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Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001082-MR

THE CITY OF HENDERSON UTILITY COMMISSION — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN L. WILSON
ACTION NO.10-CI-00898

MICHAEL C. DONTA, EXECUTIVE DIRECTOR OF THE DEPARTMENT OF WORKPLACE STANDARDS; MICHAEL L. DIXON, COMMISSIONER OF THE KENTUCKY LABOR CABINET, COMMONWEALTH OF KENTUCKY; OWENSBORO AREA BUILDING AND CONSTRUCTION TRADES COUNCIL, by and through its President, LESLIE KEITH WIGGINS; and GREG T. PHILLIPS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND J. LAMBERT, JUDGES.

JONES, JUDGE: This appeal concerns the interpretation and application of Kentucky's Prevailing Wage Act. The City of Henderson Utility Commission

(hereinafter "HMP&L") filed a declaratory judgment action in Henderson Circuit Court after the Labor Cabinet notified HMP&L that it was in violation of Kentucky's Prevailing Wage Act with respect to a scheduled outage at Big Rivers Electric Corporation. The Labor Cabinet maintained that the outage constituted a single project subject to KRS[1] 337.010(3)(a) in its entirety. The circuit court agreed with the Labor Cabinet. On appeal, HMP&L's main argument is that the outage does not fall within the requirements of the Prevailing Wage Act because it is not procured under a single contract. For the reasons more fully explained below, we AFFIRM the ruling of the circuit court, finding that the outage constituted a single project subject to KRS 337.010(3)(a) in its entirety.

I. Background and Procedural History

HMP&L is a utility commission established by the City of Henderson and is a public body politic "which has absolute control of the municipal electric system of the City of Henderson, Kentucky, including its operation and fiscal management." In the 1970's, HMP&L constructed the coal-fired power plant known as Station Two to produce electricity on land that it owned and still owns. Also in 1970, it contracted with Big Rivers Electric Corporation to operate and maintain the plant. The 1970 Operating Agreement, as amended, is still in effect. While Big Rivers is responsible for the daily operation of the plant, Tim Brooks, an HMP&L employee, is stationed there. Brooks works with Big Rivers' operations and maintenance managers, budget analysts, purchasing agents, and

[1] Kentucky Revised Statutes.

others. As Big Rivers handles day-to-day operations for Station Two, Big Rivers also proposes the plant's annual budget, which the HMP&L commissioners then review and ultimately approve.

Under the 1970 Operating Agreement, Big Rivers is "subject to the City of Henderson's ownership, management and control." Purchases of materials and supplies required for Station Two must be "made for the City of Henderson's account, subject to approval and acceptance by the City of Henderson." Periodically, Big Rivers, with consent of HMP&L, schedules a "planned outage" of one of the two boilers at Station Two. During the outage, Big Rivers takes the plant offline by shutting down the boiler for approximately three weeks to perform inspection, repairs, reconstruction, and major maintenance. For each planned outage, Big Rivers puts together a plan of work to be performed and submits it to HMP&L's power production director, Wayne Thompson, who then reviews it and meets with Big Rivers' personnel. Before a proposed outage plan is submitted, Thompson discusses future outages with Big Rivers' personnel so that by the time a formal plan is submitted, Thompson has already had input and knows what to expect. After reaching an agreement with Big Rivers, Thompson submits it to the HMP&L Board of Commissioners. The Commissioners then approve each contract based on the recommendation of its own power production director, Thompson. Big Rivers Vice-President of Production, Robert Berry, made it clear that, as the authority accountable to the public, HMP&L's Board must authorize every dollar spent.

Several items of work are typically done during each outage. For example, in the Spring 2010 Outage, which is at issue here, contractors were hired to inspect the cooling tower and perform necessary repairs, replace fill in three cooling tower cells, wash the precipitator, replace the precipitator outlet ducts, repair the refractory in the boiler, replace various blowers, grinders, and mist eliminators, and perform other related tasks such as building scaffolding and operating cranes.

For all of the outages from 2005 through 2008, HMP&L notified the Labor Cabinet that all of the work to be performed was part of one public works project, and the contracts to perform all the work were bid under prevailing wage rates. The total cost of each outage has been well over the $250,000 threshold for coverage under the Prevailing Wage Act. KRS 337.010(3)(a).

However, HMP&L took a different position with respect to the scheduled 2010 Outage, which had a total cost of over two million dollars. Instead of considering the outage as a single project, HMP&L determined that the outage was comprised of approximately nineteen separate projects, only four of which exceeded the $250,000 threshold necessary to implicate Kentucky's Prevailing Wage Act. HMP&L bid only these four "projects" under prevailing wage rates.

HMP&L received a Notice of Violation from the Labor Cabinet on April 27, 2010. The Notice alleged violations of KRS 337.010(3)(a) and KRS 337.510. The Labor Cabinet alleged that HMP&L divided a public works project

into multiple contracts to avoid compliance with Kentucky's Prevailing Wage Act.[2] HMP&L has, at all times, denied these allegations and maintains its position of compliance with prevailing wage law in Kentucky.

After receiving the notice of violation from the Labor Cabinet, HMP&L brought the underlying declaratory judgment action in the Henderson Circuit Court on November 12, 2010, seeking a declaratory judgment adjudging that HMP&L was not in violation of the Prevailing Wage Act as alleged by the Labor Cabinet in its Notice of Violation.[3]

By Order of the Henderson Circuit Court entered March 4, 2011, the Owensboro Area Building and Construction Trades Council and Greg T. Phillips (collectively the "Union") were permitted to intervene in the action, over the objections of HMP&L and Big Rivers. Big Rivers, initially named as a Defendant in the underlying action, was realigned as an Intervening Plaintiff by Agreed Order entered September 14, 2011. Subsequently, Big Rivers and the Labor Cabinet filed Motions for Summary Judgment, both of which were denied on January 12, 2012.

On May 25, 2012, HMP&L was granted leave to file an Amended Petition for Declaratory Judgment. In addition to its original petition, HMP&L also requested a declaration of the court that it was not in violation of the Prevailing Wage Act for contracts determined to be maintenance work. The circuit

[2] It is important to note that the Cabinet did not cite HMP&L on the basis that it split contracts to avoid application of the Prevailing Wage Act, but rather HMP&L was cited for failing to include the required stipulation that prevailing wages would be paid to all laborers, workmen, and mechanics on the project.

[3] The Prevailing Wage Act itself provides no administrative remedy in this type of situation.

court held a bench trial on December 5 and 6, 2012, after which the parties submitted post-trial briefs. On May 24, 2013, the Henderson Circuit Court entered its final Order denying HMP&L's Petition for Declaratory Judgment and entered Judgment in favor of the Labor Cabinet, finding that the outage was a single integrated project for purposes of the Prevailing Wage Act.

This appeal followed.

II. Standard of Review

The *de novo* standard of review applies to this Court's review of a circuit court's construction of statutes. *See Osborne v. Commonwealth*, 185 S.W.3d 645, 648 (Ky. 2006). Therefore, this Court is not required to give any deference to the decision of the circuit court. *See Cabinet for Families & Children v. Cummings*, 163 S.W.3d 425, 430 (Ky. 2005).

In construing a statute, the trial court's goal is to give effect to the intent of the General Assembly. *Petitioner F v. Brown*, 306 S.W.3d, 80, 85 (Ky. 2010). In order to determine this intent, the court must first look to the language of the statute, giving the words their plain and ordinary meaning. *Id*. The court should read the statute as a whole and in context; an act is to be read as a whole, and any language in the act is to be read in light of the whole act. Further, the court must presume that the legislature did not intend an absurd result. *Id*.

The factual findings in this case "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to

judge the credibility of the witnesses." CR[4] 52.01; *Lawson v. Loid*, 896 S.W.2d 1, 3 (Ky. 1995). A factual finding is not clearly erroneous if it is supported by substantial evidence, which is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). "It is within the province of the fact-finder to determine the credibility of the witnesses and the weight to be given to the evidence." *Uninsured Employers Fund v. Garland*, 805 S.W.2d 116, 118 (Ky.1991) (citing *General Tire and Rubber Co. v. Rule*, 479 S.W.2d 629 (Ky. 1972).

[4] Kentucky Rules of Civil Procedure.

III. Analysis

HMP&L argues that the circuit court committed error by finding: (1) that HMP&L violated the prohibition of KRS 337.010(3)(a) against dividing a single contract into multiple contracts to avoid compliance with prevailing wage law; (2) the Spring 2010 Outage constituted a single, integrated project; (3) multiple projects of the Spring 2010 Outage constituted projects for construction rather than maintenance; and (4) the contracts related to the Spring 2010 Outage were entered into by a public authority.

The Prevailing Wage Act

"Prevailing wage laws require contractors constructing government projects to pay their employees a wage equal to or greater than that which is typically paid to similar workers in the locality where the project is being built." *TECO Mech. Contractor, Inc. v. Commonwealth*, 366 S.W.3d 386, 389 (Ky. 2012), as corrected (June 27, 2012). "By requiring government contractors to pay their employees the locality's prevailing wage, these laws protect community wage standards and ensure that local contractors and laborers have an opportunity to compete for publicly-funded projects." *Id.*

Kentucky's current prevailing wage laws are found in KRS 337.505-550 and definitions for their terms are found in KRS 337.010(3). The statutory duties of public authorities as to the inclusion of prevailing wage in proposals and contracts for public works are set forth in KRS 337.510:

(1) Before advertising for bids or entering into any contract for construction of public works, every public authority shall notify the department in writing of the specific public work to be constructed, and shall ascertain from the department the prevailing rates of wages for each classification of laborers, workmen, and mechanics for the class of work called for in the construction of such public works in the locality where the work is to be performed. This schedule of the prevailing rate of wages shall include a statement that it has been determined in accordance with the provisions of KRS 337.505 to 337.550 and shall be attached to and made part of the specifications for the work and shall be printed on the bidding blanks and made a part of every contract for the construction of public works.

(2) The public authority advertising and awarding the contract shall cause to be inserted in the proposal and contract a stipulation to the effect that not less than the prevailing hourly rate of wages as determined by the commissioner shall be paid to all laborers, workmen, and mechanics performing work under the contract.

The definition for "construction" used in KRS 337.505 to 557.550 is found in KRS 337.010(3) which provides that:

(a) "Construction" includes construction, reconstruction, improvement, enlargement, alteration, or repair of any public works project by contract fairly estimated to cost more than two hundred fifty thousand dollars ($250,000). No public works project, if procured under a single contract and subject to the requirements of this section, may be divided into multiple contracts of lesser value to avoid compliance with the provisions of this section.

Together these statutory provisions require that for any contract for a public works project fairly estimated to exceed $250,000, the public authority

commissioning the project must consult the Department of Workplace Standards for the prevailing wages, and insert them into the proposal specifications in the advertisement for bids and in the final contract. Ky. OAG[5] 10-008 (Ky.A.G.), 2010 WL 4635408.

Application of the Act

The first issue is whether the $250,000 threshold in KRS 337.010(3)(a) for application of the Prevailing Wage Act, KRS 337.505-.550, applies to single "projects" rather than single "contracts." HMP&L argues that the Act applies only to individual contracts for public works construction, relying heavily on the second sentence of KRS 337.010(3)(a) and the phrase "if procured under a single contract."

The circuit court read the disputed phrase in the definition of construction in light of the Act as a whole to find that the Act covers public works projects, rather than single contracts for public works. Support for the circuit court's interpretation can be found in KRS 337.510. The circuit court found that the term "construction" is defined in terms of public works "projects" and that the project must cost more than $250,000 for the act to apply. The circuit court observed that while the statute says that the $250,000 is estimated by how much it will take "by contract" to pay for it, it does not say the project must be paid for with *one contract*. Rather, the statute provides that if there is only one contract, that contract cannot be split into smaller contracts to avoid complying with the act.

[5] Opinion of Attorney General.

Under KRS 337.510, a public authority must ascertain the prevailing wage for each type of worker needed for "construction" before it advertises for bids. A schedule of those wages is to be made part of the specification and made a part of every contract. Further, the Act recognizes there will be several kinds of workers who work on any particular project, and, by extension, several contracts.

We agree with the circuit court's analysis. KRS 337.510(1) indicates that the $250,000 threshold is not based upon the value of any given bid received or contract awarded. Rather, it is determined by the fairly estimated value of the public works project as a whole. The Office of the Attorney General has also provided guidance on this matter in which it stated: "In order to comply with Kentucky's prevailing wage laws, the estimated cost of a public construction project must be determined by the notification of the project's estimated cost submitted by the public authority to the Department of Workplace Standards." OAG 10-008 (11-03-10), 2010 WL 4635408.

HMP&L also asserts that the circuit court failed to correctly interpret the phrase "if procured under a single contract" in KRS 337.010(3)(a). HMP&L claims the court's holding ignores the plain meaning of the statute and violates the basic tenant of statutory construction that the General Assembly presumptively intended for all parts of a statute to have meaning, and thus, for no part of a statute to be considered mere surplusage without meaning. *See City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 850 (Ky. 2013). We disagree.

The circuit court's interpretation of the Act is consistent with that of the Kentucky Supreme Court in the case of *TECO Mechanical Contractors, supra*. In explaining the application of KRS 337.510(1) the Court stated:

> Whenever a government entity, known as a public authority, wishes to construct a public works project it must contact the Cabinet and obtain the prevailing wage rates for each type of worker needed to complete the job. KRS 337.510(1). After the Cabinet provides it with a prevailing wage schedule, the public authority must incorporate the schedule into its bid documents and project specifications so that contractors bidding on the project are aware of the wage rates and may properly estimate their costs. KRS 337.510(1). Once the contract is awarded, the prevailing wage schedule must also be incorporated into the construction contract itself. Additionally, the contract is required to contain a stipulation that the contractor and all of its subcontractors will pay no less than the prevailing wage. KRS 337.510(1). [*Id*. at 390.]

In *TECO*, the Court recognized the plain language of the statute, and thus the legislative intent that prevailing wages must be paid on all contracts for public works projects. 366 S.W.3d 386 (Ky. 2012). This is supported by the Court's statement that the rates must be included in the project specifications "so that contractors bidding on the project are aware of the wage rates and may properly estimate their costs." *Id*. The statute makes it clear that once a project has been determined to meet the statutory threshold, all contracts awarded thereafter to construct the project must pay the prevailing wage. We find that the use of a project for applying the prevailing wage instead of any single contract supports the historical purpose of prevailing wage laws.

HMP&L asserts that the Cabinet has no authority to combine individual contracts to exceed the threshold for requiring the payment of prevailing wages on public works projects. The point, however, is that the threshold applies to the cost of the project, and the Cabinet was required to combine all the construction contracts for work on the project to see if the threshold is reached. It is the value of the project as a whole that controls, not the manner in which the public utility decides to parcel out the project to complete it.

The circuit court's conclusion that the legislature's intent when enacting the Prevailing Wage Act was to apply the $250,000 threshold in KRS 337.010(3)(a) to projects rather than individual contracts is based on the plain meaning of the language used in the Act. We find that to do otherwise would endanger the remedial purpose of the Act and the policies expressed therein.

HMP&L makes the alternative argument that, even if the Act applies to projects rather than individual contracts, the Spring 2010 Outage was not a single, integrated project subject to the requirements of the Act.

The circuit court found that the Spring 2010 Outage constituted a single, integrated project. HMP&L asserts that the circuit court erroneously found that, "because the work performed during an outage was done at the same time and place during a condensed time period while the unit is offline that the outage is a single, integrated project." Contrary to HMP&L's assertion that an outage is "nothing more than a defined time frame," the circuit court concluded that:

> The work is done at the same time and place, during a condensed time period while the unit is offline. While all jobs do not necessarily need to be done to have a "complete" outage, these jobs clearly make up a coordinated effort with a common goal, to keep the boiler and its auxiliary systems operating in a safe, efficient, and reliable manner. The outage is planned on an integrated basis to minimize cost and to optimize respective work initiatives. An outage is planned in great detail, months if not years in advance, with work coordinated both in time and location so that workers do not interfere with each other. The scheduling of work during a planned outage is a matter of necessity to Big Rivers and the City.

Substantial evidence of record supports the court's finding that the outage was a single, integrated project. The circuit court reached its conclusion based on Big Rivers' internal documents as well as the testimony presented at the hearing. From a physical standpoint, the unifying factor is that the repair work was performed while the boiler was down. The testimony at trial explained that many of the tasks are performed in areas that can only be accessed while the boiler is down. From a logistical standpoint, outages are planned as single projects due to the volume and complexity of the 'non-routine maintenance' that occurs. This is evidenced specifically in Big Rivers' Station Two 2010-2013 Business Plan which states that "outage maintenance differs significantly from routine maintenance."

From a financial standpoint, outages are budgeted separately. Testimony at trial revealed that the budget does in fact contain a routine operating and maintenance budget that is entirely separate from the outage budget. Testimony at trial further explained that due to the loss in revenue suffered by Big

Rivers and HMP&L while the boiler is down, detailed planning and scheduling of work is a financial necessity. The integrated nature of the outage is also evident from the evidence produced at trial, namely, the 2010 Outage book, Big Rivers' GANNT chart, and Lay Down chart, all of which provide for close coordination and integration of work flow due to safety issues, such as electrical and mechanical tag-outs, logistical issues related to staging of material and equipment, and avoidance of work interference between contractors.

The Spring 2010 Outage was planned, budgeted and completed as a single, integrated project as a matter of necessity. Big River's own policy states, "[m]uch of the work identified in this Budget Work Plan will require a planned outage to perform, thus the outage schedule and plant upgrades have been planned on an integrated basis." As such, we agree with the finding of the circuit court that the 2010 Outage was a single integrated project.

HMP&L points to *Norsworthy v. Clay County Fiscal Court*, 2006 WL 1113341 (Ky. Ct. App. 2006), an unpublished opinion by this Court, for guidance on this issue. *Norsworthy* involved two public library projects that were performed under separate contracts, with fairly estimated costs of less than $250,000 for each contract. The Labor Cabinet argued that the library work constituted a single project fairly estimated to cost more than $250,000 and subject to prevailing wage laws. Despite the projects being performed in the same building, at the same time, by the same contractor, and overseen by the same architect, this Court held that there had been no violation of the Prevailing Wage act. *Id.*

However, the facts of this case are distinguishable from *Norsworthy.* In *Norsworthy,* the two projects were funded by ***two distinct entities***: construction of the library's computer learning center was managed and funded by the Chamber of Commerce, a private entity, while construction of the library's community room was managed and funded by the Clay County Public Library, a public entity. Additionally, in *Norsworthy*, this Court found that the improvements were unequivocally treated as separate and distinct projects.

Here, the 2010 Outage was a coordinated, planned and scheduled event. While it clearly contained numerous components, it had a unified, central purpose. The components were part of the greater whole. The same cannot be said for the library projects. They were funded by different entities, had different purposes, and could have been performed at entirely different times.

HMP&L further asserts there is no evidence of its intent to divide the project up to avoid the Prevailing Wage Act. The circuit court found that in the past, HMP&L had considered an outage to be one project. However, following *Norsworthy*, the HMP&L Board issued its 2009 Resolution, changing its approach to authorize dividing outages so that only work on individual contracts estimated to be at least $250,000 were submitted for prevailing wage rates.

HMP&L asserts that the 2009 Resolution merely "memorialized the existing bidding process, but did not change the way the projects were awarded." However, for years, HMP&L required prevailing wages to be paid on the entire project, that is, all the work performed during a planned outage. Then in 2009,

HMP&L changed its policy on the advice of counsel, based upon this Court's unpublished decision in *Norsworthy*. The policy change began requiring prevailing wages only for work done under individual contracts over $250,000, not on work for the whole outage.

We agree that this constitutes a change to the bidding procedures. Moreover, it is clear to us from a review of the record that the purpose of this change was to avoid application of the Prevailing Wage Act.

After the circuit court observed that a "project" is not defined in the Act, it turned to a prevailing wage case decided by the California Court of Appeals, and to the prevailing wage statutes of Nevada and Oregon for guidance in determining what constituted a "project" for purposes of the Act. HMP&L does not object to the court's resort to the statutes for guidance, but contends that *Oxbow Carbon & Minerals, LLC v. Dept. of Industrial Relations*, 194 Cal. App. 4th 538 (Cal. Ct. App. 2011), does not support the circuit court's conclusion that the Spring 2010 Outage was a single, integrated project subject to the Act.

Oxbow concerned a petroleum coke storage facility, originally open-air, owned by the City of Long Beach, California, and leased to Oxbow. It had become unusable due to an amended air quality regulation which required petroleum coke to be stored in enclosed facilities. *Id.* To put the storage unit back into operation, Long Beach and Oxbow amended the lease to provide that Long Beach would reimburse Oxbow $2,258,000 for construction of an enclosed conveyor system, which they agreed was subject to California's prevailing wage

law. *Id.* Oxbow also planned to build the roof required by regulation, though the roof was not mentioned in the amended lease and Long Beach had agreed only to reimburse Oxbow the stipulated amount for the enclosed conveyor system.

The California Court of Appeals found that the conveyor system and roofing was a "complete, integrated object" under California prevailing wage law. *Id.* The Court found that work was necessarily integrated because both aspects were necessary to achieve the final goal. *Id.*

The circuit court referred to *Oxbow*, stating "while all jobs do not necessarily need to be done to have a 'complete' outage, these jobs clearly make up a coordinated effort with a common goal, to keep the boiler and its auxiliary systems operating in a safe, efficient, and reliable manner." *Id.*

HMP&L attempts to distinguish the case at hand from *Oxbow* in asserting that unlike in *Oxbow*, where both the roof and conveyor system were necessary for the facility to be operational, HMP&L could perform all, some, or none of the outage contract work, and still be able to return the boiler to operational status. HMP&L argues that the uniqueness of a maintenance outage is distinguishable from a ground-up construction project or even a project like that involved in *Oxbow* in that if HMP&L is building Station Two and schedules cooling tower work during an outage, and if that work is not done, Station Two is still operational, unlike the facility in *Oxbow.*

We believe that this argument however is weakened by the evidence of extensive planning, budgeting, and performance of outage work which is

regularly taken to keep the power generating unit efficient and operational. We agree with the findings of the circuit court that these jobs clearly make up a coordinated effort with a common goal, to keep the boiler and its auxiliary systems operating in a safe, efficient, and reliable manner.

The common goal of the two aspects of work in *Oxbow* caused that work to be classified as a single project. We disagree with HMP&L that this distinguishes the work done in *Oxbow* from the work done in the case at hand. HMP&L asserts that the multiple projects performed during the Spring 2010 Outage were "simply done during the same period for efficiency, convenience and cost saving purposes." We believe that these factors instead support that the work done during the Spring 2010 Outage was done for a common goal and constitutes a single project under the Prevailing Wage Act.

Next, HMP&L takes issues with the circuit court's conclusion regarding the type of work performed during the outage. HMP&L maintains that the work performed during the outage is maintenance work, and therefore, not included within Kentucky's Prevailing Wage Act. The Prevailing Wage Act applies to construction projects. Construction is defined by the Act to include: "construction, reconstruction, improvement, enlargement, alteration, or repair" of any public works project. KRS 337.010(3)(a). The use of the term "includes" in this definition demonstrates that the legislature intended the definition of "construction" to have the broadest possible application to the various types of projects or work that could be performed on public works projects.

As the circuit court pointed out, "the Act neither excludes maintenance nor distinguishes it from repair." Moreover, as demonstrated by the evidentiary hearing, the work performed during the Outage far exceeded the type of daily routine maintenance necessary to keep the tower running on a daily basis. The work performed during the Outage was in the nature of upgrades and necessary repairs that could only be performed when the system was nonoperational. Given the nature and scope of this work, we find no error with the trial court's finding that the project fell within the statutory definition of construction.[6]

HMP&L's final challenge is to the circuit court's ruling that it violated the Act is based on the fact that Big Rivers, rather than HMP&L, is the party and signatory on the contracts for work performed during the Spring 2010 Outage. HMP&L, itself a "public authority," asserts that Big Rivers is not a public authority as that term is defined for purposes of the Act. Therefore, HMP&L asserts that the outage cannot be construction of "public works" because the construction is not done pursuant to contract with a "public authority."

Key to the circuit court's decision was "the City's level of involvement and contractual control in the outage." The City owns Station Two, and Big Rivers operates the facility under a long term contract with the City. The

[6] We agree that it should not be overlooked that despite HMP&L's position that all of the work performed during the Spring 2010 Outage was "maintenance," and thus excluded from application of the Act, it nonetheless sought and applied the prevailing wage rates to four of the contracts – in doing so, HMP&L tacitly admitted that the work performed met the definition of "construction" in the Act.

2009 Resolution acknowledges this fact. The City reviews the budget for the outage, and the City must approve contracts over $20,000. The outage is supported in part by public funds; the City pays for part of the outage based on the amount of electricity it uses.

From the facts presented at trial, the court concluded that the outage did in fact meet the definition for "public works," and denied HMP&L's summary judgment motion. Relying on *Hardin Memorial Hospital, Inc. v. Land*, 645 S.W.2d 711 (Ky. App. 1983), the court determined that Big Rivers was a public authority or agent of HMP&L due to the control HMP&L exerts over Big Rivers' conduct of the outages at Station Two.

In *Hardin Memorial Hosp.*, a county formed a nonprofit corporation to run the day-to-day operations of the county-owned hospital. When the hospital decided to begin a major renovation project, it took the position that it was not a "public authority" as defined by the statutes in effect at that time, and therefore, did not have to pay the prevailing wage. The Court found that the county owned land on which the hospital was built, and the county fiscal court had ultimate control of the hospital, including power to remove the hospital's director with or without cause, and to appoint the hospital board of trustees, and therefore, the hospital was a public hospital owned by a "public authority." 645 S.W.2d at 714. As a result, its construction and additions thereto were public works, and thus, it was statutorily required to pay prevailing wage scale to all workers participating in the renovation project. *Id*. at 714-716.

HMP&L's main response to the circuit court's ruling in this regard is that Big Rivers is not and cannot be converted into a "public authority." HMP&L argues: "Big Rivers is not an agent of HMP&L. HMP&L is not funding Big Rivers as an extension of itself. Big Rivers simply maintains and operates Station Two by contract with HMP&L. Big Rivers acts at all times as a private corporation, independent of HMP&L." While HMP&L does acknowledge that Big Rivers is responsible for maintaining and operating Station Two pursuant to contract with HMP&L, HMP&L distances itself from the legal meaning of that relationship. HMP&L also does not mention the control it exerts over the budgeting and planning undertaken on its own behalf by Big Rivers, or that HMP&L must approve all contracts over $20,000, including those for the Spring 2010 Outage.

The evidence shows that for purposes of the Spring 2010 Outage (and all other outages), Big Rivers acts as a general contractor on behalf of HMP&L to accomplish the outage construction contracts in which HMP&L has approved authority of the long-term operating agreement. Therefore, we find that the Spring 2010 Outage is a public works project "constructed under contract with any public authority." KRS 337.010(3)(e). Based upon the control of HMP&L over Big Rivers during the planning, budgeting, and execution of the contracts performed during the Spring 2010 Outage, we find that the court's ruling denying HMP&L's motion for summary judgment was proper.

Lastly, HMP&L's alternative argument that only its proportionate share of the outage costs should be considered to determine whether the Act applies is misplaced. There is no argument that the amount HMP&L paid for the Spring 2010 Outage exceeds the threshold amount in the Act, so that issue is immaterial to this appeal. Additionally, there is no legal support for such a determination under the Act. As the circuit court stated, "whether a project is a public work does not depend on what exact percentage of the project is paid for with public funds." Because neither the Act nor any regulation or case provide any legal support for the proposition, the circuit court was correct to dismiss it out of hand.

IV. CONCLUSION

For the reasons set forth above, we AFFIRM the order of the Henderson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Dawn S. Kelsey
Henderson, Kentucky

ORAL ARGUMENT FOR APPELLANT:

H. Randall Redding
Henderson, Kentucky

AMICUS CURIAE BRIEF ON BEHALF OF KENTUCKY LEAGUE OF CITIES AND KENTUCKY MUNICIPAL UTILITIES ASSOCIATION:

Patrick D. Pace
Stephen C. Pace
Owensboro, Kentucky

BRIEF FOR APPELLEE OWENSBORO AREA BUILDING AND CONSTRUCTION TRADES COUNCIL:

Irwin H. Cutler, Jr.
Matthew P. Lynch
Louisville, Kentucky

BRIEF FOR APPELLEE KENTUCKY LABOR CABINET:

Mark F. Bizzell
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE OWENSBORO AREA BUILDING AND CONSTRUCTION TRADES COUNCIL:

Irwin H. Cutler, Jr.
Louisville, Kentucky