MEMORANDUM OF LAW

DATE: November 19, 2001

TO: George Loveland, Senior Deputy City Manager

FROM: City Attorney

SUBJECT: Prevailing Wage Applicability After Labor Code Amendment

QUESTIONS PRESENTED

The California Labor Code was amended to apply prevailing wages to design and pre-construction activity. This memorandum addresses two issues: (1) what constitutes design and pre-construction activities, and (2) what City projects and contracts may be affected by this change.

SHORT ANSWER

1) "Design and pre-construction" activities include land surveying and inspection work. The activities traditionally considered to be "white collar" professional activities, such as architecture and engineering, is not included.

2) Prevailing wages continue to apply only to projects of a charter city which are not municipal affairs projects. However, application of this Amendment may decrease the number of City projects considered to be municipal affairs.

BACKGROUND

In order to evaluate the full impact of the Amendment, it is necessary to understand prevailing wage law as it existed before the Amendment. Prior to enactment of this Amendment, existing law dictated that charter cities were not subject to prevailing wage laws. "Under article XI, section 5 of the California Constitution, a city may make and enforce all regulations with respect to municipal affairs, subject only to restrictions and limitations provided in their charters and with respect to other matters they shall be subject to general laws. As a charter city legislates with regard to municipal affairs, its charter prevails over general state law. The prevailing wage law, a general law, does not apply to public works projects of a charter city so long as the projects in question are within the realm of municipal affairs." *Vial v. City of San Diego*, 122 Cal. App. 3d 346, 348 (1981). *Regents of the Univ. of California v. Aubry*, 42 Cal. App. 4th 579, 590 (1996).

A public works project is a municipal affair project when: 1) it is funded solely by City funds; and 2) the nature of the work is not a matter of statewide concern. The attached Memorandums of Law thoroughly discuss what constitutes a municipal affair project. 1993 City Att'y MOL 318; 1990 City Att'y MOL 322; 1990 City Att'y MOL 125. When the City is engaged in a municipal affair project, it is not subject to prevailing wages on public work. Further, the City is precluded from paying prevailing wages on municipal affair projects. Under City of San Diego Charter section 94, the City must award construction contracts to the lowest responsible bidder. This requirement prohibits the City from paying prevailing wages on municipal affair projects. 1993 City Att'y MOL 318.

ANALYSIS

On January 1, 2001, California Labor Code section 1720 was amended to broaden the scope of application of prevailing wages. The Amendment, when read in context with Labor Code section 1720(a), purports to extend payment of prevailing wages to "work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work." [See copy of the statute attached.]

I. Definition of "Design and Preconstruction" Activities.

Turning to non-municipal affair projects, which will generally include any project funded with non-City money and/or projects which implicate non-municipal concerns, the Amendment requires that prevailing wages apply to "design and preconstruction." Subsection (a) of the Amendment expressly states that "design and preconstruction phases of construction includ(e), but (are) not limited to, inspection and land surveying work." Other than the inclusion of these activities, the term "design and preconstruction" remains undefined.

In order to construe the meaning of "design and preconstruction" activities, one may rely on several well established principles of statutory construction. When a statute is unclear, parties may look to legislative intent to facilitate interpretation of the statute. *Select Base Materials v. Board of Equalization*, 51 Cal. 2d 640, 645 (1959). The primary rule is that one should ascertain the intent of the legislature, in order to effectuate the purpose of the law. *Id.* In determining the intent, the reader should look first at the actual words of the statute, giving them their normal and ordinary meaning. *People v. Knowles*, 35 Cal. 2d 175, 182 (1950). Moreover, every statute should be considered within the framework of the system of law as a whole, so that it may be harmonized. *Moore v. Panish*, 32 Cal. 3d 535, 541 (1982). Legislative history is also a valuable aid in interpretation. *California Mfrs. Ass'n. v. Public Utilities Comm'n.*, 24 Cal. 3d 836, 844 (1979).

The Legislative history of the Amendment facilitates interpretation of "design and construction." The Assembly Committee on Appropriations described the purpose of the Amendment for an August 23, 2000 hearing. Comments from an analysis for that hearing included:

> This bill codifies current DIR practice by including inspectors and surveyors among those workers deemed to be employed upon public works and by insuring that workers entitled to prevailing wage during the construction

phase of a public works project will get prevailing wage on the design and pre-construction phases of a project.

S.B. 1999, Assembly Analysis, Stephen Shea (Aug. 22, 2000).

On August 17, 2000, the California State Assembly Committee on Labor and Employment described further the legislative intent. In Comment 5 from the Bill Analysis for an August 18, 2000, Assembly hearing, the legislative analyst for the Committee noted that the Amendment, not yet passed, should be modified to make clear the intent of its proponents. Specifically, the proponents did not intend "to expand the definition of public works to include traditionally white collar workers such as architects and engineers and others in their employ who primarily work off-site." Consequently, on August 23, 2000, the Assembly Committee struck language regarding architectural, engineering, and environmental services. The language stricken was:

1) The professional services of an architectural, engineering, environmental, and land surveying nature, including services incidental to the performance of architectural, engineering, environmental, and land surveying services that members of these professions and those in their employ may logically or justifiably perform;

2) Construction project management provided by a licensed architect, registered engineer, or licensed general contractor, as defined; and

3) Environmental services performed in connection with project development and permit processing in order to comply with federal and state environmental laws.

As a result, we conclude that the Amendment does not apply to professional architectural, engineering, environmental services and incidental services, construction project management by licensed architect, engineer, or general contractor; and persons performing environmental review. Further, it does not apply to off-site white collar workers. Instead, only those who would be entitled to prevailing wages during the actual construction phase on the project should be paid prevailing wages during earlier phases of the project.

II. Amendment Applicability to Municipal Affairs.

Subsection (c) of the Amendment applies prevailing wages to street, sewer, or other improvement work done under the direction and supervision of a charter city. While courts give great weight to the stated purpose of the Legislature in enacting general laws, the Legislature may not determine what is a municipal affair. *Bishop v. City of San Jose,* 1 Cal. 3d 56, 63 (1969); *Sonoma County Org. of Pub. Employees v. County of Sonoma*, 23 Cal. 3d 296, 315-16 (1979). Therefore, despite the language in the Amendment, we opine that it does not apply to charter cities on municipal affair projects. Consequently, the law remains that on municipal affairs, the City shall not pay prevailing wages.

III. Amendment May Result in Fewer Projects Being Municipal Affairs.

It is possible that the Amendment may decrease the number of projects considered to be municipal affairs. It was argued that where state, federal, County, or Redevelopment Agency money was spent on City projects, as long as the money was not expended on "bricks and mortar," prevailing wages would not apply to the subsequent municipal affair construction contract. Cal. Lab. Code 1771. However, in light of the Amendment, the Department of Industrial Labor Relations [DIR] will likely argue that these projects are now subject to prevailing wages.

For example, an opinion released subsequent to the Amendment reflects the DIR's broad interpretation of the Amendment. Though not directly on point, the determination sheds light on the DIR's focus. This determination was in the context of a private project; however, it is foreseeable that a court could apply the same rationale to a municipal affair project to which the Redevelopment Agency, the County, or other governmental agency may have contributed. On two purely private projects to build an office building and a mattress plant, a redevelopment agency's sole contribution was payment of City permitting and plan check fees during the design process as an inducement to develop the areas where the projects were located. The DIR found that prevailing wages applied to the otherwise private project because of the redevelopment agency's contribution. Public Works Case No. 2000-015, p.4 (March 22, 2001). This office recommends that each project to which non-City governmental agencies contribute during the design and pre-construction phase, must be evaluated on a case by case basis.

CONCLUSION

On non-municipal affair projects, the Amendment extends the statute's application to "design and preconstruction activities." These preconstruction activities likely do not include traditionally white collar worker such as architects, engineers, and others who primarily work off the construction site. However, it does include inspectors and land surveyors. It may also include those performing geological testing, drilling and soil density testing, as well as others performing preconstruction or design activities who would be paid prevailing wages during the actual construction of the public works project.

In light of the above, the City Attorney recommends modifying consultant agreements to clarify that prevailing wages apply to subconsultants performing inspection and land surveying work, as well as all other subconsultants within the Amendment.

CASEY GWINN, City Attorney

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By
Jacqueline Lindsay
Deputy City Attorney

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Attachments

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