162}* ANALYSIS

The New Mexico Public Works Minimum Wage Act is to be found in Sections 6-6-6 through 6-6-10, N.M.S.A., 1953 Compilation as amended. Minimum wages as determined under the law are to be paid on all public works under the conditions prescribed in Section 6-6-6, supra. This statute states that applicable minimum wages must be paid:

". . . for every contract in excess of two thousand dollars ($ 2,000), to which the State or any political subdivision thereof is a party, for construction, alteration, demolition or repair, or any combination of these, including painting and decorating, of public buildings, or public works, or public roads of the state, and which requires or involves the employment of mechanics or laborers or both. . . ."

There is no exception in the Public Works Act that goes to utility companies. If they enter into a construction contract with the State or a political subdivision which meets the conditions set forth in Section 6-6-6, supra, such utility companies would be subject to the payment of minimum wages.

However, the type of contract described in your second question does not fall within the Minimum Wage Act because it is not for the construction, alteration, demolition or repair of public buildings, public works or public roads of the State, as is provided under Section 6-6-6, supra. Such an agreement merely involves the relocation or replacement of the facilities of the utility company at the project site. It is not a part of the actual construction of a public work under contract between the State or political subdivision and a general contractor.

This interpretation receives substantial support from the United States Department of Labor in its interpretation of the Federal Davis-Bacon Act, on which our law is modeled. In the United States Department of Labor Opinion DB-25 dated June 1, 1962, it was held "that where a public utility, in furnishing its own materials and equipment, is in effect extending its utilities system, the work performed is not subject to the aforementioned laws. And the same conclusion would apply where the utility company may contract out this work of extending its utility system." We are not concerned with an exception noted in the Labor Department's ruling above. This occurs when the facilities that are relocated become a part of the general construction contract and become the property of the State or political subdivision sponsoring the public works construction. This opinion, specifically, does not deal with that issue.

To sum up, we believe that utility companies are not exempt under the Public Works Minimum Wage Act. But, the law does not apply to a utility when the particular contract in question involves a relocation or a replacement of the facilities, owned by that company.