

## Prevailing Wage Opinion Letter 08-31-06

August 31, 2006

I am writing in response to your request for this Office's written opinion regarding the applicability of the Massachusetts Prevailing Wage Law, G.L. c. 149, §§26-27. Specifically, you have asked if the prevailing wage law applies to contracts for certain feasibility studies.

As I understand it, your client company conducts feasibility studies for municipalities to determine the availability and quantity of water in a particular municipality. [1] This work involves a review of existing maps and geological studies, as well as an independent geological study to identify the possible location of underground aquifers. If the company locates a potential aquifer, it drills a pipe approximately 2.5 inches in diameter into the ground at that site. Water is then pumped out through the pipe and tested. Generally speaking, only 50 percent of the aquifers tested during this phase of the study ultimately become water sources for the municipality.

If any of the sites appear to be appropriate for public use, the company drills a second pipe into the aquifer. This pipe is approximately eight to 12 inches in diameter. Water is then pumped out and tested over a period of time. Approximately 90 percent of the aquifers tested in this phase of the study ultimately become water sources for the municipality. If the source is found to be appropriate, the municipality will utilize the second larger pipe as a municipal well and will build a pumping station around that well. (If the aquifer is on private land, the municipality will have to take the additional step of acquiring the property.) Your client company is not involved in the construction of the pumping station.

The Massachusetts prevailing wage law applies to the construction of public works by the commonwealth, or by a county, town, authority or district. G.L. c. 149, §§26, 27. The term "construction" is defined, in pertinent part, as "additions to and alterations of public works ... [and] certain work done preliminary to the construction of public works, namely, soil explorations, test borings and demolition of structures incidental to site clearance ..." G.L. c. 149, §27D. The question before us is whether these soil explorations/test borings performed to identify potential aquifers are encompassed within this definition of "construction." [2]

The question causes us to consider the extent to which an activity may be considered "preliminary" to construction. While the answer may be somewhat fact-specific, we note that inherent in testing is a trial and error approach, i.e. it is anticipated that soil explorations or test borings will yield more or less satisfactory results, and that numerous tests are often required to obtain the necessary information. Therefore, the percentage of "successful" tests is not necessarily germane to the analysis. Furthermore, the express purpose of the testing you have described is to allow for eventual construction of a municipal well and pumping station. Considered in this light, this testing appears to be "work done preliminary to the construction of public works." Given these facts, we consider the drilling of these pipes during any phase of this project to be covered by the prevailing wage law. [3]

I hope this information has been helpful. If you have any further questions, please feel free to contact me.

Sincerely,  
Lisa C. Price  
Deputy General Counsel

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[1] Your client is a subcontractor to the consulting engineer who enters into a contract with the municipality.

[2] Your letter indicates that various consulting engineers have informed your client that their work is not covered because it constitutes "professional services" or because the contract is not put out for public bid. Please be advised that neither of these factors is dispositive as to the application of the prevailing wage law.

[3] As we have stated in numerous other opinion letters, any off-site analysis of the water samples is not covered work.