VOLUME NO. 42 OPINION NO. 60

CONTRACTS - What constitute "public works contracts" subject to standard prevailing wage requirements;
LABOR AND INDUSTRY, DEPARTMENT OF - What constitute "public works contracts" subject to standard prevailing wage requirements;
LABOR RELATIONS - What constitute "public works contracts" subject to standard prevailing wage requirements;
PREVAILING WAGE - What constitute "public works contracts" subject to;
CODE OF FEDERAL REGULATIONS - 29 C.F.R. §§ 5.2(i) to (k) (1987);
MONTANA CODE ANNOTATED (1987) - Sections 18-1-102, 18-2-401 to 18-2-432, 18-2-403, 18-2-431;
MONTANA CODE ANNOTATED (1985) - Section 18-2-403;
MONTANA CODE ANNOTATED (1981) - Sections 18-2-403, 18-2-422;
MONTANA CODE ANNOTATED (1978) - Sections 18-2-401, 18-2-403 to 18-2-405;
MONTANA LAWS OF 1987 - Chapter 561;
MONTANA LAWS OF 1981 - Chapter 139;
MONTANA LAWS OF 1973 - Chapter 375;
MONTANA LAWS OF 1931 - Chapter 102;

REVISED CODES OF MONTANA, 1947 - Section 41-701;
UNITED STATES CODE - 40 U.S.C. §§ 276a to 276a-7; 41 U.S.C. §§ 351 to 358.

HELD: The term "public works contracts" in section 18-2-403(2), MCA (1987), includes all contracts subject to the requirements of section 18-2-403(1), MCA (1987).

1 February 1988

Mary M. Hartman, Commissioner
Department of Labor and Industry
P.O. Box 1728
Helena MT 59624

Dear Commissioner Hartman:

You have requested my opinion concerning the following question:

> Do the standard prevailing wage rate provisions in sections 18-2-401 to 432, MCA (1987), apply to public contracts which provide for the rendering of nonconstruction-related services?

Based on a review of the legislative history associated with Montana's prevailing wage statute, I conclude that its provisions continue to apply, as they have since 1973, to service contracts entered into by the state, counties, municipalities or school districts.

Sections 18-2-401 to 432, MCA (1987), are commonly referred to as Montana's "Little Davis-Bacon Act." Thompkins v. Fuller, 40 St. Rptr. 1192, 1195, 667 P.2d 944, 948 (1983). Enacted in 1931 shortly after passage of the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-7, it initially required "all contracts hereafter let for state, county, municipal and school construction, repair and maintenance work under any of the laws of this State" to include an employment preference provision for bona fide Montana residents and a provision mandating the contractor to "pay the standard prevailing rate of wages in effect as paid in the county seat of the county in which the work is being performed[.]" 1931 Mont. Laws, ch. 102, § 1. The statute has been extensively modified since 1931, and several of the amendments are presently relevant.

In 1973 the word "services" was added to the first sentence of section 41-701, R.C.M. 1947. 1973 Mont. Laws, ch. 375. As amended, the statute's employment preference and standard prevailing wage requirements were thus extended to all contracts "let for state, county, municipal, school, heavy highway or municipal construction, services, repair and maintenance work[.]" The effect of the amendment was to broaden the statute's scope beyond contracts dealing only with construction-related matters and to encompass contracts concerned with the provision of "services." See Feb. 7, 1973, Minutes of House Labor and Employment Relations Committee (statement of R. L. Rampy). This extension of minimum wage standards to service contracts paralleled the passage of the Federal Service Contract Act, 41 U.S.C. §§ 351-58, in 1967. See generally American Federation of Labor v. Donovan, 757 F.2d 330, 333 (D.C. Cir. 1985) ("The Service Contract Act ... provided the third leg in Congress' support of labor standards in federal contracting. Workers on federal or federally funded construction contracts were already protected under the Davis-Bacon Act ... which was enacted in 1931, while those performing work under federal supply contracts were protected under the Walsh-Healey Public Contract Act ... passed by Congress in 1936"). When the Commissioner of Labor and Industry was given general rulemaking authority under the Montana statute in 1985 (§ 18-2-431, MCA (1987)), he was accordingly directed to consider Federal Service Contract Act rates in determining standard prevailing wage levels. House Bill 387 (49th Reg. Sess.) (statement of intent), reprinted in 2 MCA Annot., § 18-2-431 (1986).

As a result of the 1978 recodification, the lengthy section 41-701, R.C.M. 1947, was divided and placed into sections 18-2-401(1), 18-2-401(3), 18-2-403, 18-2-404(1), and 18-2-405, MCA (1978). Section 18-2-403(1), MCA (1978), contained the first sentence of section 41-701, R.C.M. 1947, and read:

> In all contracts hereafter let for state, county, municipal, school, or heavy highway construction, services, repair, and maintenance work under any of the laws of this state there shall be inserted in each of said contracts a provision by which the contractor must give preference to the employment of bona fide Montana residents in the performance of said work and must further pay the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions and travel allowance provisions

> in effect and applicable to the county or locality in which the work is being performed.

The statute was amended in 1981 to add, most significantly, a new subsection to section 18-2-403, MCA (1978), and a new section, § 18-2-422, MCA (1981). 1981 Mont. Laws, ch. 139, §§ 2, 4. Section 18-2-422, MCA (1981), stated that "[a]ll bid specifications and contracts for public works projects must contain a provision stating for each job classification the prevailing wage rate, including fringe benefits, that the contractors and subcontractors must pay during construction of the project[,]" while the new subsection to section 18-3-403, MCA (1978), provided that "[f]ailure to include the provisions required by 18-2-422 in a public works contract relieves the contractor from his obligation to pay the standard prevailing wage rate and places such obligation on the public contracting agency" (§ 18-2-403(3), MCA (1981)). The 1981 amendments also modified section 18-2-403(1), MCA (1978), to require that the bid specifications for all contracts subject to such provision include a provision setting out the employment preference and standard prevailing wage rate requirements. 1981 Mont. Laws, ch. 139, § 2. The terms "public works contract" and "public works projects" used, respectively, in sections 18-2-403(3) and 18-2-422, MCA (1981), were not defined, and there is no indication from the minutes of pertinent legislative hearings as to the scope those terms were intended to have. See Jan. 8 and 13, and Feb. 3, 1981, House Labor and Industry Committee Minutes; Mar. 5 and 7, 1981, Senate Labor and Employment Relations Committee Minutes. The changes effected in 1981 were instead discussed in broad terms and were designed generally to strengthen the statute's enforceability. No intent to modify its substantive reach appears either in the changes themselves or the associated legislative history.

During the 1987 legislative session, finally, substantial changes were enacted in the geographical areas used for determining applicable standard prevailing wage rates for all public contracts except heavy highway construction contracts now subject to uniform, statewide prevailing wage rates. 1987 Mont. Laws, ch. 561, §§ 1-4. Pursuant to these amendments, the employment preference and standard prevailing wage rate requirements in section 18-2-403(1), MCA (1985), were separated into distinct subsections which read:

> (1) In any contract let for state, county, municipal, school, or heavy highway construction, services, repair, or maintenance

> work under any law of this state, there shall be inserted in the bid specification and the contract a provision requiring the contractor to give preference to the employment of bona fide Montana residents in the performance of the work.
>
> (2) All public works contracts under subsection (1), except those for heavy highway construction, must contain a provision requiring the contractor to pay the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions and travel allowance provisions, in effect and applicable to the district in which the work is being performed.

§ 18-2-403(1), (2), MCA (1987). No reported discussion of the term "public works contracts" used in section 18-2-403(2), MCA (1987), appears in pertinent committee minutes. See Feb. 18, 1987, House Business and Labor Committee Minutes; Mar. 24 and 26, 1987, Senate Labor and Employment Relations Committee Minutes. Except for the exclusion of all public contracts of $25,000 or less from coverage under the statute (1987 Mont. Laws, ch. 561, § 2), there was no expressed intent to modify the substantive scope of the statute.

As stated above, no question exists that public contracts for services unrelated to construction matters were subject to the employment preference and standard prevailing wage rate conditions prior to the 1987 amendments. The issue becomes, therefore, whether those amendments were intended to limit application of the prevailing wage requirement to a class of public contracts smaller than that subject to the employment preference requirement in section 18-2-403(1), MCA (1987). Resolution of this issue is in large measure controlled by well-settled canons of statutory interpretation.

The goal of all statutory construction is to ascertain and implement legislative intent. E.g., Burritt v. City of Butte, 161 Mont. 530, 534, 508 P.2d 563, 565 (1973); State ex rel. School District No. 8 v. Lensman, 108 Mont. 118, 128, 88 P.2d 63, 67 (1939). Search for that intent begins with the language of the statute itself and, if such language is unambiguous, ends there. Lewis & Clark County v. State, 43 St. Rptr. 2150, 2153, 728 P.2d 1348, 1350 (1986); W.D. Construction, Inc. v. Board of County Commissioners, 42 St. Rptr. 1638, 1641, 707 P.2d 1111, 1113 (1985). However, when ambiguity does exist, legislative intent can be inferred from both

internal and external sources--i.e., from a careful reading of all provisions in the statute and from, most typically, extant legislative history. See, e.g., Lewis & Clark County v. State, supra ("[i]f intent cannot be determined from the context of the statute, we examine the legislative history"); McClanathan v. Smith, 186 Mont. 56, 61, 606 P.2d 507, 510 (1980) ("[w]here there is doubt about the meaning of a phrase in a statute, the statute is to be construed in its entirety and the phrase must be given a reasonable construction which will enable it to be harmonized with the entire statute"); Hostetter v. Island Development Corporation, 172 Mont. 167, 171, 561 P.2d 1323, 1326 (1977) ("[t]his is one section of the [act] and it is the duty of this Court to interpret it in such a manner as to ensure coordination with other sections of the Act, and fulfill legislative intent"); Aleksich v. Industrial Accident Fund, 116 Mont. 127, 137, 151 P.2d 1016, 1020 (1944) ("[t]o ascertain the intention of the legislature the Act must be read as a whole and, where possible, conflicting and ambiguous parts made to harmonize"). My duty, like that of a court, is thus "to give effect to the objects of the statute [and] to construe it so as to promote justice[.]" Mackin v. State, 37 St. Rptr. 1998, 2002, 621 P.2d 477, 481 (1980); accord LaFountaine v. State Farm Mutual Automobile Insurance Company, 42 St. Rptr. 496, 499, 698 P.2d 410, 413 (1985).

Instantly, the term "public works contracts" in section 18-2-403(2), MCA (1987), is not defined and is arguably susceptible to different interpretations. The Montana Supreme Court, for example, has construed the term "public contracts for ... public works of all kinds" in section 18-1-102(1)(a), MCA (1987), as including a contract for janitorial services. State ex rel. Great Falls Mr. Klean v. Montana State Board of Examiners, 153 Mont. 220, 226, 456 P.2d 278, 281 (1969). The Commissioner of Labor and Industry, however, issued a declaratory ruling in 1982 construing the term "public works projects" in section 18-2-422, MCA (1981), to include only construction-related activity and thereby concluded that other public contracts, while subject to the standard prevailing wage rate requirement, need not contain a provision setting forth the prevailing wage rate for each job classification. The ruling relied heavily for its conclusion upon the definitions of the terms "building" or "work," "construction," and "public building" or "public work" appearing in United States Department of Labor regulations implementing, inter alia, the Davis-Bacon Act. 29 C.F.R. §§ 5.2(i) to (k) (1987). These definitions limit the scope of such terms to construction-related activity.

Although the issue is not free from doubt, the more reasonable interpretation of the term "public works contracts" in section 18-2-403(2), MCA (1987), is an expansive one consonant with the 1973 amendment to the statute extending both employment preference and standard prevailing wage requirements to contracts for services. An interpretation restricting section 18-2-403(2), MCA (1987), to construction-related contracts would exempt, of course, service contracts from the latter requirement without any apparent legislative intent to undo partially what had been accomplished 16 years earlier. Such a major change in labor standards law seems clearly unintended by the 1987 amendments whose objective, as developed above, was to strengthen the statute's remedial provisions; there was, conversely, no discernible intent to alter its reach except for exclusion of contracts with a value of $25,000 or less. Whatever the precise reason for use of the term "public works contracts" in subsection 2 of section 18-2-403, MCA (1987), rather than simply the term "contracts," I find the scope of that subsection and the previous subsection to be coterminous with respect to the type of public contracts covered. Cf. Johnson v. Marias River Electric Cooperative, Inc., 41 St. Rptr. 1528, 1532, 687 P.2d 668, 671 (1984) (Legislature did not intend to abrogate sub silentio established right of children to recover damages for the wrongful death of a parent by adoption of the Uniform Probate Code).

Lastly, my interpretation of the term "public works contracts" in section 18-2-403(2), MCA (1987), is not inconsistent with the Commissioner's 1982 declaratory ruling as to section 18-2-422, MCA (1981). The Commissioner realized that section 18-2-403(1), MCA (1981), directed bids for public contracts and the contracts themselves to require payment of standard prevailing wage rates and was thus concerned only with the discrete question of whether section 18-2-422, MCA (1981), mandated such bids and contracts to include not only a statement of that requirement but also the actual wage rate, including fringe benefits, for each employee job classification of the contractor or subcontractor performing work on the "public works project[.]" The central term in his ruling was therefore not "public works contract," as used in section 18-2-403(3), MCA (1981), but rather "public works projects," as used in section 18-2-422, MCA (1981). When read in its entirety, the latter provision is clearly directed to construction-related contracts which, like service contracts, represent a form of a "public works contract." The declaratory ruling should not be viewed as concluding that the term "public works contract" in

section 18-2-403(3), MCA (1981), refers only to construction-related contracts; instead, that provision, now codified as section 18-2-403(5), MCA (1987), applies only to that class of public works contracts subject to the requirements of section 18-2-422, MCA (1987).

THEREFORE, IT IS MY OPINION:

> The term "public works contracts" in section 18-2-403(2), MCA (1987), includes all contracts subject to the requirements of section 18-2-403(1), MCA (1987).

Very truly yours,

MIKE GREELY
Attorney General