



**DEPARTMENT OF JUSTICE**  
GENERAL COUNSEL DIVISION

August 22, 2006

Annette Talbott, Deputy Commissioner  
Bureau of Labor and Industries  
Portland State Office Bldg.  
800 NE Oregon St., #1045  
Portland, OR 97232

Re: Opinion Request OP-2006-2

Dear Ms. Talbott:

**Introduction**

Oregon's prevailing wage rate law ("PWR") generally requires that workers on "public works" be paid not less than the prevailing rate of wage. ORS 279C.840(1). "Public works" are "improvements" whose "construction, reconstruction, major renovation or painting" ("construction" for short) is "carried on" or "contracted for" by a public agency "to serve the public interest." ORS 279C.800(5). The PWR is codified at ORS 279C.800 to 279C.870. ORS chapters 279A, 279B, and 279C comprise the Oregon Public Contracting Code (Code). *See* ORS 279A.010(1)(z). ORS 279A.025(2)(c) provides that the Code "does not apply to \* \* \* [g]rants," which are a kind of "agreement" to provide or receive money, property or other assistance. ORS 279A.010(1)(i).

You ask two questions about the intended meaning and effect of ORS 279A.025(2)(c). First, would that statute exempt a public work from the PWR if it were funded in whole or in part by a grant? Second, if a public agency "contracted for" the construction of an improvement within the meaning of ORS 279C.800(5), i.e., if the improvement were a public work, *and* the instrument by which the agency did so was a "grant," would the public work be exempt from the PWR by virtue of ORS 279A.025(1)(c)?

Based on the analysis below, we conclude that the legislature did not intend for ORS 279A.025(2)(c) to effect an exemption for improvements that would otherwise be subject to the PWR. That is to say, if the terms of an agreement between a public agency and its grantee were such that the agency had "contracted for" the construction of an improvement within the meaning of ORS 279C.800(5), then the project would not be exempted from PWR by ORS 279A.025(2)(c).<sup>1/</sup>

## Discussion

### 1. Method for Construing Statutes

To answer your questions, we must interpret the relevant statutes with the goal of determining the legislature's intended meaning. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993); ORS 174.020. We begin by examining the statute's text and considering statutory and judicially created rules of construction that bear directly on how to read the text, such as "not to insert what has been omitted, or to omit what has been inserted," and to give words of common usage their "plain, natural and ordinary" ("ordinary") meaning. *Id.* at 611; ORS 174.010. We do not examine the text in isolation but in the context of other provisions of the same statute, prior versions of the statute and other related statutes, as well as case law interpreting those statutes. *Id.* at 610; *SAIF Corporation v. Walker*, 330 Or 102, 108, 996 P3d 979 (2000). If the text and context suggest only one possible meaning, our inquiry ends there. *PGE*, 317 Or at 610-11. If more than one meaning is possible, we examine legislative history to determine which meaning the legislature intended. *Id.* at 611-12.

### 2. Text and Context of Grants Exemption

ORS 279A.025(2)(c) provides that "[t]he Public Contracting Code does not apply to \* \* \* [g]rants." The Code defines "grant" to mean a particular type of financing "agreement" under which a "contracting agency" either receives or provides money, property or other assistance. ORS 279A.010(1)(i).<sup>2/</sup> A "contracting agency" is a public body authorized by law to conduct a procurement. ORS 279A.010(1)(b). The Code does not define "apply," but it is a word of common usage, so we give it its ordinary meaning. Used as an intransitive verb, as in the statute, "apply" means "to have a valid connection, agreement, or analogy: have a bearing: be pertinent <the argument *applies* to the case>." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (WEBSTER'S) (unabridged 2002) at 105. Text therefore indicates that the legislature did not intend for the Code to have a bearing on *agreements*<sup>3/</sup> that public bodies make to acquire or disburse grant funding.

Turning to the context of ORS 279A.025(2)(c), we first examine the other subsections of ORS 279A.025. ORS 279A.025(1) provides that "[e]xcept as provided in subsections (2) to (4) of this section, the Public Contracting Code applies to all **public contracting**." (Emphasis added). According to that text, subsections (2) to (4) serve only to limit subsection (1), so an initial question is what, precisely, is the scope of subsection (1)?

The Code defines "public contracting" to mean "procurement activities described in the [Code] relating to obtaining, modifying or administering public contracts or price agreements." ORS 279A.010(1)(y). Code definitions apply to terms used in the Code "unless the context or a specifically applicable definition requires otherwise." ORS 279A.010(1). Neither context nor a specifically applicable definition require a different interpretation, so ORS 279A.025(1) means that the Code applies to all "procurement activities described in the [Code] relating to obtaining, modifying or administering public contracts or price agreements." The Code defines "procurement" to mean "the act of purchasing, leasing, renting or otherwise acquiring goods or

services” and “includes each function and procedure undertaken or required to be undertaken by a contracting agency to enter into a public contract, administer a public contract and obtain the performance of a public contract under the [Code].” ORS 279A.010(1)(u). “Public contract,” in turn, means “a sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency [of property or services] \* \* \*. ‘Public contract’ does not include grants.” ORS 279A.010(1)(x). Read in light of those definitions, by specifying that the Code applies to all “public contracting,” ORS 279A.025(1) appears to mean that the Code applies to *all activities relating to obtaining, modifying and administering public contracts (which do not include grants) and price agreements to acquire or dispose of property or services described in the Code.*

Subsections (2) to (4) limit the scope of subsection (1) by exempting certain types of activities relating to obtaining, modifying and administering public contracts and price agreements and certain types of entities when they engage in those activities. Subsection (2) exempts particular kinds of contracts and agreements, e.g., grants (already exempt by virtue of subsection (1) unless the funds are acquired or disbursed by means of a price agreement) and insurance contracts, and particular kinds of acquisitions, disposals, expenditures, and procurements, e.g., contracts for the sale of timber from Forestry Department lands. It also contains a “catchall provision” exempting “[a]ny other *public contracting* of a public body specifically exempted from the [C]ode by another provision of law.” ORS 279A.025(2)(r) (emphasis added). Subsection (3) exempts the “public contracting” activities of particular agencies, and subsection (4) exempts one type of “public contracting,” namely, “contracts” made with qualified nonprofit agencies that employ the disabled, from Code provisions concerning “cooperative procurements” and “source selections.”

In sum, standing alone, the text of ORS 279A.025(2)(c) indicates that the Code does not apply to *agreements* to acquire or disburse grant funds. The statute’s context indicates, redundantly in part, that the Code does not apply to *activities relating to obtaining, modifying or administering* public contracts (which do not include agreements to acquire or disburse grant funds) to acquire or disburse grant funds or to *activities relating to obtaining, modifying or administering* price agreements to acquire or disburse grant funds. While the two meanings differ slightly, they are not actually contradictory. Rather, the meaning indicated by context seems to be an elaboration of the meaning indicated by text. Therefore, we conclude that the Code does not apply to agreements to acquire or disburse grant funds; to activities relating to obtaining, modifying or administering grants; or to activities relating to obtaining, modifying or administering price agreements to acquire or disburse grant funds. With that in mind, we examine the relevant provisions of the PWR.

### **3. PWR**

The fundamental purpose of the PWR is to ensure that the wages and benefits paid to workers on publicly financed construction meet community-established compensation standards. See ORS 279C.805. ORS 279C.840(1) implements that purpose, providing in relevant part:

The hourly rate of wage to be paid by any contractor or subcontractor to workers *upon all public works* shall not be less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where the labor is performed. \* \* \*.

(Emphasis added). A "public works:"

[I]ncludes, but is not limited to, roads, highways, buildings, structures and *improvements* of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest \* \* \*.

ORS 279C.800(5) (emphasis added). Even if an improvement is a "public works," ORS 279C.810(2) provides for two exceptions:

(2) ORS 279C.800 to 279C.870 *do not apply to:*

(a) *Projects* for which the contract price does not exceed \$50,000. \* \* \*

\* \* \* \* \*

(b) *Projects* for which no funds of a public agency are directly or indirectly used. In accordance with ORS chapter 183, the commissioner shall adopt rules to carry out the provisions of this paragraph.<sup>4/</sup>

(Emphasis added). In short, by virtue of ORS 279C.840(1), 279C.800(5) and 279C.810(2), the prevailing rate of wage applies to "improvements" (that result from specified governmental action), except for two types of construction "projects," to which it does not apply.

As discussed above, ORS 279A.025(1) and (2)(c) seemingly provide that the Code, and thus ORS 279C.840(1) and 279C.810(2), are to have no application to activities relating to obtaining, modifying and administering contracts or price agreements to acquire or distribute grant funds. But ORS 279C.840(1) and 279C.810(2) would have no application to agreements or activities of that nature, even in the absence of ORS 279A.025(2)(c). ORS 279C.840 and 279C.810(2) are applicable to particular types of *improvements* and *projects*. While another provision of the PWR, ORS 279C.830, requires "every contract for public works" to contain particular specifications, the *obligation* to pay the prevailing wage rate depends on whether an *improvement* meets the criteria for a "public works," the contract price for the *project* exceeds \$50,000 and the *project* uses public funds.<sup>5/</sup> For those reasons, if on a particular project one of the requirements for the application of PWR were satisfied by a grant agreement or the funds it provided, it would remain true that ORS 279C.840(1) and 279C.810(2) have nothing to do with *obtaining, modifying or administering* agreements.

Finally, ORS 279C.810(1)(a)(A) assumes, and explicitly recognizes, one situation in which projects funded by grants *are* subject to the PWR. ORS 279C.810(1)(a)(A) provides that

“‘[f]unds of a public agency’ does not include \* \* \* [f]unds provided in the form of a government grant to a nonprofit organization, unless the government grant is issued for the purpose of construction.” That provision can mean only that grants issued to nonprofit corporations for the purpose of construction *are* funds of a public agency. Moreover, the provision implies that grants issued to other than nonprofits *are* funds of a public agency. Interpreting ORS 279A.025(2)(c) to be a blanket exemption from the PWR for all public works projects that use grant funds would render ORS 279C.810(1)(a)(A) meaningless. We are to interpret statutes, if possible, in a way that gives effect to all provisions. *See* ORS 174.010 (“where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all”); *City of Eugene v. Nalven*, 152 Or App 720, 725-26, 955 P2d 263, *rev den*, 327 Or 431, 966 P2d 221 (1998) (courts are obligated “to give effect to all relevant statutory provisions.”).

To summarize, contracts to acquire or disburse grant funding are not subject to the Code. ORS 279A.025(1). We also conclude that the meaning most likely intended by the legislature for ORS 279A.025(2)(c) is that grant agreements are exempted from code provisions relating to obtaining, modifying or administering price agreements. Because the PWR provisions that trigger the obligation to pay the prevailing rate of wage relate to the type of improvement or project and not to obtaining, modifying or administering agreements, they do not implicate the grants exemption. It follows that ORS 279A.025(2)(c) has no affect on whether an improvement is, or is not, subject to the PWR.

We cannot say that the meaning of ORS 279A.025(2)(c) is entirely free from doubt, however, so we next consider legislative history.

#### **4. Legislative History**

In 2003, the Legislative Assembly enacted the Code in order to assemble the state’s public contracting laws in a single, comprehensive statutory scheme. Or Laws 2003, ch 794. Much of that effort consisted of recodifying pre-existing statutes. The PWR is one of the instances in which the legislature simply reenacted preexisting statutes verbatim, recodifying *former* ORS 279.348 to 279.380 as ORS 279C.800 to 279C.870. The legislature also added new provisions to the Code, one of which was the grants exemption, ORS 279A.025(2)(c).

The Code originated as HB 2341 and was the product of the House Work Group on Public Contracting Law. The House Work Group in turn approved of and worked with the assistance of the Task Group on ORS 279 Rewrite, which was comprised of stakeholders. Jessica Harris of Associated General Contractors was one of the co-chairs of that Task Group and she testified extensively before the legislature about the rewrite.

At the first legislative hearing on HB 2341, Representative Schaufler asked Ms. Harris whether the rewrite affected the applicability of the PWR:

In this bill and its amendments as it exists and how it may be rewritten, is there or will there be any change, any impact, take anything away from prevailing

wage language, law or rates and/or labor's ability to negotiate contracts, and when I say labor, I mean unions?

Ms. Harris responded:

There is no change to the prevailing wage section. \* \* \* [W]e have retained for the most part the term "public agency" in the prevailing wage section for the sole purpose of ensuring that every word of that highly negotiated section did not change.

\* \* \* \* \*

[The stakeholders] took great care not to make any changes to that section. Largely because, as we talked about in the guiding principles, no change was to be made in the public improvement section unless there was complete consensus to do so. And we knew that opening up the prevailing wage section to any discussion thereof would only create and wreak havoc, so we did not touch it.

Testimony of Jessica Harris, House Committee on Business, Labor and Consumer Affairs (HB 2341), January 31, 2003, Tape 13, side B, at 196 to 249.

At the second legislative hearing on HB 2341, Ms. Harris discussed the grants exemption. Representative Rosenbaum asked:

Can you tell me, donations which would be received by a school of books. Is that also an exception to his statute? How are we able to receive things without violating the public contracting?

Ms. Harris responded:

Grant is defined to include gifts and bequests \* \* \*. In other words, yes, those gifts and bequests can be accepted and they are not required to be acquired through a competitive process.

We specifically included grants [in the exemptions] because in our estimation and especially in the estimation of the Housing and Community Services Department that the receipt of grants from the federal government may need to be competitively acquired, which is beyond absurd. For example, because you don't go out for a competitive process to acquire a grant; you make an application and you hope and pray you get it. So, it is because you acquire it and because the acquisition of things is subject to the Code, we specifically exempted grants, and we worked hard to create language, for example, for grants from the federal government for a highway project, to ensure that the acquisition of the grant itself is exempt but the use of the money is not exempt, so you still have to contract it out.

Testimony of Jessica Harris, House Committee on Business, Labor and Consumer Affairs (HB 2341), February 3, 2003, Tape 15, side A, at 412 to end.

Legislative history therefore demonstrates that the purpose of the grants exemption was to exempt the acquisition of grants from competitive bidding requirements that otherwise apply to contracts to acquire property. That history supports an interpretation exempting grant agreements only from Code provisions that relate to obtaining, modifying or administering public contracts and price agreements to acquire or disburse grant funds. There is no suggestion that the drafters or the legislature intended the grants exemption to limit the scope of the PWR. In fact the opposite is true. In response to a question from a legislator about whether the *Code rewrite* would limit the PWR in any way, the co-chair of the Rewrite Task Group told the House Committee that the drafters had not made any changes to the prevailing wage rate laws.

### **Conclusion**

In conclusion, the text, context and legislative history of ORS 279A.025(2)(c) tell us that the legislature did not intend for its exemption of grants from the Public Contracting Code to affect the scope of the prevailing wage rate law or to eliminate the obligation to pay prevailing wages for work on improvements that meet the criteria established by ORS 279C.840(1) and 279C.810(2). In particular, we conclude that if the terms of an agreement between a public agency and its grantee were such that the agency had “contracted for” the construction of an improvement within the meaning of ORS 279C.800(5), then the project would not be exempted from PWR by ORS 279A.025(2)(c).

Sincerely,

Donald C. Arnold  
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General Counsel Division

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<sup>1/</sup> This opinion concerns the meaning and effect of ORS 279A.025(2)(c) and does not concern the meaning of ORS 279C.800(5) or whether a single agreement could be both a “grant” within the meaning of ORS 279A.010(1)(i) and the instrument by which a public agency contracts for the construction of an improvement to serve the public interest within the meaning of ORS 279C.800(5).

<sup>2/</sup> ORS 279A.010 provides, in relevant part:

(1) As used in the Public Contracting Code, unless the context or a specifically applicable definition requires otherwise:

(i)(A) “Grant” means:

(i) An agreement under which a contracting agency receives moneys, property or other assistance, including but not limited to federal assistance that is characterized as a

grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, from a grantor for the purpose of supporting or stimulating a program or activity of the contracting agency and in which no substantial involvement by the grantor is anticipated in the program or activity other than involvement associated with monitoring compliance with grant conditions; or

(ii) An agreement under which a contracting agency provides moneys, property or other assistance, including but not limited to federal assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, to a recipient for the purpose of supporting or stimulating a program or activity of the recipient and in which no substantial involvement by the contracting agency is anticipated in the program or activity other than involvement associated with monitoring compliance with grant conditions.

(B) "Grant" does not include a public contract for a public improvement, for public works, as defined in ORS 279C.800, or for emergency work, minor alterations or ordinary repair or maintenance necessary to preserve a public improvement, when under the public contract a contracting agency pays, in consideration for contract performance intended to realize or to support the realization of the purposes for which grant funds were provided to the contracting agency, moneys that the contracting agency has received under a grant.

<sup>3/</sup> As used in ORS 279A.010(1)(i), "agreement" appears to have its ordinary meaning, namely, "contract." WEBSTER'S at 43.

<sup>4/</sup> In 2005, the legislature amended ORS 279C.810 and, as part of that amendment, it recodified former ORS 279C.810(1) as 279C.810(2). It also renumbered the provision describing "funds of a public agency," formerly ORS 279C.810(1)(c)(B)(i), as ORS 279C.810(1)(a)(A). Or Laws 2005 ch 360 § 8. The 2005 amendments did not change the substance of the PWR in any way relevant to this analysis.

<sup>5/</sup> Moreover, "every contract for public works" appears to refer to construction contracts whereas ORS 279A.025(2)(c) is concerned with contracts or agreements to acquire or disburse grant funds.