



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

October 15, 1993

**Mr. John Pouland
Executive Director
General Services Commission
P.O. Box 13047
Austin, Texas 78711-3047**

Letter Opinion No. 93-92

**Re: Effect of certain amendments to the
Texas prevailing wage statute, article 5159a,
V.T.C.S., and related questions (RQ-591)**

Dear Mr. Pouland:

You have asked us to consider the effects of certain amendments to the Texas prevailing wage statute, article 5159a, V.T.C.S. In particular, you ask about the addition of the following language to section 2(a) of the statute by House Bill 560:

To ascertain the general prevailing wage rate, the public body shall either conduct a survey to determine the prevailing wage based upon the wages received by classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, county or other political subdivision of the State in which the work is to be performed, or adopt the prevailing wage rate as determined by the U.S. Department of Labor in accordance with the Davis-Bacon Act, if the survey on which the Davis-Bacon rate was founded was conducted within three years prior to the bidding of the project.

You ask us a series of questions about how such a survey ought to be conducted. In our view, this office has addressed most of your questions in Attorney General Opinion DM-25 (1991), and nothing in the proposed amendments alters the reasoning of that opinion.

You note, for example, that all classes of needed workers for a particular construction project may not be obtainable within the particular political subdivision in which the work is to be done. This was noted as well in Attorney General Opinion DM-25:

[I]f a project called for a specialized kind of work that had not recently been performed in the immediate locality of the project, it might be impossible for the public entity to establish prevailing wages "for work of a similar character" in the immediate locality. In such

cases, we think that the agency might reasonably look to a larger geographic area in which "work of a similar character" to that required on the project had been performed in order to establish a prevailing wage for such work.

Attorney General Opinion DM-25 (1991) at 3.

As a general rule, however, Attorney General Opinion DM-25 holds that "a state agency making a prevailing wage determination should select as the 'locality' on which it bases such determination the political subdivision most nearly corresponding to the location of the work." *Id.* The opinion addressed particularly the argument that a state agency might, as a discretionary matter, select as the locality on which it based its determination "whichever overlapping political subdivision it decided would have the lowest prevailing wages, in order to reduce its costs on the project." *Id.* The opinion rejected that argument, noting that the intent of the statute was "to protect workers in the immediate locality of the work from wages being driven down by payment of a lower rate than was the locally prevailing rate," and that such a reading of the statute would therefore undermine the law's intent. *Id.* The opinion's reasoning in this regard was sound, and we find nothing in the recent amendments which would change this result.

You ask, then, what political subdivision the public body should choose to survey for the purpose of determining prevailing wage rates. We believe, generally, that it should, as Attorney General Opinion DM-25 phrases the matter, choose "the political subdivision most nearly corresponding to the location of the work." *Id.* It may survey a larger area only in certain limited circumstances, as for example when the smaller area does not contain certain sorts of laborers.¹ It may not choose an expanded area for survey in order to decrease its costs. Nor, in our view, may it include in the categories of workers surveyed in the larger area those who are available in the political subdivision where the work is to be done. To use the example you have provided, the fact that one may have to go to a nearby city to find tile workers, and therefore may have to use that city as the source for determining prevailing wages for tile workers, does not mean that it is necessary or permissible to use that city as the source for determining prevailing wages for plumbers or electricians, if the site of the work has plumbers or electricians.

You ask whether a council of governments is a political subdivision for the purposes of this statute. In Attorney General Opinion M-518 (1969), this office held that under article 1011m, V.T.C.S., since repealed and codified at chapter 391 of the Local Government Code, there was no legal distinction between councils of governments and regional planning commissions: "[T]he legislative intent is to provide that a Council of Governments may be constituted under the Act and that when so constituted it has all the

¹It may be that, as an economic matter, it will be necessary to include transportation costs or a premium for the inconvenience to workers of going from an urban to a rural area in order to arrive at a correct prevailing wage computation. However, this is a factual matter upon which we cannot speculate.

attributes and powers provided by the statute for a Regional Planning Commission, or a 'Commission.'" Attorney General Opinion M-518 at 2. Section 391.003 of the Local Government Code, which concerns the creation of such commissions, provides in relevant part:

(a) Any combination of counties or municipalities or of counties and municipalities may agree, by ordinance, resolution, rule, order, or other means to establish a commission.

....
(c) *A commission is a political subdivision of the state.*

(emphasis added). We conclude on the basis of section 391.003(c) of the Local Government Code that a council of governments is a political subdivision for the purposes of article 5159a, V.T.C.S.

The public body may not omit any classes of workmen or rates for prevailing wages from its contracts. Section 2 of the prevailing statute, in both its amended and unamended forms, makes this clear:

The public body . . . *shall* specify in the call for bids for said contract, and in the contract itself, what the general prevailing rate of per diem wages in the said locality is for *each* craft or type of workman needed to execute the contract, also the prevailing rate for legal holiday and overtime work [Emphasis added.]

You further ask whether the General Services Commission may "perform prevailing wage surveys for other entities through agreement under the Interagency Cooperation Act, Texas Government Code, chapter 771." We believe that agencies required or authorized under the recent amendments to the prevailing wage statute to conduct such surveys may contract with the General Services Commission for the commission to conduct such surveys.

Section 771.003(a) of the Government Code provides that a "state agency may agree or contract with another state agency for the furnishing of necessary and authorized services and resources." Section 771.010 provides that an agency "may not enter into an agreement or contract that requires or permits the agency to exceed its duties and responsibilities or the limitations of its appropriated funds." The purpose of the Interagency Cooperation Act, as we understand it, is to permit any agency authorized to take some action to contract with another agency to undertake the act for it. The initial agency must not act beyond the scope of its authority. In the instant case, state agencies along with other public bodies must either conduct prevailing wage surveys or use the results of the surveys made by the Department of Labor, pursuant to section 2(a) of H.B. 560. Accordingly, since they have the authority to conduct such surveys, state agencies

have the authority to contract with the General Services Commission to perform the surveys under the Interagency Cooperation Act.

Your final question is whether a body awarding public work contracts must adopt as administrative rules its procedures for ascertaining prevailing wage rates, if that body is subject to the Administrative Procedures and Texas Register Act ("APTRA"), article 6252-13a, V.T.C.S. As we understand it, you are asking whether such procedures would be "rules" for APTRA purposes.

Article 6252-13a, section 3(7), V.T.C.S. defines rule as

any agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of an agency. The term includes the amendment or repeal of a prior rule but does not include statements concerning only the internal management or organization of any agency and not affecting private rights or procedures.

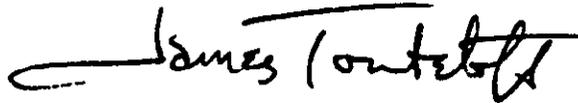
On two prior occasions, this office has been asked to determine whether an agency action constituted a rule for APTRA purposes. In Attorney General Opinion H-858 (1976), we held that an agency's formal interpretation of a previously adopted rule was itself a rule for APTRA purposes, and that the agency was therefore required to comply with APTRA's notice and hearing requirements before issuing such an interpretation. In Attorney General Opinion JM-67 (1983), we held that the plan of operation of the Texas Catastrophe Property Insurance Association was a rule of the State Board of Insurance, because the plan was of general applicability, had a substantial public impact, implemented and interpreted law and policy, and "augment[ed], rather than merely interpret[ed], existing law." Attorney General Opinion JM-67 at 4.

In both these cases, this office was advised of the specific agency action contemplated, and was therefore able to say those acts constituted rule-making. In the instant case, however, you have asked us in the abstract about "procedures for ascertaining prevailing wages." Since we do not know what these procedures may consist of, we are unable to give you more specific guidance on this question.

S U M M A R Y

Nothing in the recent amendments to the Texas prevailing wage rate statute alters the reasoning or result of Attorney General Opinion DM-25 (1991). Generally, when choosing an area in which to perform a prevailing wage rate survey, a public body should choose the political subdivision most nearly corresponding to the location of the work. For the purposes of this statute, a council of governments is a political subdivision. The public body may not omit any classes of workers or rates for prevailing wages from its contracts. Agencies required or authorized by the statute to conduct prevailing wage surveys may contract with the General Services Commission for the commission to conduct such surveys.

Yours very truly,

A handwritten signature in black ink, appearing to read "James Tourtelott", with a long horizontal flourish extending to the left.

**James Tourtelott
Assistant Attorney General
Opinion Committee**