



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

May 13, 2005

Jack Kenny, Deputy Director
Oregon Housing & Community Services
P.O. Box 14508
Salem, OR 97309-0409

Re: Opinion Request OP-2005-1

Dear Mr. Kenny:

You have requested our advice about the applicability of Oregon's prevailing wage law, ORS 279C.800 to 279C.870, to the construction of low income, multi-unit housing that is financed with Oregon Housing and Community Services ("OHCS") loans pursuant to ORS 456.550 to 456.725 and OAR chapter 813, division 10, and that receives tax credits pursuant to OAR chapter 813, division 90. We understand that "Risk Share" loans, where the U.S. Department of Housing & Urban Development assumes 50 percent of the risk of default, are included in the division 10 loan program. Your questions and our answers are as follows:

1. Is it necessary that a construction project both constitute a "public work" *and* use "public funds" in order for the prevailing wage law to apply? Yes.
2. Do the conditions imposed by OHCS on the construction of low income housing financed pursuant to ORS 456.550 to 456.725 and OAR chapter 813, divisions 10 and 90, render them "public works"? No.

Discussion

1. Requirements of the Prevailing Wage Law

The prevailing wage rate must be paid to workers on "public works." ORS 279C.840(1). "[P]ublic works" include, but are 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 but does not include the reconstruction or renovation of privately owned property which is leased by a public agency. (Emphasis added.)

ORS 279C.800(5). A contract for a public work must require that the workers employed by "the contractor or subcontractor or other person doing [the work] or contracting" to do the work under the contract be paid at least the prevailing wage rate. ORS 279C.830(1).

ORS 279C.810(1) creates three exceptions to the prevailing wage law, one of which is “projects for which *no* funds of a public agency are directly or indirectly used.” (Emphasis added.) The effect of that provision, though framed as an exception, is that *some* public funds must be used for the project, directly or indirectly, in order for the prevailing wage law to apply. Therefore, and in answer to your first question, the prevailing wage law applies to a construction project only if it is a “public work” *and* it uses “public funds.”

2. Public Works: “Carried On or Contracted For”

To be a public work, an improvement’s construction must be “carried on or contracted for by [a] public agency” as well as serve the public interest. The term “carried on or contracted for” is not defined in ORS 279C.800 to 279C.870. Our goal in interpreting a statute is to determine the intent of the legislature. *PGE v. Bureau of Labor and Industries (PGE)*, 317 Or 606, 610, 859 P2d 1143 (1993); ORS 174.020. We start by examining a statute’s text and context, with text being the better evidence of legislative intent. In interpreting text, we consider statutory and judicially developed 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 meaning.” *PGE*, at 611; ORS 174.010. The context of a statute includes other provisions of the same statute, prior versions of the statute and other related statutes, as well as case law interpreting those statutes. *PGE*, at 610; *SAIF Corporation v. Walker*, 330 Or 102, 108, 996 P2d 979 (2000); *Krieger v. Just*, 319 Or 328, 336, 876 P2d 753 (1994); *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 560 n 8, 871 P2d 106 (1994). If a statute’s text and context unambiguously disclose the legislature’s intent, the inquiry ends there. *PGE*, at 610-11. Only if the legislative intent is not clear from the text and context are we to take account of legislative history to attempt to discern that intent. *Id.* at 611-12; *see also Young v. State*, 161 Or App 32, 983 P2d 1044, *rev den* 329 Or 447 (1999).

Regarding plain, natural and ordinary meaning, “carry on” is defined as “CONDUCT, MANAGE <carry on the new enterprise>.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (WEBSTER’S) (unabridged 1993) at 344. The Oregon Court of Appeals considers “a number of factors, the most important of which is who exercised the most control over the project” to determine whether construction is “carried on” by a public agency. *Columbia-Pacific Bldg. & Constr. Trades Council v. Oregon Com. on Public Broadcasting*, 102 Or App 212, 219, 794 P2d 438 (1990).

Used as a verb, as in the statute, “contract” means “to enter into with mutual obligations : establish or undertake by contract.” WEBSTER’S at 494. Used as a noun, as in the verb’s definition, “contract” means “an agreement between two or more persons or parties to do or not do something : BARGAIN, COMPACT, COVENANT; *esp*: an agreement that is legally enforceable * * *.” *Id.* Regarding context, all public works contractors and subcontractors, or their sureties, are required to file certified statements attesting to their compliance with the prevailing wage law with the “public contracting agency.” ORS 279C.845(1). The agency must “include a provision that the contractor and any subcontractor shall comply with ORS 279C.840 in the advertisement for bids, the request for bids, the contract specifications, the accepted bid or elsewhere in the contract documents,” ORS 279C.855(3), which also appears to contemplate a contractual

relationship between the agency and the builder. And the same appears to be true of ORS 279C.835, which provides that:

Public agencies shall notify the Commissioner of the Bureau of Labor and Industries in writing, on a form prescribed by the commissioner, whenever a contract subject to the provisions of ORS 279C.800 to 279C.870 has been awarded. The notification shall be made within 30 days of the date that the contract is awarded. The notification shall include a copy of the disclosure of first-tier subcontractors that was submitted under ORS 279C.370.

The context of “contracted for” suggests a narrower meaning than the text standing alone, as these other statutes suggest that the agency itself is to be the developer, i.e., the entity that contracts directly with the construction contractor. We therefore consider legislative history.

The phrase “contracted for” was added to the predecessor of ORS 279C.800(5) in 1989 by HB 2609. Or Laws 1989, ch 752 § 1. The bill’s legislative history makes clear that it was prompted by the failure to pay prevailing wages in the construction of the Oregon Public Broadcasting (OPB) Building that was the subject of *Columbia-Pacific Bldg. & Constr. Trades Council v. Oregon Com. on Public Broadcasting*, cited above. In that instance, OPB had solicited proposals from developers for the construction of a building meeting six performance specifications, including 20 percent television studio space. OPB then entered into a 20-year lease with an option to buy the building constructed in accordance with its specifications. Senator Shoemaker, who carried the bill in the Senate, stated that:

HB 2609 was submitted in response to the circumvention of payment of the prevailing wage rate in the construction of the Oregon Public Broadcasting Building. * * *. When a public agency contracts for the construction of a building, the spending power of the government is at work regardless of the form of the agreement. Ownership is not the crucial issue. The issue is whether a project owes its existence to the financial commitment of a public agency. ***That commitment may be in the form of a promise to purchase or a promise to lease, either way construction undertaken on the basis of such a commitment is precisely the circumstance on which the prevailing wage rate law is meant to apply.*** This bill excludes from coverage the reconstruction or renovation of privately owned property that is being leased by a public agency. * * *.

(Emphasis added.) Senator Shoemaker, Senate Floor Debate on HB 2609, June 15, 1989, Tape 181, Side B at 46 to 91. That history makes clear that the public agency need not be the developer and need not have a contract with the construction contractor.

Therefore, in order for the prevailing wage law to apply to construction undertaken pursuant to ORS 456.550 to 456.725, OHCS must either (1) conduct or manage, i.e., have substantial control over, the construction or (2) have entered into a binding agreement **for** the construction, even if the agreement was not with the contractor directly.

To determine whether OHCS has that role or relationship with the construction, we examine the statutes, administrative rules and loan documents that govern division 10 loans.^{1/} ORS 456.620 requires, in relevant part, that OHCS:

(1) With the approval of the State Housing Council, adopt standards for the planning, development and management of housing projects for which qualified housing sponsors receive all or a portion of any required financing under ORS 456.550 to 456.725, for audits and inspections to determine compliance with such standards and adopt criteria for the approval of qualified housing sponsors under ORS 456.550 to 456.725.

(2) Adopt criteria for the approval of qualified housing sponsors in ORS 456.550 to 456.725.

(3) *Enter into agreements with qualified housing sponsors* [prospective borrowers] to regulate the planning, development and management of housing projects constructed with the assistance of the department under ORS 456.550 to 456.725.

(4) With the approval of the council, establish maximum household income limits for all or a portion of the units in housing projects, housing developments or other residential housing financed in whole or in part by the department. * * * .

(Emphasis added.) ORS 456.625(7) authorizes OHCS to:

Make or participate in the making of residential loans to qualified individuals or housing sponsors to provide for the acquisition, construction, improvement, rehabilitation or permanent financing of residential housing or housing development; undertake commitments to make residential loans; * * * .

OHCS also is responsible for evaluating and maintaining current data on the state's need for affordable, low income housing. ORS 456.559(1); 456.572; 456.625(1).

OAR 813-010-0016 prescribes the "Standard Underwriting Criteria" for approving or disapproving a loan application, which generally bear on a proposal's suitability and expected utility, but also include consideration of the "experience of the developer, contractors, architects, consultants and management agent in developing, constructing and operating housing [p]rojects." OAR 813-010-0021(3) requires that "[t]he *Sponsor* shall comply with the provisions of the Program rules and the Act. If the Department determines that *the Sponsor* has not complied, appropriate action shall be taken in accordance with the Commitment or trust deed." (Emphasis added.) OAR 813-010-0023(4) requires that in order for a loan to be approved, a project must:

(a) Be approved by the Department with respect to site; location; market demand; financial feasibility; qualifications of general contractor, management agent and developer; appraisal; financial strength and credit worthiness of the Sponsor;

management plan; final architectural package; organizational documents; title report; and any other information the Director shall require;

(b) Meet all applicable state and local land use and zoning requirements, housing codes, and similar requirements;^{2/}

(c) Be in compliance with federal regulations, state statutes and Program rules;

(d) Be located in the State of Oregon; and

(e) If the Loan is for an amount over \$ 100,000, be approved by the State Housing Council * * *.

During a project's construction, OHCS is to conduct "random inspections * * * for compliance with the plans and specifications previously approved by [OHCS]." OAR 813-010-0023(9). OHCS is to conduct similar inspections upon completion and within 10 months after the completion. *Id.* "The Sponsor" shall be responsible for correcting construction defects within a time period set by the Department. *Id.* The Sponsor's supervising architect also must submit regular inspection reports to OHCS. *Id.*

OAR 813-010-0036(2) sets out the Department's project evaluation responsibilities and replicates the requirements of OAR 813-010-0023(4)(a), (b) and (d) and fleshes out the federal requirements. OAR 813-010-0042 prescribes the conditions for tenant eligibility (low income). Division 12 (Rental Housing Program) imposes conditions on Sponsors and loans that are generally similar to those imposed by division 10.

You have provided our office with copies of six form documents that you advise currently are used to consummate loans for the construction of low income housing pursuant to OAR chapter 813, divisions 10 and 12, as well as a copy of the October 2004 Bond Financing Loan Application. Four of the documents, the Loan Commitment, Loan Agreement, Promissory Note and Regulatory Agreement, are contracts between OHCS and the borrower only. The Management Agreement, which concerns the project's management as a going concern *post-construction*, and the Trust Deed include as additional parties a management Agent and a Trustee, respectively. Among other things, the Regulatory Agreement specifies that a project meets and will continue to meet Internal Revenue Code requirements, essentially that it will be low income, residential housing, and the Loan Commitment requires that a project's "final Working Drawings, Material Specifications, Project Manual, finalized construction schedule, and construction budget" be approved by OHCS's architectural consultant prior to the start of construction.

The Bond Financing Loan Application is a lengthy document, requiring detailed information about the proposed project's site and vicinity (*e.g.*, the proximity of grocery stores, parks and schools) and imposing requirements on site design (*e.g.*, orient units to receive sunlight daily); building design (*e.g.*, privacy for individual yards and patios); and unit design (*e.g.*, number of bathrooms). Loan applications may be submitted on a prospective sponsor's

own initiative or in response to OHCS's request for proposals, statewide or local, pursuant to ORS 456.623.

There is little or nothing in the statutes, rules or the contract documents we reviewed to suggest that OHCS *carries on* the construction of low income housing projects. OHCS has no direct relationship with the builder and its right of inspection is a conventional lender prerogative that would entitle OHCS to require that unsatisfactory construction be corrected but would not entitle OHCS to direct the work itself.

Regarding whether OHCS has *contracted for* the construction, OHCS is not a party to a contract that provides for construction, either directly with a construction contractor or through a developer. The loan documents that we have reviewed, like ORS 456.550 to 456.725 and OHCS's administrative rules, allow the loan proceeds to be used for the construction of low income housing and prohibit their use for anything else. But they do not actually provide for the sponsor/borrower to construct the housing. And while OHCS requires that construction conform to myriad design specifications, similar conditions are imposed in conventional private-sector lender-borrower relationships to assure the lender that the finished product will be economically viable and the lender's security interest thereby protected. We think they are more aptly viewed as restrictions on the use of the loan proceeds than as specifications in a construction contract. Certainly, OHCS and its rules and documents contemplate that a sponsor/borrower will contract for construction (reconstruction or renovation), but OHCS has not itself entered into a contract *for* construction. For those reasons, we believe that the OHCS's loans for division 10, low income, multi-use housing are not "public works" within the meaning of ORS 279C.800(5).^{3/}

Our answer applies to transactions that are governed by the statutes, administrative rules and loan documents discussed above – as they are currently written. It is important to recognize that the answer to whether a particular construction project is a public work is fact-specific. For that reason, materially amending the statutes, rules, loan documents or OHCS/borrower relationship (such as by granting OHCS greater control over construction) could change the analysis and answer.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

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^{1/} We see nothing in division 90 that informs the analysis of this question.

^{2/} You inform us that the sites proposed for projects are sometimes governed by local zoning laws requiring that a building's ground floor be used for commercial space. We see no reason why that requirement would change the analysis.

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^{3/} Because we conclude that OHCS neither carries on nor contracts for construction, it is unnecessary to consider whether the other element of the definition of public works – “to serve the public interest” – is met.