

☞ **07hr_JCR-AR_Misc_pt36d**



☞ Details: Complaint.

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2007-08

(session year)

Joint

(Assembly, Senate or Joint)

Committee for Review of Administrative Rules...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
(**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
(**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (August 2012)

**JT ROOFING, INC.,
GERALD T. THULL as President
of JT ROOFING, INC., and as
an individual,**

Plaintiffs,

v.

**WISCONSIN DEPARTMENT OF
WORKFORCE DEVELOPMENT, an
Executive Department of the State
of Wisconsin**

and

**ROBERTA GASSMAN,
Secretary of the Wisconsin Department
of Workforce Development,**

and

**ROBERT (BOB) ANDERSON,
Director of the Labor Standards Bureau,
Wisconsin Department of Workforce
Development,**

and

**JULIE ECKENWALDER,
Chief of Prevailing Wage Section,
Wisconsin Department of Workforce Development,**

and

**TERRENCE MOE,
Investigator, Prevailing Wage Section,
Wisconsin Department of Workforce Development,**

Defendants

THIS IS AN AUTHENTICATED COPY OF THE
ORIGINAL DOCUMENT FILED WITH THE DANE
COUNTY CLERK OF CIRCUIT COURT.

CARLO ESQUEDA
CLERK OF CIRCUIT COURT

08CV3636

Case No.: _____

CIRCUIT COURT
08 AUG 13 PM 2:17
DANE COUNTY, WI

STATE OF WISCONSIN)
) SS.
WASHINGTON COUNTY)

I, GERALD T. THULL, being first duly sworn on oath, states as follows:

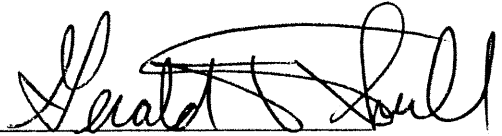
1. I am the principal owner, President and chief Executive Officer of JT Roofing, Inc. (JTR), a Wisconsin for-profit corporation organized pursuant to Chapter 180 Wis. Stats. JTR's principal place of business is 350 Tower Drive, Saukville, WI 53080.

2. On July 16, 2008, I was personally served a subpoena at my corporate offices, directing me to appear before some investigator of the Wisconsin Department of Workforce Development and produce an array of documents described in the subpoena, and answer questions, under oath or under legal compulsion, about those documents and the payments made to roofers and sheet metal workers employed by JTR and working on both public and private projects during the period July 1, 2008 – December 10, 2005. See Exhibit 9 to my Affidavit.

3. As President and CEO of JTR, as well as its principal owner, I am well aware that I am ultimately and formally responsible for the accuracy of all payroll records of JTR on all projects, public and private, that are electronically generated and maintained by the ForeFront software data system. However, operationally, on a day-to-day functioning business model, the task of accurately creating and maintaining such records and producing spreadsheet "downloads" or print-outs of those data upon appropriate request from any party, including state and federal government, has been entirely delegated to Nikki Jozowski, who has the responsibility of generating and maintaining all records of JTR's economic performance, especially revenues in, and costs out on all on-site construction projects, public and private.

4. Therefore, it was most unnerving and anxiety producing to be informed by JTR's outside litigation, Attorney David F. Loeffler, that Robert (Bob) Anderson, Director of the DWD

Labor Standard's Bureau told him to "tell your client that if any of the information (documentary or oral) he produces pursuant to the July 16, 1008 subpoena is wrong and not true, he has committed a crime." That disclosure continues to be anxiety producing to me.


Gerald T. Thull

Subscribed and sworn to before me
this 12 day of August, 2008.

Juan M. Sawa
Notary Public, Ozaukee County, WI
My Commission is/expires: 2/21/2010

**THE STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION**

STATE OF WISCONSIN

Ozaukee County

SUBPOENA

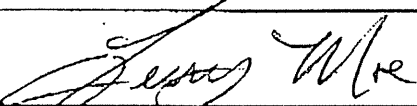
To: Gerald T. Thull
350 Tower Drive
Saukville, WI 53080

Complainant		Respondent	
Equal Rights Division Dept. of Workforce Development 201 E Washington Ave Madison, WI 53708		J.T. Roofing, Inc. c/o Gerald T. Thull 350 Tower Drive Saukville, WI 53080	
Location & Room Number		Date	Time
Ozaukee County Justice Center 1201 S. Spring Street Port Washington, WI 53074		July 24, 2008	11:00 AM

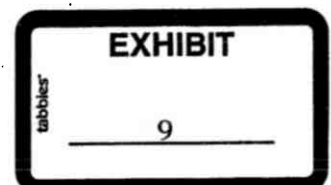
You are required to appear before the Department of Workforce Development on the date, time and place stated above, to give evidence in a controversy between the above named complainant and respondent, on the part of the Department. Failure to appear may result in punishment for contempt which may include monetary penalties, imprisonment and other sanctions. You are further required to bring with you the following papers and documents:

as listed on back of this subpoena and deliver them to Terry Moe or another Deputy of the Department.

This subpoena is issued pursuant to §103.005(5), (13), (14), Wis. Stats.

By: Signature of Department Deputy	Date of Subpoena
	July 9, 2008

The Department of Workforce Development is committed to serving anyone who has accessibility needs. If you do need assistance in using this service, please contact the Equal Rights Division at 201 E. Washington Ave., PO Box 8928, Madison, Wisconsin 53708, (608)266-6860.



The following seven requests apply to the entire period of April 1, 2006 through July 1, 2008. (Please note that this request applies to all work both private & public.)

1) Bring copies of all documents for all past and present employees including the following:

- A. Name and address.
- B. Date of birth.
- C. Starting and ending dates of employment.
- D. Time of beginning and ending of work each day.
- E. Time of beginning and ending of meal periods where they were deducted from the hours worked.
- F. Total number of hours worked per day and per week.
- G. Rate of pay and wages paid each pay period.
- H. The amount of and reason for each deduction from the wages earned for each pay period.
- I. Proof of wage payments received/cashed by the employee.

2) Bring copies of records identifying all public works projects subject to §66.0903, Wis. Stats. and §103.49, Wis. Stats. on which your company worked and list the prevailing wage rate determination number, the project name and the project location.

3) Bring copies of records identifying all employees who worked on each of the projects subject to §66.0903, Wis. Stats. and §103.49, Wis. Stats. on which your company worked including the job classification of each employee on each project and the date(s) and number of hours worked by each employee on the project.

4) Bring copies of all accounts receivable records for the noted period of time.

5) Bring copies of checks paid to all subcontractors with which your company contracted to fulfill its contracted work for all the projects subject to §66.0903, Wis. Stats. and §103.49, Wis. Stats.

6) Bring the name(s) and address(es) of any subcontractor(s) receiving the checks referred to in Request 5).

7) Bring copies of signed Agent or Subcontractor Affidavit of Compliance for any subcontractor(s) identified in response to request 5).

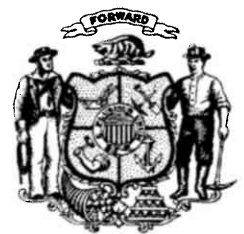
ALND06 0001470

Present these documents to Terry Moe or another Deputy of the Department. The Equal Rights Division will retain these documents until the investigation has been completed.

NAME	<u>HAN / [Signature]</u>
PLACE	<u>350 TWINER RD</u>
PERSONAL	<input checked="" type="checkbox"/> DESTITUTE
DATE	<u>07-16-08</u>
TIME	<u>3:12 PM</u>



WISCONSIN STATE LEGISLATURE



**JT ROOFING, INC.,
GERALD T. THULL as President
of JT ROOFING, INC., and as
an individual,**

Plaintiffs,

v.

**WISCONSIN DEPARTMENT OF
WORKFORCE DEVELOPMENT, an
Executive Department of the State
of Wisconsin**

and

**ROBERTA GASSMAN,
Secretary of the Wisconsin Department
of Workforce Development,**

and

**ROBERT (BOB) ANDERSON,
Director of the Labor Standards Bureau,
Wisconsin Department of Workforce
Development,**

and

**JULIE ECKENWALDER,
Chief of Prevailing Wage Section,
Wisconsin Department of Workforce Development,**

and

**TERRENCE MOE,
Investigator, Prevailing Wage Section,
Wisconsin Department of Workforce Development,**

Defendants

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ORIGINAL DOCUMENT FILED WITH THE DANE
COUNTY CLERK OF CIRCUIT COURT.

CARLO ESQUEDA
CLERK OF CIRCUIT COURT

CIRCUIT COURT
08 AUG 13 PM 2:17
DANE COUNTY, WI

08CV3636

Case No.: _____

STATE OF WISCONSIN)
) SS.
MILWAUKEE COUNTY)

I, DAVID F. LOEFFLER, being first duly sworn on oath, states as follows:

1. I am an attorney and a member in good standing of bars of the States of Wisconsin and Michigan, the United States Supreme Court, the United States Courts of Appeals for the 7th, 6th, 2nd Circuits, and the Circuit Court of Appeals for the District of Columbia, and the Federal District Courts of the Eastern and Western Districts of Wisconsin, Eastern and Western Districts of Michigan, Southern Eastern and Northern Districts of New York, and the Southern District of Indiana.

2. On June 24, 2008, I sent a letter to the Wisconsin Department of Workforce Development (DWD) proposing a settlement of any shortfall in payment of determined prevailing wages on the three state and municipal public projects upon which JTR performed on-site construction work, projects that were the focus of the DeFrancisco transaction, paragraphs 12-17 of the Jozwowski Affidavit and Exhibits 6(a) to 6(e). The settlement proposal also offered to provide to DWD weekly payroll records for roofers and sheet metal workers of the three projects upon which JTR was performing on-site construction work going forward. In exchange for this transfer of money (\$20,654.75 gross, \$18,739.17 net), and prospective record production, DWD would accept a non-admission clause and agree not to seek any additional sanctions for JTR's conduct occurring before execution of the settlement agreement and unconditional release. See pages 1-3 and 5 and the proposed settlement agreement and unconditional release, executed by me. Exhibit 10 to my Affidavit.

3. This letter was sent in response to the DWD directives to JTR of April 9, 2008 and May 14, 2008, to conduct look-back "self-audits," May 14, 2008 to December 10, 2005, and report the results of those audits to the DWD. See Exhibits 2 and 3 to the Jozwowski Affidavit.

4. The first response of the DWD to that settlement proposal was a sheriff's service of the July 16, 2008 personal and duces tecum subpoena on Gerald Thull, President of JTR at his corporate offices in Saukville, Washington County. No copy was ever provided to me, though my role as counsel to JTR was known to DWD as of June 25, 2008, at the latest. See paragraph 2 of the Thull Affidavit and Exhibit 9 to that Affidavit.

5. On July 17, 2008, I had a phone conversation with Robert (Bob) Anderson, Director of the Bureau of Labor Standards of the DWD. I expressed displeasure over the failure to receive any notice that the June 24, 2008 JTR settlement offer had been rejected, other than the "rejection" implied in the service by a sheriff of the personal and duces tecum subpoena on President Thull in his corporate offices on July 16, 2008. Director Anderson told me he "assumed" that I had been notified, an assumption that was incorrect. Director Anderson told me that he, Julie Eckenwalder, Chief of the DWD Prevailing Wage Section and Terrance Moe, an Investigator for the Prevailing Wage Section, had jointly participated in the decision to reject the JTR settlement proposal of June 24, 2008. I then asked him why the settlement proposal had been rejected and why a subpoena duces tecum of the breath, depth duration and of the July 16, 2008 subpoena had been issued, a subpoena asking for all payroll records for roofers and sheet metal workers on all private construction jobs, July 1, 2008 – April 6, 2008. As it happens, 2,333 private jobs were performed during that particular period, but I did not communicate that number to Director Anderson at that time. See paragraph 19, Jozwowski Affidavit. Director Anderson did not give me a direct answer as to why the June 24, 2008 settlement proposal was rejected, but as to the breath, depth and duration of the July 16, 2008 subpoena, he replied that

DWD had the power to “randomly” inspect, for no reason whatsoever, all employment payroll records of all Wisconsin employers whether they were working on municipal and state projects requiring payment of prevailing wage or on private construction projects not covered by prevailing wage norms, but covered by “regular” minimum wage, overtime provisions, child labor prohibitions and mandated rest periods. I told him that, in my view, that was simply not the law. Director Anderson then responded to both the matter of production of the outcome of the self-audits, May 14, 2008 to December 10, 2005, and to the content of documents produced pursuant to the July 16, 2008 subpoena duces tecum that, “I should advise my client” (thank you) that if any of the data produced was “wrong” or “not true,” “he would have committed a crime.” In context, it was not clear whether the masculine gender reference was to the corporation – JTR or to President Thull personally. I told Director Anderson that knowing, purposeful, intentional presentation of information that, ex post production, turned out to be not correct, was a necessary element of any prevailing rate crime in Wisconsin. The conversation ended abruptly there.

6. I received two letters from DWD, dated July 17, 2008. One informed me, post the service of the personal and duces tecum subpoena, that the settlement proposal of June 24, 2007 was “rejected.” Exhibit 11 to my Affidavit. The other, also dated July 17, 2008, expressed an agreement to extend the document production date to July 31, 2008, and Thull’s personal appearance to August 7, 2008. Exhibit 12. In a July 16, 2008 phone conversation with DWD Investigator Moe, I had asked for these extensions, but never explicitly promised unconditional compliance. In my letter to DWD of June 24, 2008, I had explicitly made clear that production of all documents under the April 9, 2008 and May 14, 2008 “self-audit” directives, covering the period of May 14, 2008 to December 10, 2005, was not going to be forthcoming. Pp. 4-5 of the June 24, 2008 letter, Exhibit 10 to my Affidavit.

7. On July 24, 2008, I sent another letter to DWD proposing amended terms for a full settlement and unconditional release of JTR: JTR would pay any agreed upon shortfall in prevailing rate on all 37 municipal and state public projects, from July 31, 2008 [sic] (July 1, 2008) to April 1, 2006, including the Craig High School project, the subject of the June 24, 2008 letter, the accounting period of the July 16, 2008 personal and duces tecum subpoena. JTR would produce all relevant payroll documents to permit an agreed-upon calculation of that shortfall, including addresses and social security numbers of the roofers and sheet metal workers working on-site on those construction projects, and "hard copies" of negotiated paychecks, checks now held in the electronically maintained record systems of JTR's depository banks. Pp. 8-9 of Exhibit 13, the July 24, 2008 letter, and paragraph 20 of the Jozwowski Affidavit. JTR also proposed to produce all payroll records on all municipal and public projects the firm was working on and would be working on, going forward, not just the three projects identified in the letter of June 24, 2008. P. 9 of Exhibit 11, the July 24, 2008 letter. Again, the letter of July 24, 2008, made it clear that the proposal was contingent upon DWD accepting a non-admission of liability clause in the settlement agreement and an agreement that DWD would not seek additional sanctions for JTR's conduct on public or private projects ex ante the date of execution of the settlement. Pp. 8-9, Exhibit 13 to this Affidavit.

8. The letter of July 24, 2008 was explicit that JTR would not comply with the July 16, 2008 personal and duces tecum subpoena, or the April 9 and May 14, 2008 directives to conduct look-back "self-audits," May 14, 2008 to December 10, 2005, and report the results to DWD. See p. 9 of the July 24, 2008 letter, Exhibit 13 to this Affidavit.

9. On July 30, 2007, I received a letter from the DWD rejecting the first amended proposal of July 24, 2007 because of a claimed unreliability of the payroll data in Exhibits 1, 4 and 5 to the Jozwowski Affidavit, Schedules A, B & C accompanying the original June 24, 2007

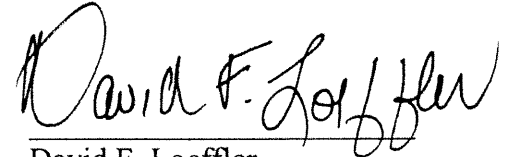
proposal and an absence of information on payroll data on some 2,568 private projects (see paragraph 19, Jozwowski Affidavit), undertaken during the July 1, 2008 – December 10, 2005 accounting period. Exhibit 14 to this Affidavit, pp. 1-2. The letter also treated the documents accompanying the June 24, 2008 letter, Exhibits 1, 4 and 5, Schedules A, B and C accompanying that letter, and the content of Exhibits 1 and 13, the letters of June and July 24, 2008, offered in support of a compromise settlement, as admissible “admissions” of liability justifying rejection of the settlement proposal. See Exhibit 14, p. 2.

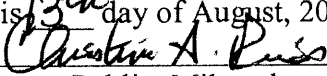
10. On August 7, 2008, I responded to the DWD’s July 30, 2008 rejection of the July 24, 2008 amended proposal. Exhibit 15. The second amended proposal of August 7, 2008, offered to pay the prevailing rate shortfall on all public projects, municipal and state, on which JTR performed on-site construction work during the period July 1, 2008 to December 10, 2005, and to provide payroll records related to on-site roofers and sheet metal workers performing work on those sites, identical to the payroll records provided in support of the two previous settlement offers, Exhibits 1, 4 and 5 in the Jozwowski Affidavit, Schedules A and C accompanying the initial settlement proposal of June 24, 2008; to provide weekly payroll records to DWD on all municipal and state public projects going forward, and to reinforce this agreement by entering into a judicially approved and enforced consent decree. Exhibit 15, pp. 3, 8-9 and 11. This proposal was contingent on DWD’s acceptance of a non-admission clause in the settlement and agreement that DWD would not seek additional sanctions for DWD’s conduct, ex ante execution of that settlement agreement. The August 7, 2008, letter also set forth reasons why enforcement of the July 16, 2008 personal and duces tecum subpoena, and the April 9 and May 14, 2008 look-back “self-audits” were not “reasonable orders” within the meaning of Section 103.005 6(a) 6(e) Stats, because the social cost of enforcement, in this case, exceeded the social benefit of obtaining information, through compulsion, that could not otherwise be obtained

voluntarily, without the cost of compulsion, and that the probability was low that information that could be obtained only through compulsion would disclose conduct imposing substantial social cost. Exhibit 15, p. 4, p. 4 fn 9, pp. 5-10, p. 10 footnote 24. The August 7, 2008 letter responded to the DWD's claim that the data contained in Schedules A-C accompanying the June 24, 2008 letter, Exhibits 1, 4 and 5 to the Jozwowski Affidavit were unreliable. Exhibit 15, pp. 2-4. The August 7, 2008 letter asserted that payroll information on 2,568 private jobs (98% of the total jobs upon which JTR worked during the accounting period July 1, 2008 – December 10, 2005. See Jozwowski Affidavit, paragraph 19), was not relevant to the claim that JTR did or did not comply with prevailing wage norms on municipal and state public projects. Exhibit 15, pp. 4-6. The August 7, 2008 letter also asserted that the data provided in Schedules A-C accompanying the June 24, 2008, settlement proposal, Exhibits 1, 4 and 5 to the Jozwowski Affidavit, was not admissible evidence because in any adjudicative proceeding, the information was offered for the purposes of settlement. The same exclusion attached to any statements about payroll data on the Craig project in my letters of June 24, 2008 and July 24, 2008. See Exhibit 15 at pp. 8-9. See also pp. 1-5 and 8-10, letter of July 24, 2008, Exhibit 13, and pp. 1-5 of Exhibit 10, the letter of June 24, 2008. See Section 904.08 Wis. Stats.

11. The August 7, 2008 letter was explicit that JTR would not comply with the July 16, 2008 personal and duces tecum subpoena or the April 9, 2008 or May 14, 2008 look-back "self-audits" if the second amended proposal was also rejected. Exhibit 15, pp. 10-11.

12. No response has been received from the DWD to the second amended settlement proposal as of the date of the filing of this Complaint seeking to enjoin enforcement of all compulsory process issued.


David F. Loeffler

Subscribed and sworn to before me
this 13th day of August, 2008.

Notary Public, Milwaukee County, WI
My Commission is/expires: 11/20/11

126109/2008038-0

7111 West Edgerton Avenue
P.O. Box 28999
Milwaukee, WI 53228-0999
Phone 414.423.1330
FAX 414.423.1694

KRUKOWSKI & COSTELLO s.c.

VIA FEDERAL EXPRESS (608-266-0028)

June 24, 2008

Krukowski & Costello, S.C.
Attorneys at Law

Thomas P. Krukowski
Timothy G. Costello
Robert J. Bartel
Kevin J. Kinney
David F. Loeffler
Mark A. Johnson
M. Pia Torretti Gekas*
Deborah A. Krukowski
Daniel J. Finerty
Dean F. Kelley
Brian M. Radloff
Timothy C. Kamin
Keith E. Kopplin
Emily Rupp Anderson
* Not licensed in Wisconsin

Terry Moe
Investigator
Construction Wage Standards Section
Department of Workforce Development
Equal Rights Division
201 E. Washington Avenue, #407
Madison, WI 53702

Re: Response to Information Requests of May 14, 2008 and Self-Audit Report Requested on April 9, 2008

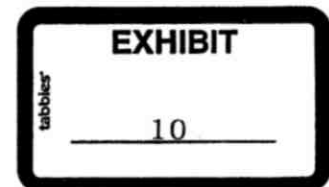
Dear Mr. Moe:

I am outside litigation counsel for JT Roofing, Inc.

Enclosed is a proposed Settlement Agreement and Conditional Release – a proposed agreement between JT Roofing, Inc., and the Wisconsin Department of Workforce Development (“DWD”), which JT Roofing, Inc., hopes will resolve a current dispute over payment of the determined prevailing rate on municipal and state public works projects arising under Sections 66.093 and 103.49 Wis. Stats.

In the view of JT Roofing, Inc., the Settlement Agreement will accomplish one of the basic objectives of the prevailing rate regulatory system – optimal enforcement of the norms of that legislative economic stimulus program.

By “optimal enforcement,” I mean substantial compliance with the legitimately determined prevailing rate, at the least aggregate cost – the sum of enforcement administrative costs, costs to the employer which costs can impose disemployment costs on the firm’s employees, and cost to the taxpayers who ultimately finance public works projects as defined in the statute. Optimal



FILE COPY

Terry Moe
June 24, 2008
Page 2

enforcement is a background goal of the prevailing rate regulatory system generally, and in this particular case.¹

Under this settlement proposal, JT Roofing, Inc., a subcontractor to JP Cullen & Sons, Inc., on the Craig High School, Janesville School District Project – Project No. 2786² – would make payments to identified Roofers and Sheet Metal workers who worked on the Craig High School project from April 28, 2006 to June 23, 2008, in the individual sums specified by means of checks prepared, but not yet distributed.³ The total hours worked daily and weekly, straight time and overtime on the Craig project by each Roofer and Sheet Metal worker are set forth in Attachment C.⁴

The aggregate amount to be transferred is \$19k rounded to the nearest thousand dollars.⁵

The precise calculation for each individual Roofer and Sheet Metal worker – the sum of base wages plus fringes pursuant to the terms of the individual employment contracts between JT Roofing and each worker is set forth in Schedule B to the proposed Settlement Agreement and Unconditional Release.⁶ Schedule A sets forth the payments made to each worker in each relevant pay period in which worked, gross pay, deductions, net pay.⁷ Exhibit B records the information on the check that will be distributed to each named individual upon execution, by both parties, of the proposed Settlement Agreement and Unconditional Release.⁸

All the information in Schedules A, B & C, and Exhibit B, has been “downloaded” on to “hard copy” from the electronically created and maintained regular payroll business records of JT Roofing, Inc., related to work on the Craig High School project.

The information provided does not include any hours worked on non-public works projects (private projects) as you requested in sub-paragraph (2) of your May 14, 2008 letter. This is because the overtime provisions of Section 66.0903(1)(f)(3)(am)(dm)4(a) and Section 103.49(1)(c)(2)(2m), and DWD 290.05, apply only to work performed on a public works project

¹ Optimal enforcement as the background goal of the prevailing rate regulatory system: See Kruczek v. Department of Workforce Development, 278 Wis.2d 563, 574-578, ¶¶ 12-23, 585-586, ¶ 42 (Ct. App. 2004), emphasizing the relative costs and benefits to employees, employers and taxpayers generally of various modes of enforcement.

² See Exhibit A.

³ See Schedules A, B & C, attached to the proposed Settlement Agreement and Unconditional Release. See also paragraphs 1 and 2 of the proposed Settlement Agreement and Unconditional Release.

⁴ See Attachment C.

⁵ See Attachment C.

⁶ Schedule B.

⁷ Schedule A.

⁸ See paragraphs 1 and 2 of the proposed Settlement Agreement and Unconditional Release.

Terry Moe
June 24, 2008
Page 3

within the meaning of each statute. The statutes, and the administrative rules consistent with statute apply only to the stimulus elements of public works programs, payment of compensation above market-clearing rates, rents if you will, that have a net stimulus effect at macro-economic levels. Kruczek v. Department of Workforce Development, 278 Wis.2d at 585-586 ¶ 42 (Ct. App. 2004).

JT Roofing, Inc., agrees to continue to provide payroll information in the manner in which information has been provided in Schedules A, B & C, and Exhibit B on Roofers and Sheet Metal workers continuing to work on the Craig High School and on three state public works projects for which it has been awarded contracts in the manner in which information has been provided to date on the Craig High School project.⁹ JT Roofing will continue this information, in that form, until roofing and sheet metal work on those projects is completed.¹⁰

Upon the transfer of these payments described in paragraphs 1 and 2, and the continuing transfer of payroll information in the manner described in paragraphs 4-7 on the Craig project and the 3 state projects identified, and prospective payment of the determined prevailing rate for Roofers and Sheet Metal workers going forward on the Craig project, and the 3 state projects,¹¹ DWD will give JT Roofing, Inc., an unconditional release from all liability of any kind under Sections 66.093 and 103.49, and will not initiate any form of enforcement action, under those statutes, in relation to any conduct on any municipal and state project upon which JT Roofing, Inc., performed any work prior to the date of execution of the Settlement Agreement and Unconditional Release.¹²

In my view, mutual execution of this proposed Settlement Agreement and Unconditional Release will achieve optimal regulatory law enforcement. Roofers and Sheet Metal workers will be paid the total compensation rate determined by the DWD to be "prevailing" in the relevant labor market areas [This is a determination not accepted as being legitimate by JT Roofing, Inc., but that issue can be by-passed by execution of this Agreement]. Enforcement and administrative costs are minimal; there is no additional cost to taxpayers [JT Roofing, Inc., bid the job as a subcontractor to JP Cullen at the labor cost initially incurred, sans the prospective transfers described in paragraphs 1-6 of the proposed Settlement Agreement]. There will be no employment loss arising from a potential debarment of JT Roofing, Inc. This is optimal regulatory law enforcement.¹³

⁹ Paragraphs 4-7 of the proposed Settlement Agreement and Unconditional Release.

¹⁰ Paragraphs 4-7 of the proposed Settlement Agreement and Unconditional Release.

¹¹ See paragraph 7 of the proposed Settlement Agreement and Unconditional Release.

¹² See paragraph 9 of the Proposed Settlement and Unconditional Release.

¹³ Kruczek v. Department of Workforce Development, 278 Wis.2d at 574-579 ¶¶ 12-23, 585-586 ¶ 42 (Ct. App. 2004).

Terry Moe
June 24, 2008
Page 4

Of course, conspicuous by its absence is any look-back self-audit conducted by JT Roofing, Inc., and the reporting of the results of that audit as you requested in your letter of April 9, 2008.

There is no explicit provision in Sections 66.093, 103.49 or DWD 290, mandating look-back self-audits under any circumstances. And I notice that you cited no statutory provision or Chapter 227 administrative rule legitimizing such an enforcement device in your letter of April 9, 2008. The one DWD 290 rule you do cite, 290.04, simply says, "you may pay the total compensation embedded in a legitimately determined prevailing rate (basic rate plus fringes) in a cash payment of basic on-the-check wage plus a translation of fringe contributions paid as an hourly rate incremental add-on." No talk of look-back audits. In fact, the statutes don't prescribe any period for payroll record retention.

I don't mean to put to fine a point on this because administrative rule DWD 290.13(2), which you don't cite, requires payroll records to be maintained for three years. This rule is functionally related to the debarment Sections 66.093(10)(a) and 103.49(7) in which a final "finding" of a violation of payment of the appropriate prevailing wage or overtime rate for work on a public works project within three years of commencement of the debarment proceeding is a necessary condition of debarment.

Therein lies the rub. There has been no "finding," within the meaning of Section 66.093(12)(a) or 103.49(7), that JT Roofing, Inc., has violated any substantive payment provision of the statute.

Such "finding" for the purposes of look-back audits, to unearth information justifying the heavy sanction of debarment, requires either a Section 109, Wisconsin Wage Claim and Collections Act violation of either the 66.093 or 103.49 payment provisions in an action prosecuted by the DWD in Circuit Court or an internal adjudicating proceeding, or an action brought in the courts by the short-changed worker.¹⁴

There was no adjudication of liability under Chapter 109. JT Roofing, Inc., just paid the amount requested - \$3,118.07 - and that was that. A optimal enforcement transaction.

There is no basis for a look-back audit to generate information indicating that JT Roofing, Inc., is a recidivist violator of 66.093 or 103.49, subject to debarment. The only statutory justification for three-year record maintenance, and look-back audits is as a prelude to a debarment proceeding. But DWD can't conduct what is effectively random audits to achieve that objective.

¹⁴ Kruczek v. Department of Workforce Development, 278 Wis.2d at 572 ¶¶ 5-6, 580 ¶ 29, 580 n. 6 ¶ 28, 583-584 ¶ 36, 581 ¶ 26, 583-584 ¶ 36, 684-585 ¶ 39 (Ct. App. 2004); Habermehl Electric, Inc. v. State Department of Transportation, 260 Wis.2d 466, 473 ¶ 5, 475 ¶ 18 (Ct. App. 2003).

KRUKOWSKI
& COSTELLO, LLC

Terry Moe
June 24, 2008
Page 5

There must be a previously adjudicated violation within three years of the requested audit. JT Roofing, Inc., is not even a first-time adjudicated violator of either statute within a three year period preceding your request.

So full circle. We request that DWD execute the proposed Settlement Agreement and Unconditional Release and end this matter with a net social benefit conferred: Determined prevailing rates have been paid and will be paid going forward;¹⁵ no further enforcement costs or increased public project cost to taxpayers; no prospective loss of employment for the employees of firm who might be subject to a debarment action.

Very truly yours,

KRUKOWSKI & COSTELLO, S.C.


David F. Loeffler
dfl@kcllegal.com

Enclosures

cc: Jerry Thull (w/encs.)
Robert G. Pyzyk (w/encs.)

125420/2008038-0

¹⁵ JT Roofing, Inc., does not admit that the relevant "determined" prevailing rates were properly determined under Section 66.093(1)(a)(cm), g 1. 2. or 103.49(1)(bs)(d) 1 and 2, and DWD 290.08.

SETTLEMENT AGREEMENT AND UNCONDITIONAL RELEASE

Now comes JT Roofing, Inc., by its attorney David F. Loeffler, and the Wisconsin Department of Workforce Development by _____, and mutually agree:

1. JT Roofing, Inc., will pay to each of its employees identified on attached Schedules A, B & C, the sums set forth on those schedules, immediately upon execution of this Settlement Agreement and Unconditional Release.

2. JT Roofing, Inc., has provided copies to the Department of Workforce Development ("DWD") of the electronically created and maintained records of the negotiable instruments (checks) by which this transfer will be made. These checks shall be distributed to each named employee on the schedule upon execution of this Agreement.

3. JT Roofing, Inc., will provide DWD with copies of the negotiated (canceled) checks within a week of receipt by DWD.

4. JT Roofing, Inc., will provide DWD with payroll records, as defined in Section 66.0903(10)(a) and (b) Wis. Stats. related to all work performed on the Craig High School – Janesville School District project no. 2786 from April 28, 2008 forward, including hours worked on that Craig High School project, and other regular payroll information of the company electronically maintained as regular business records, indicating each employees classification as indicated in the determination of April 25, 2007, the rate of pay of total compensation – basic wage rate plus benefits – gross total compensation, and net total compensation paid. See attached Schedules A, B & C, and Exhibit B. This information will be provided by JT Roofing, Inc., to DWD, in the manner set forth on attached Schedules A, B & C, and Exhibit B, as the information is generated in the regular payroll information system of JT Roofing, Inc.

5. JT Roofing, Inc., will pay to the workers classified in the April 25, 2007 Craig High School – Janesville School District project no. 2786, determination no. 2007-00719, as “Roofer of Waterproofer” total compensation – base wage rate plus cash value of fringe benefits, as indicated on attached Schedules A, B & C. JT Roofing, Inc., will pay to all workers classified in the Craig High School – Janesville School District project no. 2786 as “Sheet Metal Workers” total compensation – base wage rate plus cash value of fringe benefits, as indicated on attached Schedules A, B & C, from the date of execution of this Agreement to completion of work on the project.

6. JT Roofing, Inc., will also provide all the payroll information required by Section 103.49(5) on the following state financed projects upon which JT Roofing, Inc., has been awarded a contract as a prime contractor: Multi-Building IRMA Roof Replacement University of Wisconsin-Madison project no. 07CIR; Multi-Buildings EPDM Roof Replacement project no. 07CIS; Kolf Roof Recoating project no. 06D2A; Kolf Roof Recoating Project no. 06D2A. This payroll information will be the same information described in paragraph 5 relating to the Craig High School – Janesville School District project no. 2786: Regular payroll information electronically maintained as regular business records of JT Roofing, Inc., which will indicate hours worked by each worker on each of the described state projects, the rate of pay for each classification described in the relevant prevailing rate determination, the total gross compensation and total net compensation paid – total compensation being basic wage rate plus the cash value of fringe benefits. See attached Schedules A, B & C. The relevant prevailing rate determinations are Multi-Buildings EPDM Roof Replacement determination for Roofer of Waterproofer and Sheet Metal Workers, of December 27, 2007, determination 2007-01477; Multi-Building IRMA Roof Replacement determination for Roofer or Waterproofer and Sheet

Metal Workers of December 27, 2007, determination 2007-01478; Kolf Roof Recoating determination for Roofer or Waterproofer and Sheet Metal Workers of May 16, 2006 determination no. 2006-00789.

7. The payroll information described in paragraph 6 will be provided as the information is generated in the regular payroll information system of JT Roofing, Inc.

8. JT Roofing, Inc., does not admit that the firm has violated any provision of Section 66.093 or 103.49 relating to the payment of prevailing wage on any municipal or state project.

9. DWD agrees that upon execution of this Settlement Agreement and Unconditional Release, and substantial compliance with its terms by JT Roofing, Inc., going forward on the projects described, DWD will release JT Roofing, Inc., for all liability under Sections 66.093 and 103.49, and will not commence any further enforcement action related to these projects or any other municipal and state projects upon which JT Roofing, Inc., performed any work prior to the date of execution of this Settlement Agreement and Unconditional Release.

Dated: 6/24/08

JT ROOFING, INC.

By: David F. Loeffler
David F. Loeffler, Esq.
Attorney for JT Roofing, Inc.

Dated: _____

THE WISCONSIN DEPARTMENT
OF WORKFORCE DEVELOPMENT

By: _____

Jim Doyle
Governor

Roberta Gassman
Secretary

Jennifer A. Ortiz
Division Administrator



EQUAL RIGHTS DIVISION

201 E. Washington Ave., Rm. A300
P.O. Box 8928
Madison, WI 53708
Telephone: (608) 266-6860
Fax: (608) 267-4592
TTY: (608) 264-8752
<http://www.dwd.state.wi.us/>

State of Wisconsin
Department of Workforce Development

July 17, 2008

Attorney David F. Loeffler
7111 West Edgerton Avenue
P.O. Box 28999
Milwaukee WI, 53228-0999

Dear Attorney Loeffler:

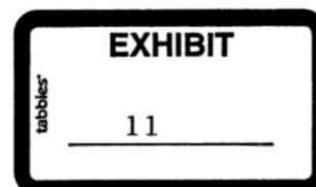
The Department of Workforce Development rejects the "Settlement Agreement and Unconditional Release" that was proposed with your letter dated June 24, 2008.

Feel free to call me at 608-266-0028 if you have any questions regarding this matter.

Sincerely,
LABOR STANDARDS BUREAU

A handwritten signature in black ink, appearing to read 'Terry Moe', is written over the typed name.

Terry Moe
Prevailing Wage Investigator
Construction Wage Standards Section



Jim Doyle
Governor
Roberta Gassman
Secretary
Jennifer A. Ortiz
Division Administrator



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State of Wisconsin
Department of Workforce Development

July 17, 2008

Attorney David F. Loeffler
Krukowski & Costello, S.C.
7111 West Edgerton Avenue
P.O. Box 28999
Milwaukee WI, 53228-0999

Re: Department of Workforce Development (DWD) – Equal Rights Division Subpoena
of J T Roofing, Inc. (Gerald Thull, Owner) dated July 9, 2008 and served on July
16, 2008

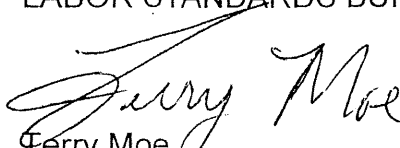
Dear Attorney Loeffler:

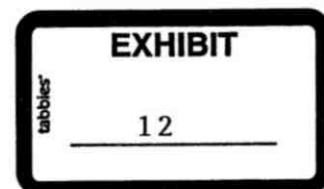
This letter is a follow-up to our telephone conversation today and stipulates date
changes and revisions to the subpoena noted above.

1. J T Roofing, Inc.'s records described in the subpoena, will be mailed to the
Department of Workforce Development-Equal Rights Division for receipt on or
before **July 31, 2008**.
2. Request # 4 on the subpoena is revised to exclude private accounts receivable
records.
3. The date of the subpoena is extended to **August 7, 2008** for the owner Gerald
Thull to appear, at a location to be determined, to answer questions if needed.

You may call me at 608-266-0028 if you have any questions regarding this matter.

Sincerely,
LABOR STANDARDS BUREAU


Terry Moe
Prevailing Wage Investigator
Construction Wage Standards Section



File: LS200704575, LS200801498, LS200802028

7111 West Edgerton Avenue
P.O. Box 28999
Milwaukee, WI 53228-0999
Phone 414.423.1330
FAX 414.423.1694

Krukowski & Costello, S.C.
Attorneys at Law

Thomas P. Krukowski
Timothy G. Costello
Robert J. Bartel
Kevin J. Kinney
David F. Loeffler
Mark A. Johnson
M. Pia Torretti Gekas*
Deborah A. Krukowski
Daniel J. Finerty
Dean F. Kelley
Brian M. Radloff
Timothy C. Kamin
Keith E. Kopplin
Emily Rupp Anderson
** Not licensed in Wisconsin*

KRUKOWSKI & COSTELLO S.C.

VIA FEDERAL EXPRESS (608-266-6860)
July 24, 2008

Terry Moe
State of Wisconsin
Department of Workforce Development
201 E. Washington Avenue, Room A300
Madison, WI 53703

Re: Settlement Proposal of June 24, 2008, of J. T. Roofing, Inc. and DWD Subpoena to J. T. Roofing, Inc., Personally Served by Sheriff's Service of July 16, 2008

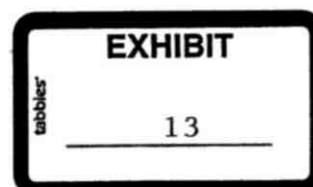
Dear Mr. Moe:

Although you sent me two separate letters dated July 17, 2008, the content of these communications is of a piece so I will respond with a single letter.

On June 24, 2008, I sent you a 5 page letter with three schedules and two exhibits, totaling 76 pages, relevant to the issues of payment of the determined rate of prevailing wage (base pay plus fringes) for journeyman quality roofing/sheet metal work on the Craig High School project, No 2786 – a municipal determined prevailing wage project, 200700719.

This letter and the documents were offered in support of a settlement proposal of J. T. Roofing, Inc. (JTR), by the terms of which 20-21 sheet metal workers would have received an individual share of some \$19k in net aggregate total compensation for the period April 19, 2008 through May 31, 2008 – in addition to the total compensation already paid to them during that period.

Moreover, JTR proposed a system for providing the DWD Labor Standards Bureau, and its Prevailing Wage Section, with payroll information derived from its electronically created and maintained payroll data system on the Craig High School project and on 3 other prevailing rate projects, state and municipal, for which JTR had received public contracts. JTR promised to generate this information and transmit the data to DWD, on its initiative and at its cost, without any further requests from the Prevailing Wage Section or Labor Standards Bureau of DWD.



FILE COPY

Terry Moe
July 24, 2008
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This proposal arose out of the DeFrancisco transaction involving one sheet metal worker of 122 workers employed on 3 separate prevailing rate projects in the relevant period. Those projects generated an aggregate payroll of \$870k. So DeFrancisco was barely 1% of the workforce, and the additional \$3k paid was about 4 hundredths of 1% of a total payroll which included payments to DeFrancisco.

On December 10, 2007, DeFrancisco filed a Section 109.01(3) & (4) and 109.09(1)(2)(a) wage claim for \$10,300 (rounded) with DWD, the validity of which was never adjudicated, or admitted by JTR. Nor did JTR enter into any sort of consent agreement with DWD with respect to DeFrancisco's filed claim, LS200704575. JTR simply made its own assessment of the compensation paid to DeFrancisco on these prevailing rate jobs and paid him 20% net of what he originally asked for, \$2,400 or \$3,000 gross or 30% of his initial demand rounded, and that was the end of it with respect to the substance of his prevailing wage claim. There was no admission of a shortfall. JTR just got the matter over with at low cost. The Labor Standards Bureau and its Prevailing Wage Section fully accepted this non-adjudicated resolution of DeFrancisco's specific claim.

But that was not the end of the matter, overall, with the Labor Standards Bureau and its Prevailing Wage Section.

On April 9, 2008, and again on May 14, 2008, you, on behalf of the Labor Standards Bureau and its Prevailing Wage Section, ordered JTR to conduct a "self-audit" of all compensation payments on all municipal and state prevailing rate projects from April 9, 2008 to December 5, 2005 – a period of more than 2 years (Section 109.09(1)).

The proposal of June 24, 2008, was a response to that order of April 9, 2008.

On July 16, 2008, some 3 weeks after Labor Standards and Prevailing Wage branches of DWD received the JTR proposal, JTR got an answer, of sorts: A sheriff served a personal and documentary subpoena on JT Thull, President of the Company, demanding the production of an array of records on both municipal and state prevailing rate projects on which JTR was awarded public contracts, and on all private projects performed by JTR, looking back from July 31, 2008 to April 1, 2006.

So your letter dated July 17, 2008, and received by me on July 21, 2008, rejecting the June 24, 2008 proposal was hardly news.

Terry Moe
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Your letter states no reasons for the rejection. You ask me to call you if I have "any questions regarding this matter." Well, my question is, why was this proposal rejected? Please give me reasons, and give me those reasons in writing. I do not intend to get into a "he said – he said" exchange with you over the reasons for rejection of the proposal, which would have put \$19k in the hands of 20-21 sheet metal workers, and provided the relevant branches of the DWD with timely, detailed information, at no cost to the Bureau or the Department, on JTR's compliance with the determined prevailing rates on municipal and state public projects.

A phone exchange is not a particularly useful method for exploring the reasons for rejection of a comprehensive settlement proposal or the possibilities of an alternative settlement. That was demonstrated by my conversation with Bob Anderson, Director of the Labor Standards Bureau on July 17, 2008, the day following the Sheriff's service of a subpoena on the President of a Company who, as the Bureau and Department knew, from June 25, 2008 forward, was represented by counsel for over a month previous.

Mr. Anderson acknowledged familiarity with the June 24, 2008 proposal. He "assumed," incorrectly as it turned out, that I had been informed of the rejection of that proposal before service of the July 16, 2008 personal and documentary subpoena. A small matter.

What wasn't (and isn't) a small matter are the "reasons" Mr. Anderson gave for service of a subpoena of the scope, depth and duration of a July 16 subpoena, in light of the fact that, as of July 16, 2008, there was no adjudication, admission, consent decree, or active complaint identifying any violation of the municipal or state prevailing wage statutes by JTR, within two years of July 16, 2008. Nor was there any adjudication, admission, consent decree, or complaint related to any violation of the minimum wage, overtime, rest-time, or child labor provisions of Chapter 103 Wis. Stats. by JTR on any private work site – potential violations mentioned by Mr. Anderson.¹

Mr. Anderson was quite clear about this. The lack of determined or admitted prior violations, or present complaints, didn't matter a whit. Under Chapter 103, the Bureau of Labor Standards, acting on behalf of DWD, could "randomly" subpoena records and the person of any employer in the state, and the magnitude of the subpoena could well equal the scope and duration of the subpoena issued to JT Thull and his company. And that was that. The settlement proposal had

¹ De Francisco had made another Section 109.01(3) & (4) and 109.04(1)(2)(a) claim for failure to pay overtime at the appropriate rate on a private construction project at the Flambeau Paper Mill. LS 200704576. JTR found an advertent miscalculation of hours worked – he worked more hours than he claimed – and with no ado, paid him \$180.00 – end of the matter from the DWD perspective, as well. See Ms. Mickey letter of January 18, 2008. 33 sheet metal workers worked on this project generating a total payroll of \$79k. The claimed shortfall is less than two hundredths of 1% of the total payroll. This ratio defines trivality.

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no relation to the power to “randomly” subpoena persons and documents to the extent embodied in the subpoena of July 16, 2008, to Thull and his Company.

An “order” – and that’s what the July 16, 2008 personal and documentary subpoena is – based on an assertion of an unqualified power to randomly and broadly search persons and firms under Section 103.005(5)(13) & (14) is not a reasonable or lawful order within the meaning of Section 103.005(6)(a) and 103.005(6)(e) Stats, let alone Sections 1 and 11 of Article I of the Wisconsin Constitution, and the 14th Amendment to the Federal Constitution which imposes the restrictions of the 4th and 5th Amendment to the Federal Constitution on the State of Wisconsin Executive Departments, such as DWD. Sec. 15.22 Stats.

The June 24, 2008 proposal was offered in the name of optimal law enforcement of the Prevailing Rate statute – most output, in terms of payment of the determined prevailing rate, for the least input, in terms of the cost of investigation, enforcement litigation, and cost to the employer, a cost that could have disemployment effects for his workforce – hardly a goal of the stimulus policy which underlies the Prevailing Rate statutes.

Put another way, the Prevailing Rate statutes were enacted against a background premise of efficient enforcement. Each enforcement effort should be pursued only to the point where the marginal benefit of compensation enhanced is at least equal to, or, one would hope, greater than the aggregate marginal social cost of enforcement to construction workers and taxpayers, the consumers of public projects. That’s a simple statement of “reasonableness” within the meaning of Section 103.005(6)(a) and (6)(e), putting to one side, for now, the “reasonableness” standards of Section 1 and 11 of Article I of the Wisconsin Constitution, and the 14th Amendment to the Federal Constitution.

An enforcement policy of “random,” not targeted, issuance of broad personal and documentary subpoenas, is not efficient, optimal enforcement, in a world of limited resources. The DWD appropriation (and budget) for enforcement of the state and municipal prevailing rate statutes and the private labor standards provisions of Chapter 103 is not infinite. Allocation decisions must be made by DWD. To reject random searches as unreasonable and require some evidence of current or past violation, adjudicated, admitted, or complained of, as a condition of issuance of broad subpoenas is to allocate scarce enforcement resources efficiently – in a manner that will most likely yield a net of social benefits above social costs.

It does not take much imagination to predict the response by the Department of Administration and the Office of the Governor (let alone the appropriate legislative committees), to a DWD budget request incorporating a policy of random, rather than targeted enforcement of the relevant labor standards statutes.

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To reign this particular enforcement effort in from an obviously unreasonable reach, resting on a claim of a power to randomly "search" via personal and documentary subpoenas, I ask the Bureau of Labor Standards to modify the subpoena to exempt private construction projects of JTR, July 31, 2008, looking back to April 1, 2006 from its scope. The number of those projects is, as you would expect, exponentially greater than the public projects to which the prevailing rate applies. Of 2,370 jobs in this period, only 38 are covered by the state and municipal Prevailing Rate statutes (2%).

This request is not a concession that the subpoena is otherwise reasonable, given the absence of adjudicated violations, admissions, agreement to consent decrees, and even current complaints with respect to JTR compliance with those prevailing rate statutes. That's a matter for another day. But, to get a workable grip on the reasonableness of the enforcement orders in play, the subpoena should be restricted to the public projects to which the state and municipal Prevailing Rate statutes apply.

A slight digression. JTR did not subcontract to second or third subcontractors any of the roofing/sheet metal construction work it was awarded by public or private owners in the July 31, 2008 – April 1, 2006 period. So paragraphs 5 through 7 of the July 16, 2008 personal and documentary subpoenas are not relevant. No such information exists because no second and third tier subcontractor relationships with JTR existed.

The July 17, 2008 conversation with Mr. Anderson also generated information specific to the rejection of the June 24, 2006 settlement proposal, information that is useful in considering whether any amended settlement proposals might be acceptable.

Mr. Anderson stated that the offer to settle at \$19k, allocated among the named individuals in the amounts indicated in Attachments A through C, was not acceptable because the Bureau of Labor Standards could not "match" the data in the proposal to the data requested in the subpoena.

With the exception of the (1) names and addresses and dates of birth of the identified workers, information not relevant to the proposal to fill the gap between compensation paid and the determined prevailing rate (without admitting the legitimacy of the determined prevailing rate or the magnitude or reasons for the shortfall, if any), and (2) canceled checks as further evidence of payments made during the accounting period, all the data set forth in Schedules A through C are all the data that exist, embedded in the JTR electronically created and generated payroll accounting system. (Obviously, JTR will provide available canceled checks for the period of April 19, 2008 through May 31, 2008, "matching" the payments indicated to each individual, if that is what it takes to settle this matter now. Names and addresses too).

Terry Moe
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JTR employs a software system with the trade name Forefront, licensed from Dexter and Chaney. This is a system designed for construction company payroll accounting, taking into account the culture of the construction workforce which is, well, "not into" executing or keeping paper records. As the phrase goes, much construction work is "always on wheels," moving from site-to-site in relatively short time horizons.

Here is how it works at JTR. On each project, a Crew Management Leader is assigned by highest management at JTR – JT Thull. The Crew Management Leader is, functionally, the front-line supervisor on that job, although he also works with his hands. On very large jobs, a crew leader or lead man is assigned, who assists the Crew Management Leader in hands-on supervision, since the Crew Management Leader has more general supervisory management functions and regular interaction with the owners on these larger projects.

One of the basic tasks of the Crew Management Leader, who is always on-site, is to observe all hours worked by each member of the crew, from start to end of the daily work turn.

The Crew Management Leader then records these hours by an on-site method that works for him. He literally "calls in" to a designated payroll administrator, the hours worked daily by each on-site roofer/sheet metal worker, start-to-finish of the work turn. He makes that call, daily, right at the end of the daily work turn.

All hours on the site, or hours "on the clock," as it were, are hours "called-in" daily by the Crew Management Leader, excluding a ½ hour lunch break, "off the clock."

The payroll administrator immediately enters that individualized information into the Forefront digitalized (computerized, if you prefer) information system. A matter of a few key strokes.

All the other relevant payroll information for each roofer and sheet metal workers has already been entered into the system: Classification; total base compensation, per hour.

JTR does not pay separate fringes. The firm does not contribute to ERISA multi-employer benefit plans because the terms of employment are not established by a collective bargaining agreement. No deductions for union dues or assessments. There are "programmed" relevant employment tax deductions and other individually specific deductions.

The Forefront system then generates each worker's weekly gross and net earnings through an application of the simple algorithm programmed into the system: hourly base compensation multiplied by hours worked, less relevant deductions.

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The roofer receives a check for the weekly net.

All that information is displayed in Schedules A and C to the June 24, 2008 letter. The documentary Schedules are "downloaded" spreadsheets of information electronically embedded in the Forefront software system, with respect to work performed on the Craig High School project, No. 2786. What you see on Schedules A and C is all you get in available payroll information, electronically created, maintained and retrieved at JTR. Except for the canceled checks, which JTR would gladly provide to "tie-down" the numbers on Schedules A and C, if settlement is a viable possibility. The subpoena will produce no more relevant documentary payroll information that is available on the ground.

To reject the settlement proposal because of inadequate information as set forth in Schedules A-C, with respect to the Craig High School project, is unreasonable and arbitrary within the meaning of Section 103.005(6)(a) & (6)(e) Stats. The information provided in Schedules A and C is information fully embedded in JTR's "computerized" payroll system – a regularly maintained business record.² The spreadsheets are the only documents, in the world, that capture that information.

The endgame of the conversation with Labor Standards Bureau Chief Anderson revealed that the reason for the rejection of the June 24, 2008 proposal was not solely any inadequacy in the numbers set forth in Schedules A-C offered in support of the proposal. The other reason was that JTR had not performed the broad, not well-defined, "self-audit" on state and municipal projects looking back, more than two years, from April 9, 2008 to December 5, 2005. See your letter of April 9, 2008.

The conversation circled around to the orders to JTR of April 9 and May 14, 2008, to conduct comprehensive "self-audits" of total compensation paid on both state and municipal public projects from April 9, 2008 looking back more than two years to December 5, 2005.

² Schedule B is the laborious efforts undertaken by JTR to translate the determined prevailing rate of the Craig project, No. 200700719, into a hourly total compensation number equal to the hourly aggregate prevailing rate. The aggregate payment of \$54.72 is the full load hourly compensation rate (base wage plus the dollar value, expressed as an hourly rate, of various "fringes" and educational payments identified in the determined prevailing rate). This hourly rate sets the "ceiling" that allows determination of the alleged prevailing rate shortfall of \$19k, which JTR proposes to pay, without admitting the legitimacy of the determined rate on the Craig High School project. If there is some trouble with the arithmetic in Schedules A-C, JTR will freely discuss that matter en route to a settlement. But that is not a matter justifying the breath of the July 16, 2008 subpoena.

Terry Moe
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With respect to that order, I indicated to Director Anderson that it's range and duration were unreasonable in light of the absence of any adjudicated, admitted violation, consent decree, or even complaint of violation of the Prevailing Rate statutes. The ordered "self-audit" was a random search.

Director Anderson agreed. But strongly asserted that random searches of any Wisconsin employer were permitted by Sections 66.0903(1) and 103.49(5) Stats., 103.005(5)(a) and 14(a) and (e).

I disagreed. Then Director Anderson, charmingly, instructed me to advise "your client" that if any of the information supplied to the DWD in a self-audit was "wrong," or if he just refused to do a self-audit, the client would have committed a "crime." I responded that that wasn't the law and all conversation ended, abruptly. Director Anderson's entire affect in this exchange was one of pique over JTR's resistance to the "self-audit" program.

In my view, the provisions of Section 66.0903(11)(b) 1, 2, 4, 5, Section 103.49(6m)(b)(d) and (e), Section 946.15(2) require, as an element of criminal liability, that the employer actively, and knowingly filed false statements, or knowingly induced the workers to accept less than the "prevailing rate" as a condition of employment.

But that is not a matter we have to lawyerup and resolve now. What is clear from Director Anderson's attitude and performance is that the "self-audit" program is a euphemism for issuance of compelled process – functionally a subpoena issued at lower cost to the DWD. That kind of process is not enforceable unless "reasonable," under the circumstances, within the meaning of Section 103.005(6)(a) and (e), Section 1 and 11 of Article I of the Wisconsin Constitution, and 14th Amendment of the Federal Constitution, incorporating and applying to the DWD, the 4th and 5th Amendments to the Federal Constitution. As matters stand, all outstanding process issued by DWD is unreasonable in scope, depth and duration in the absence of a prior adjudication of a violation by JTR, within the last three (3) years, of the Prevailing Rate statutes or any Labor Standards statutes; an admission of violation within that time period, a court enforced consent decree relating to past violations, or current complaints. Random searches, motivated, in part, by irritation at resistance to "self-audits," are not "reasonable," within the meaning of the relevant legal norms.

JTR would still like to negotiate a settlement of this dispute. Using the methodology that created Schedules A and C to the proposal of June 24, 2008,³ JTR stands ready to pay any shortfall from the determined prevailed rate on all state and municipal projects, covered by the Prevailing Rate

³ See pp. 5 to 7, supra.

KRUKOWSKI
& COSTELLO..

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statutes, from July 31, 2008 to April 1, 2006. That number would include the \$19k on the Craig High School project embedded in the June 24, 2008 settlement proposal.


JTR would produce and transmit to DWD payroll information on all covered state and municipal public projects on which the firm has contracts in the manner described in paragraphs 2-7 of the June 24, 2008 settlement proposal.

By making this second settlement proposal, JTR does not admit to any violations of the Prevailing Rate statutes or any Labor Standards statutes. JTR does not admit that the determined prevailing rate, on any of the state or municipal public projects on which it had or has contracts, during the period April 6, 2006 and forward from this date, were legitimately determined.

It would be helpful if DWD could respond to this second settlement proposal as soon as possible. JTR will make no response to the documentary subpoena of July 16, 2008, until that response is received.

Very truly yours,

KRUKOWSKI & COSTELLO, S.C.



David F. Loeffler
dfl@kclegal.com

cc: Bob Anderson, Director Labor Standards Bureau (via Federal Express – 608-266-3345)
Julie Eckenwalder, Chief, Prevailing Wage Section (via Federal Express – 608-267-2495)

Department of Workforce Development
Equal Rights Division
P.O. Box 8928
Madison, WI 53708-8928
Telephone: (608) 266-6860
Fax: (608) 267-4592
TTY: (608) 264-8752



State of Wisconsin
Department of Workforce Development
Jim Doyle, Governor
Roberta Gassman, Secretary
Jennifer A. Ortiz, Division Administrator

July 30, 2008

Atty. David F. Loeffler
Krukowski & Costello, S.C.
P.O. Box 28999, 7111 W. Edgerton Ave.
Milwaukee, WI 53228-0999

RE: JT Roofing, Inc – LS200802028

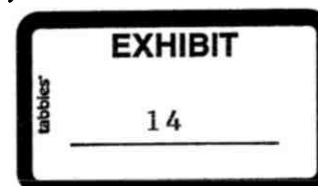
Dear Mr. Loeffler:

Thank you for your letter dated July 24, 2008.

As a prevailing wage investigator, one of my job responsibilities is to investigate prevailing wage complaints filed with the Equal Rights Division. Last year, Christopher DeFrancisco filed such a complaint alleging that JT Roofing underpaid him on three prevailing wage projects. The case was assigned ERD Case #LS200704575 and I was assigned to investigate it. One of the outcomes of LS#200704575 case was that Jerry Thull stated, "...we have concluded that Christopher DeFrancisco was not paid correctly for hours worked on 3 prevailing wage jobs." Mr. Thull attached a spreadsheet with his calculations and a check. Because JT Roofing did not pay DeFrancisco the correct prevailing wage rates at the time he performed the work, JT Roofing violated state prevailing wage laws.

As the April 9, 2008 self-audit letter to JT Roofing stated, contractors who violate the prevailing wage rate laws are required to both conduct a self-audit and complete weekly payroll report forms for work being performed on current public works projects. DWD's authority for directing self-audits is found under §109.11(1)(b), Stats. DWD's authority for the weekly payroll reports is found under the employer recordkeeping and records inspection requirements §66.0903(10), Stats., §103.49(5), Stats., and Wis. Admin. Code §DWD290.14(2), among others.

Another job responsibility of prevailing wage investigators is to conduct on-site visits to projects covered by the state's prevailing wage laws. I am assigned to make these visits in the southern part of Wisconsin. On-site visits involve interviewing employees to confirm hourly rates of pay and their conformity with the project's prevailing wage rate determination. In follow-up to the on-site visit, payroll records may be requested of the employer. On May 9, 2008, I conducted an on-site visit to Craig High School (Prevailing Wage Rate Determination #200700719). When I chose to visit Craig High School, I was unaware that JT Roofing was a contractor on the project. On May 9th, I interviewed about 8 individuals working for 3 contractors including employees of JT Roofing.



The follow-up request for records for the Craig High School project was assigned ERD case #LS200801498 and sent to JT Roofing on May 14, 2008.

So, while you have chosen to merge together the DeFrancisco case and the Craig High School on-site visit case, in fact, the two were separate cases generated by unrelated circumstances.

Your settlement proposals have been rejected because the law does not permit DWD to settle for less than the prevailing wage rate listed on the appropriate prevailing wage rate determination. DWD cannot verify the accuracy of JT Roofing's calculations without the records that JT Roofing repeatedly was asked to produce and which by law it is required to maintain. My understanding is that Labor Standards Bureau Director Robert Anderson communicated this to you, along with a discussion about the source of DWD's subpoena authority, in a telephone conversation earlier this month.

Through your letters, JT Roofing has demonstrated that it underpaid at least 21 of its employees on the Craig High School project in the amount of at least \$20,654.75. JT Roofing does not need DWD's consent to compensate its employees what is required by law. JT Roofing should immediately pay its employees correctly on this project.

Your letters allude to JT Roofing not accepting "the total compensation rate determined by the DWD to be 'prevailing'." I am not sure what you mean by this. However, any appeal of either the "Initial Determinations" or a specific project determination has long expired. You are welcome to call me to discuss the annual prevailing wage rate survey and how rates are determined.

I have been generous in granting extensions to JT Roofing with regard to each of the aforementioned cases and the subpoena (with the representation by both you and Mr. Thull that you were complying with the requests). Despite this, JT Roofing has not complied with any of these outstanding requests.

In your July 24th letter, you stated that JT Roofing did not subcontract any work on public works projects during the period April 1, 2006 through July 31, 2008. DWD accepts that as your response to Subpoena Requests 5 – 7. However, the subpoena will not be modified to exempt private construction projects. Without those records, DWD cannot determine either the accuracy of JT Roofing's wage calculations or its representations about its public work.

JT Roofing must comply with the subpoena dated July 9, 2008 (and revised in consultation with you in my letter dated July 17, 2008) by providing the requested records to me by **August 7, 2008**. Because this is yet another extension of the time available to JT Roofing, I hope that Mr. Thull will make himself available without further process if there are any questions about the submitted records.

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If you do not respond completely to each of the remaining subpoena requests 1 – 4 by the deadline date, we will take appropriate legal action. As you know, if you believe JT Roofing's subpoena violates the law, then your remedy is to seek to quash it in the appropriate legal forum.

Sincerely,
LABOR STANDARDS BUREAU


Terry Moe
Labor Standards Investigator
(608)266-0028

7111 West Edgerton Avenue
P.O. Box 28999
Milwaukee, WI 53228-0999
Phone 414.423.1330
FAX 414.423.1694

Krukowski & Costello, S.C.
Attorneys at Law

Thomas P. Krukowski
Timothy G. Costello
Robert J. Bartel
Kevin J. Kinney
David F. Loeffler
Mark A. Johnson
M. Pia Torretti Gekas*
Deborah A. Krukowski
Daniel J. Finerty
Dean F. Kelley
Brian M. Radloff
Timothy C. Kamin
Keith E. Kopplin
Emily Rupp Anderson
* Not licensed in Wisconsin

KRUKOWSKI & COSTELLO S.C.

VIA EMAIL ONLY (terry.moe@dwd.state.wi.us)
August 7, 2008

Terry Moe
Prevailing Rate Investigator
State of Wisconsin
Department of Workforce Development
201 E. Washington Avenue, Room A300
Madison, WI 53703

Re: Enforcement of the July 16, 2008 Personal and Duces Tecum Subpoena and ERD Case No. LS-2007-04575 (April 9, 2008 Letter Moe to Thull on Three Public Works Projects); ERD Case No. LS-2008-01498 (May 14, 2008 Letter Moe to Thull, Craig School Project); ERD Case No. LS-2008-02028 (July 30, 2008 Moe Letter to Loeffler – Project Unidentified)

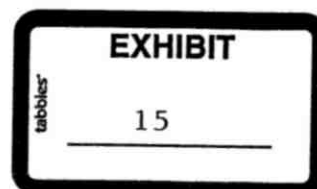
Dear Mr. Moe:

I take it that the DWD Labor Standards Bureau is choosing not to exercise the power conferred by Sections 109.11(1)(a) and (c) and (2)(a) to settle any Municipal or State Public Project Prevailing Wage disputes with JT Roofing, Inc. (JTR). That's unfortunate.

But, let's be clear as to exactly what JTR's settlement proposal is, and exactly why DWD is rejecting JTR's initiative.

The initial proposal of June 24, 2008 was to pay an aggregate gross of \$20,654.75 (net \$18,739.17) to, as you put it, "at least" 21 roofer/sheet metal workers who worked the Craig School municipal project during the accounting period you identified in your May 14, 2008 look-back production specific to the Craig Project.

That proposal was rejected in a one sentence reply of July 17, 2008.



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The second JTR proposal of July 24, 2008 offered to pay the entire agreed-upon shortfall "on all state and municipal projects covered by the Prevailing Rate Statutes, including the Craig School project, July 1, 2008 – April 1, 2006, the time horizon of the July 16, 2008 subpoena.¹ This proposal, like the proposal of June 24, 2008, contained no admissions of violations of the statutes. Just the opposite: an explicit non-admission clause the proposal also would "cap" sanctions at the shortfall period. These were settlement proposals to end the matter voluntarily and promptly with quick transfers to the workers at a time when some fiscal stimulus is quite in order. As such, the content of the two proposals cannot be used as substantive evidence of any violation of the Prevailing Rate Statutes in any adjudicative proceeding. Section 904.08.

I take it DWD has rejected this expanded proposal, as well, although you ignore its specific terms in your letter to me of July 30, 2008.

The basic conflict is over the depth, breath and duration of the July 16, 2008 subpoena, reaching both public and private projects with a look-back from July 1, 2008 to April 1, 2006, and the breath and duration of the April 9, 2008 and May 14, 2008 orders to conduct look-back "self-audits" for the period of April 9, 2008 to December 10, 2005.²

Your letter suggests that a subpoena of this magnitude is necessary because JTR has not maintained employment payroll records in the manner required by the Prevailing Rate statutes and the relevant Administrative Code provisions.³ See paragraphs 2 of p. 1, and paragraph 3 on p. 2 of the July 30, 2008 letter to me.

That is simply not true. DWD has no evidence that the payroll records have not been maintained in the manner required by the relevant statutes and DWD Administrative rules. Quite the contrary. Accompanying the settlement proposal of June 24, 2008, were Schedules A & C, downloaded spreadsheets from the regularly created and maintained business records of JTR – records created and maintained electronically – digitally – hardly an innovation.

The full sequence of how information flows from the job-site to the ForeFront software system and on to the spreadsheets was fully described in my letter of July 24, 2008, pp. 5-7, Schedules A & C to the June 24, 2008 settlement proposal.

¹ See Loeffler to Moe letter of July 24, 2008, pp. 8-9.

² On self-audits see Section 109.11(b).

³ Section 66.093(10)(a), Section 103.49(5)(a), DWD 290.13(2)(a) 1, DWD 290.14(2)(a)1.

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It doesn't get any better, in terms of reliability of the information, than those spreadsheets, which, ironically, you accept as having "demonstrated that (JTR) underpaid at least 21 of its employees of the Craig High School project in the amount of at least \$20,654.75." Suddenly, the same kind of records, provided for the period July 31, 2008 – April 1, 2006 (which JTR has offered to provide in pursuit of settlement) becomes unreliable evidence of hours worked, and compensation in fact paid by JTR in that period, and you need an additional, exponential increase in records from private projects as well to insure reliability? So much for the "demonstration," through these records, of a shortfall on the Craig project, I guess.

In any event, no matter how many pieces of spreadsheet information JTR produces for the subpoena and self-audit duration period, July 1, 2008 to December 10, 2005, as evidence of payroll records of work performed on municipal and state projects, the data will have the same reliability as the data supplied to DWD on Schedules A and C accompanying the June 24, 2008 proposal.

The amended settlement proposal of July 24, 2008 offered the ForeFront software system data, downloaded on spreadsheets, as evidence of hours worked, and compensation paid on "all state and municipal projects, covered by the Prevailing Rate statutes, from July 31, 2008 [sic] to April 1, 2006."⁴ JTR now extends the look-back period to December 10, 2005, to cover the duration of the "self-audit" order as well.

JTR also offered, and continues to offer, to produce the names and addresses of roofers/sheet metal workers and canceled/negotiated checks as evidence of transfers to those workers who worked on all municipal and state public projects, July 1, 2008 – December 10, 2005.⁵

In your letter to me of July 30, 2008, you make absolutely no mention of the data offered – data which would allow you to "verify the accuracy of JT Roofing's calculations," which you claim you cannot do on the data offered by JTR in support of the proposed settlements, without the necessity of compelled process.⁶

That's all the data there is in the world as to who worked what hours, when, and was compensated how much for work performed on all municipal and state public projects July 1, 2008 – December 10, 2005, the accounting period for DWD's July 16, 2008 subpoena, and the April 9, 2008, and May 14, 2008, self-audit directives.

⁴ Last paragraph of p. 8, first paragraph of p. 9 of the Loeffler to Moe letter of July 24, 2008. The duration of the production should be July 1, 2008 to April 1, 2006.

⁵ Last paragraph p. 5 of the Loeffler to Moe letter of July 24, 2008.

⁶ Moe letter of Loeffler of July 30, 2008, p. 2, paragraph 3.

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Your statement that JTR is unwilling to produce this information, sans subpoena, relevant to the claim of potential municipal and state public project prevailing wage shortfalls, July 1, 2008 – December 10, 2005, is observably false.⁷

Nonetheless, DWD continues to insist that JTR produce the same payroll information on all private projects on which roofers/sheet metal workers worked July 1, 2008 – April 1, 2006, because “DWD cannot determine either the accuracy of JT Roofing’s wage calculations or its representations about its public work.”⁸

At the very least, the information sought by subpoena should be relevant to a claim of violation of the public project prevailing wage and overtime norms, and, if produced pursuant to subpoena, advance the determination in either direction as to whether such violation has or has not occurred.⁹

⁷ Loeffler to Moe letter of June 24, 2008, pp. 2-3, 5, paragraphs 1-7 of the proposed Settlement Agreement of June 24, 2008, Schedules A-C accompanying the June 24, 2008 proposal. Loeffler to Moe letter of July 24, 2008, last paragraph p. 5, last paragraph p. 8, and last paragraph p. 9.

⁸ Moe to Loeffler letter of July 30, 2008, p. 2, penultimate paragraph. I understand this to mean that DWD wants the payroll information on private jobs, in and outside of the state of Wisconsin, which private jobs exceed the public jobs by a factor of about 47 (56 public, 2,568 private, 16 of which were out of state), in order to determine the accuracy of JTR records maintained on Wisconsin public jobs. This, at least, focuses the active dispute differently than Bureau Director Anderson presented the issue in our phone conversation of July 16, 2008. It was his position that DWD had an unqualified right to subpoena any private project payroll records (in-state or out-of-state), of any Wisconsin employer, randomly (a general warrant as it were), to determine whether the employer was paying the minimum wage, or required overtime, not hiring child labor, or exceeding maximum hours of labor in a work week or any other statutory labor standard enforced by DWD, regardless of whether there was a complaint outstanding, previous adjudication or admission of liability or violation, or Court approved consent order regulating the employer’s behavior going forward. I replied that was not the law, in my view. The DWD’s claim on the private records, now, is that private project data is necessary to determine the reliability of JTR’s Wisconsin municipal and state public project payroll records, and that is the issue I will address. Nikki Jozwowski, the JTR employee responsible for generation and maintenance of all economic data of JTR, will testify to the “numbers.”

⁹ The standard of “reasonableness” imposed on DWD orders (such as the subpoena of July 16, 2008, and the ordered self-audits of April 9, 2008 and May 16, 2008), by Section 103.005(6)(a) and (e) is a function of a straightforward calculus: Is the cost of the subpoena enforcement (here, the direct cost to the firm with a derivative cost to public project owners, taxpayers, and employees of the firm, including the subpoenaed executives and to the judicial process, greater than the product of the probability that a violation of some magnitude cannot be discovered by less costly alternative means, and the aggregate social cost of that potential undiscovered violation, all as indicated by the admissible evidence at hand. A simple equation captures the relationships: The subpoenas should be enforced, if, and only if, B (total cost of enforcement < PL, a probability that only full enforcement of the broad subpoena will yield evidence of a potential violation multiplied by a reasonable estimate of the aggregate cost of that potential but undiscovered violation). Kruczek v. Department of Workforce Development, 278 Wis. 2d 563, 574-578 ¶¶ 12-23, 585-586 ¶ 42 (Ct. App. 2004). See Posner, Economic analysis of Law, (6th Edition) Section 29.1 pp. 711-712 (2003), Posner, Rethinking the Fourth Amendment, 1981 Supreme Court Review 49, 71-80 (1981). So, the

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Section 904.01 defines relevant information as data which makes the existence of material fact (here violation of the prevailing rate and overtime provisions), more or less probable, than would be the case without the evidence.¹⁰

Let's work through the relevance of the demand for payroll records on all private projects, in and out of the state of Wisconsin, to the proposition was there a violation of prevailing rates on the municipal and state public projects?

Assume that the data shows that JTR was in compliance with all state and federal minimum wage and overtime provisions "on private construction projects."¹¹

Is that "relevant" to the issue of whether it is more or less probable than JTR complied with the much higher "prevailing rate" on public jobs, or paid the appropriate overtime premium on that higher base rate? No. JTR could have run a two-track, two-tier compensation system depending on who was paying the bills. The data broadly sought on private projects does not advance the inquiry at issue, in either direction on these assumptions. Hence, the subpoena does not generate relevant information, a minimal condition of the legitimacy of imposing the costs entailed in production pursuant to the July 16, 2008 subpoena.¹²

requirement of "relevance" to the matter at issue is a minimal requirement of "reasonableness" of the order to produce, within the meaning of Section 103.005(6)(a) & (e).

¹⁰ Section 904.01 definition of "relevant evidence:"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

¹¹ Not hard to do with respect to the state minimum wage of \$6.50 per hour, or the federal minimum of \$6.55 per hour effective July 24, 2008. See Schedules A-C to the June 24, 2008 JTR proposal.

Is that "relevant" to the issue of whether it is more or less probable than JTR complied with the much higher "prevailing rate" on public jobs, or paid the appropriate overtime premium on that higher base rate?

¹² See Footnote 9, supra. See also, U.S. Supreme Court cases requiring relevance of the data sought as a necessary condition of administrative, investigative subpoena enforcement. U.S. v. Morton Salt Co., 338 U.S. 631, 642, 652-654 (1950); Oklahoma Press Publishing v. Walling, 327 U.S. 186, 195-196, 206-209, 213, 216-217, 203 n. 30 (1946); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 507-510 (1943).

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Now assume that the private job data does show widespread state and federal minimum wage and overtime violations. Yes, this information would be minimally relevant to the claim that JTR was violating compensation norms on public projects. If an employer violates labor standards in one product market, he might well violate even more generous compensation requirements in another market. But, of course, the subpoenaed data on compensation on the public jobs is even better evidence of the employer's performance on those jobs. And, what if that data showed complete compliance with prevailing rate norms? Again, requiring JTR to generate huge quantities of paper about performance on more than 2,500 private jobs does not significantly advance the inquiry about performance on Wisconsin public jobs in either direction. At best, imposition of a large cost on JTR generates only cumulative evidence, which should not be admissible, in any case, in any adjudicative proceeding.¹³

So, it is just not the case that generating payroll information about 2,568 private market jobs, July 1, 2008 – December 10, 2005 yields, accurate, meaningful, relevant evidence as to whether JTR paid prevailing rate and the appropriate overtime premium on 56 public works jobs in the period July 1, 2008 – December 10, 2005, the matter at issue by the terms of the July 16, 2008 subpoena and the April 9 and May 14 orders to conduct “self-audits.”

The demand for information on all private jobs (all 2,568 of them), July 1, 2008 – December 10, 2005, is arbitrary and oppressive and not “reasonable” within the meaning of Section 103.005(6)(a) and (6)(e).¹⁴ JTR requests that, at the least, DWD remove from the July 16, 2008 subpoena demand, information for payroll records on all 2,568 private jobs, including 16 out-of-state projects or during the period July 1, 2008 – December 10, 2005.

As indicated, coherent concept of the Section 103.005 (6)(a) and (e) requirement of the “reasonableness” of an administrative subpoena and order to “self-audit” – both administrative orders to behave in a certain way – looks at the relative cost/benefit ratios of enforcement and non-enforcement of the order. In this case, the social cost of requiring JTR to produce 27 months of payroll data on 2,624 public and private jobs worked in the period July 1, 2008 looking back to December 10, 2005.¹⁵ This calculus is simply a restatement of the JTR position that Section 103.005(6)(a) and (e) codify the norm of optimal law enforcement: The marginal

¹³ 904.03 exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. (emphasis added). Although relevant, evidence may be excluded if its probative value is substantively outweighed ... by considerations of ... waste of time or needless presentation of cumulative evidence. (emphasis added).

¹⁴ See footnote 9, supra.

¹⁵ Kruczek v. Department of Workforce Development, 278 Wis. 2d at 574-578, ¶¶ 12-23, 585-586, ¶ 42 (Ct. App. 2004), Posner, Economic Analysis of Law (6th Edition) Section 29.1, pp. 711-712 (2003); Posner, Rethinking the Fourth Amendment, 1981 Supreme Court Review at 71-83 (1981). See footnote 9, supra.

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social benefit of each enforcement initiative should be greater than, or at least equal to, the marginal social cost of that initiative.¹⁶

The social cost of enforcement in this case is substantial. The immediate direct cost to JTR of generating 27 months of payroll data on over 2,624 public and private jobs during the period July 1, 2008 – December 10, 2005 is reliability estimated at \$23,000 by Nikki Jozwowski, the relevant JTR employee. Direct cost is the sum of the opportunity cost of employee time committed to this project, plus the production cost of “downloads” of the data from the ForeFront software payroll system. An additional, not easily quantifiable direct cost is not only the opportunity cost to CEO Thull of appearing with the documents and explaining their content. Thull will also experience the emotional cost imposed by the DWD position that if any of the data submitted or explained are “wrong,” a crime has been committed. That is the view of Bureau Director Anderson in any event. The derivative social cost is the estimated cost of broad, look-back, self-audits, and subpoenas, an anticipated cost embedded in all bids for public projects financed by taxpayers, not only for JTR, but for all employers, if enforcement of these subpoenas, under these circumstances, is the enforcement norm for DWD. Since the cost of compliance is effectively an increase in labor cost, and prevailing rates are mandated, total employment will decline, by some magnitude, as JTR and all other employers seek productivity gains to offset the increased potential enforcement costs. Some employers will simply decline to bid on public projects, a move which can increase the cost of the projects to taxpayers because of the reduction in the number of suppliers in the product market, as well as causing loss of jobs.

Now all these enforcement costs may be justified, if exceeded by the cost of non-enforcement.

But, that’s not the case here. There is simply no evidence, now available to DWD, that it is probable that JTR is a purposeful, systemic or recidivist violator of the Public Project Prevailing Rate statutes.

The only established failure to pay prevailing rate on public project jobs is the \$3,118.07 (gross), \$2,424.83 (net) paid to DeFrancisco, a shortfall quickly acknowledged by JTR.¹⁷

¹⁶ See Loeffler to Moe letter June 24, 2008 at pp. 1-3.

¹⁷ JTR letter to Moe of February 27, 2008; Moe letter to DeFrancisco of March 7, 2008.

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On average, during the accounting period of the subpoenas, JTR employed a total of 95 workers per day. Thus, DeFrancisco was 1% of the workforce.¹⁸ The \$3,000 payment to him is less than 1% of the total payroll of \$281,000 (rounded) on the public jobs identified by DWD in the accounting period.¹⁹ This shortfall is a function of an accounting error (more accurately a "counting" error with respect to 176 total hours DeFrancisco worked on these projects by DWD. The DeFrancisco transaction is not a reasonable platform from which to launch the July 16, 2008 and April 9/May 14, 2008 subpoenas for payroll information with respect to 56 public jobs, let alone for 2,568 private jobs undertaken during the subpoenas accounting period.

There is no other outstanding claim of a Section 109.01(3) and (5), 109.09(1) and (2)(r), 109.11(1)(a)(b) and (c) and (2) shortfall in payment of the prevailing wage or overtime premium by any JTR roofer or sheet metal worker who worked on any public project July 1, 2008 – December 10, 2005. This is a period in which a reasonably estimated 6,629 (rounded) man hours were worked on 56 public projects.²⁰ Nor have any other interested constituencies, JTR competitors, the Sheet Metal Workers Union or worker advocacy groups made any complaints, although encouraged to do so by the terms of 66.0903(c) and 103.49(5)(b) and (c).

Thus, there is a very low probability that enforcement of the subpoena and look-back "self-audits" will unearth additional evidence, not otherwise available to DWD without compelled process of large scale costly violations of prevailing rate standards.

JTR is willing to provide payroll records, identical to the payroll records already provided to DWD, which will allow DWD to determine the shortfall in public project prevailing rate norms July 1, 2008 – December 10, 2005. JTR has proposed to pay an agreed upon number to each affected worker, provided such disclosure and payment is part of a Section 109.11(1)(a) and (c) compromise settlement agreement that includes a non-admission clause, and an agreement that DWD will not seek additional sanctions for past behavior. JTR is also willing to incorporate the terms of that settlement into a consent decree enforceable by the Wisconsin courts, if that will end the matter. JTR has also proposed to provide to DWD, on its own initiative, weekly payroll records, derived from its regular business records, to allow DWD to monitor its prevailing rate compensation performance on all state and municipal public projects going forward.

Acceptance of this proposal, now, would transfer money to workers at a time in which such fiscal stimulus would be appreciated. That's a result certainly consistent with the purpose of the Prevailing Rate statutes which is to provide fiscal stimulus while also improving public infrastructure.

¹⁸ Ms. Jozwowski will supply the numbers.

¹⁹ Id.

²⁰ Ms. Jozwowski will testify to these payroll numbers.

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The nominal, easily quantifiable cost of compliance to JTR as a firm (as estimated by Ms. Jozwowski) (\$23k), is not a de minimus number; The cost to public owners and taxpayers of diminished competition in the product market and to roofer/sheet metal workers who ultimately pay for the cost of compliance is difficult to quantify, by obviously not insubstantial, if DWD pursues the mode of enforcement directed against JTR, against all contractors on all municipal and public projects in Wisconsin. The continuous enforcement efforts, in the face of voluntary settlement proposal, impose substantive costs on the judicial process. And finally, the opportunity cost and emotional cost to Jerry Thull, CEO of JTR, of being compelled to appear before DWD to explain the numbers under threat of criminal prosecution, if any statements turn out to be "not true," as Director Anderson asserted, is considerable.

When these costs are totaled, the social cost of enforcement exceeds the social benefit of compelling such a large production because the data are not necessary for accurate determination of the payment of appropriate prevailing rates on all JTR public projects July 1, 2008 – December 10, 2005. That information has either been provided to DWD, or will be provided, within the negotiation process contemplated by Section 109.11(1)(a) and 2(b). Prospective performance will be reinforced by a judicially enforceable consent decree.

A few final observations about the DWD style of enforcement pursued in this matter. I never suggested that JRT needed the "consent" of DWD to pay gross shortfall of \$20,654.75 (net \$18,739.17) on the Craig project.²¹ You now tell JTR to "immediately" pay the "correct" amount, although, I take it you don't accept Schedules A through C presented to you on June 25, 2008 as reliable documentary evidence of what that correct amount might be, \$20,654.75 gross - \$18,739.17 net.²²

JTR has offered to pay the entire agreed-upon shortfall in prevailing rate July 1, 2008 to December 10, 2005, but only as part of a settlement agreement that imposes no other sanctions for conduct ex ante the date of execution of agreement, and also contains a non-admissions clause.

²¹ Moe to Loeffler letter of July 30, 2008, p. 2, paragraph 4.

²² Moe to Loeffler letter of July 30, 2008, p. 2, paragraphs 3 and 4.

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Yes, JTR could pay the \$21k (rounded), because the firm does offer Schedules A through C as an accurate statement of actual payroll history. But that move would obviously be treated by DWD as an admission of purposeful violation, outside the negotiation process.²³ JTR does not want to play a "gotcha" game that discourages voluntary disclosures in support of negotiated settlements.²⁴

You accuse me and Mr. Thull of affirmatively misleading you into believing that compliance was forthcoming with the terms of the April 9, 2008 and May 14, 2008 self-audit orders and the July 16, 2008 personal and duces tecum subpoena.²⁵ No small accusation to make against an attorney.

I know for a fact neither Mr. Thull or Ms. Jozwowski have "represented" to you anything about compliance with compulsory process, post April 9, 2008.

As for me, I never made any "representations" (whatever that stiff, formal circumlocution might mean to you), that compliance with compulsory process was imminent. I did request extension of the dates for compliance, which request does not imply acceptance of the compulsory process move, as most folks well know who deal with negotiations over compulsory process issued by law enforcement agencies, within the process of negotiation of a total settlement of disputes with those agencies.

In any event, when, on June 25, 2008, you got the first settlement proposal, with Schedules A to C, it was obvious that JTR was not going to comply with the DWD self-audit demands of April 9, 2008 or May 14, 2008.²⁶

²³ Thull to Moe letter of February 27, 2008 with spreadsheet; Moe to DeFrancisco letter of March 7, 2008; Moe to Thull letter of April 9, 2008 - "instructions" to produce the outcome of a "self-audit." Your letter to me of July 30, 2008, rejecting the settlement proposals of June 24, 2008, and July 24, 2008, makes reference to Case no. not previously surfaced: LS 2008-0208. Is that a new case based on your "conversations" of May 9, 2008 with on-site JTR employees, none of whom have filed WPPCA claims or on some "admissions" contained in the settlement proposals?

²⁴ See CFTC v. Collins, 997 F.2d 1230, 1233-1234 (7th Cir. 1993). Posner, J., Refusal to enforce an administrative subpoena because enforcement would inhibit voluntary disclosure of income tax information, absent a showing of no alternative source for relevant data.

²⁵ Moe letter to Loeffler of July 30, 2008, paragraph 6.

²⁶ Loeffler to Moe letter of July 24, 2008, pp. 4-5. By the way, I was correct in my statement that neither 66.093, 103.49 or DWD 290 provide for look-back audits, absent proceedings pursuant to Chapter 109, WPPCA. See pp. 4-5 of Loeffler letter to Moe. As I indicated, Section 109.11(b) authorizes a look-back audit based on a DWD "finding" of prevailing wage violation, a "finding" DWD apparently rests on JTR's payments to DeFrancisco, not an adjudication post a hearing.

KRUKOWSKI
& COSTELLO.

Terry Moe
August 7, 2008
Page 11

The "response" to the June 24, 2008 proposal that JTR and I received from DWD, 3 weeks later, was the sheriff-served personal and duces tecum subpoena of July 16, 2008. Post that subpoena service, I got a one-liner from you, dated July 17, 2008, to the effect proposal was rejected – no reasons given. Like I said, that wasn't news at the time, especially since I discussed the subpoena and settlement proposal with Director Anderson on July 17, 2008, at which time he informed me that he "assumed" I had received notice of the rejection of the proposal, and then informed me of the DWD view that "random" inspections, audits, subpoenas were perfectly legal under the relevant statutes.

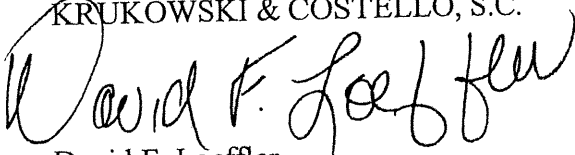
My letter of July 24, 2008, surely should have put to rest any expectation that compliance with any compulsory process was in the offing.²⁷

But just so there is no further misunderstanding: JTR will not comply with the July 16, 2008 subpoena, or the order to produce the outcome of the self-audits directed by DWD letters of April 9, 2008 and May 14, 2008, until a final judicial order compels those productions.

I would suggest that DWD forego "going negative" on JTR and its attorney, and give some serious attention to the twice amended proposal set forth in this letter, which would provide immediate fiscal stimulus, plus judicial supervision of JTR behavior going forward. It is a proposal that would yield optimal – efficient – law enforcement.

Very truly yours,

KRUKOWSKI & COSTELLO, S.C.



David F. Loeffler
dfl@kcllegal.com

cc: Bob Anderson, Director Labor Standards Bureau
(via email only - bob.anderson@dwd.state.wi.us)
Julie Eckenwalder, Chief, Prevailing Wage Section
(via email only - julie.eckenwalder@dwd.state.wi.us)

126044/2008038-0

²⁷ Pp. 2-9 of Loeffler to Moe letter dated July 24, 2008.

BEFORE THE DEPARTMENT
OF WORKFORCE DEVELOPMENT

PETITION FOR A
HEARING PURSUANT
TO SEC. 103.005(6)(a) through (g)

NOW COME J.T. Roofing, Inc., and Gerald T. Thull, as President of J.T. Roofing, Inc., and as an individual, and petition the Department of Workforce Development (DWD) for a hearing before an Administrative Law Judge of the DWD, outside the chain of command of DWD law enforcement, to determine whether enforcement of the Subpoena of July 16, 2008 and the DWD Orders of April 9 and May 14, 2008, is "reasonable" within the meaning of Section 103.005(6) and (6)(e).

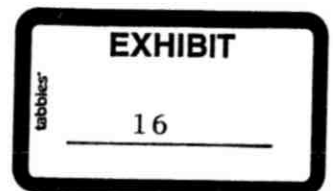
The full position of J.T. Roofing, Inc., and Gerald T. Thull in support of the proposition that enforcement of this process is "unreasonable" is set forth in the attached Complaint which has been filed with the Circuit Court for Dane County with the Affidavits of Jozwowski, Thull, and Loeffler, and all Exhibits attached to those Affidavits.

Dated at Milwaukee, Wisconsin, this 19th day of August, 2008.

KRUKOWSKI & COSTELLO, S.C.

By: David F. Loeffler
David F. Loeffler
State Bar No. 01008044
7111 W. Edgerton Avenue
Milwaukee, WI 53220
(414) 423-1330
(414) 423-8755 Facsimile

ATTORNEYS FOR PLAINTIFF
JT ROOFING, INC. AND
GERALD T. THULL



7111 West Edgerton Avenue
P.O. Box 28999
Milwaukee, WI 53228-0999
Phone 414.423.1330
FAX 414.423.1694

KRUKOWSKI & COSTELLO s.c.

Krukowski & Costello, S.C.
Attorneys at Law

Thomas P. Krukowski
Timothy G. Costello
Robert J. Bartel
Kevin J. Kinney
David F. Loeffler
Mark A. Johnson
M. Pia Torretti Gekas*
Deborah A. Krukowski
Daniel J. Finerty
Dean F. Kelley
Brian M. Radloff
Timothy C. Kamin
Keith E. Kopplin
Emily Rupp Anderson
* Not licensed in Wisconsin

August 13, 2008

Senator Robert Jauch
Representative Daniel LeMathieu
Co-Chairs
Joint Committee for Review of Administrative Rules
Room 118 South
Room 17 North
State Capitol
Madison, WI 537070-7882

Dear Senator Jauch and Representative LeMathieu:

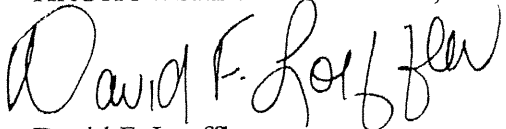
Enclosed is a copy of a Complaint filed with the Circuit Court for Dane County seeking to enjoin the enforcement of certain compulsory process issue by the Department of Workforce Development.

I am of the view that the process is not a "rule" within the meaning of Section 227.01(13). However, in some Wisconsin judicial decisions there is loose talk ("dicta," Lawyers call it) that any application of a statutory norm to a concrete situational dispute creates an obligation, under Section 227.40(5), to invite the Joint Committee into the fray.....

So, the Committee is invited to participate.

Very truly yours,

KRUKOWSKI & COSTELLO, S.C.



David F. Loeffler
dfl@kclegal.com

DFL/lrr

2008038/0 (126134)

