OPINION NO. 87-059

Syllabus:

1. A term contract to periodically repair, replace, and maintain traffic signals is a contract for the "construction" of a "public improvement" as those terms are defined in R.C. 4115.03.

2. Each service call, under a term contract to periodically repair, replace, and maintain traffic signals, is not a separate "project" for purposes of fairly estimating the "total overall project cost" under R.C. 4115.03(B) and R.C. 4115.10(A).

3. Under a term contract to periodically repair, replace, and maintain traffic signals, the total contract price is the figure to be considered when fairly estimating the "total overall project cost" under R.C. 4115.03(B).

To: John E. Shoop, Lake County Prosecuting Attorney, Painesville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, August 20, 1987

I have before me your request for my opinion concerning Ohio's prevailing wage rate law, R.C. 4115.03-.16, in which you ask the following questions:

1. Is a contract to periodically repair, replace, and maintain traffic signals a "contract for the construction of a public improvement" as defined in R.C. 4115.03?

2. Pursuant to a contract to periodically repair, replace, and maintain traffic signals, should each individual service call be considered a separate "project" as that term is used in R.C. 4115.03(B)?

The Ohio prevailing wage rate law generally provides that any "person, firm, corporation, or public authority that constructs a public improvement...the total overall project cost of which is fairly estimated to be more than four thousand dollars," R.C. 4115.10(A), must pay any employee no less than "the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed," R.C. 4115.05. See R.C. 4115.04 (the Department of Industrial Relations shall determine the prevailing rates of wages of mechanics and laborers for the class of work called for by the public improvement); R.C. 4115.05 ("[e]very contract for a public work shall contain a provision that each laborer,

workman, or mechanic, employed by such contractor, subcontractor, or other person about or upon such public work, shall be paid the prevailing rate of wages provided in this section").

Accordingly, the prevailing wage requirements apply only to a contract for the "construction" of a "public improvement." Those terms are defined in R.C. 4115.03(B) and (C) as follows:

> (B) "Construction" means any construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating, of any public improvement the total overall project cost of which is fairly estimated to be more than four thousand dollars and performed by other than full-time employees who have completed their probationary periods in the classified service of a public authority.[1]
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> (C) "Public improvement" includes all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by a public authority of the state or any political subdivision thereof or by any person who, pursuant to a contract with a public authority, constructs any structure for a public authority of the state or a political subdivision thereof. When a public authority rents or leases a newly constructed structure within six months after completion of such construction, all work performed on such structure to suit it for occupancy by a public authority, shall be a "public improvement" as defined herein. (Emphasis and footnote added.)

As you have indicated to a member of my staff, there is no question that the installation of traffic signals constitutes a public improvement[2] since such an undertaking is intricately connected to the street systems of the political subdivision, and is paid for with public funds to benefit the public authority. See R.C. 4115.03(C) (a public improvement must be constructed "pursuant to a contract with a public authority" and must be undertaken "for a public authority").[3] See also

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1 "Public authority" includes any political subdivision of the state authorized to enter into a contract for the construction of a public improvement. See R.C. 4115.03(A).

2 Several opinions of the Attorney General have addressed the meaning of "public improvement." See 1987 Op. Att'y Gen. No. 87-007; 1984 Op. Att'y Gen. No. 84-010; 1982 Op. Att'y Gen. No. 82-096; 1982 Op. Att'y Gen. No. 82-079; 1981 Op. Att'y Gen. No. 81-076.

3 In 1987 Op. No. 87-007 I noted that the following factors have been considered in determining whether construction is undertaken "for a public authority" under R.C. 4115.03(C): (1) whether public funds or their equivalent are made available, either directly or indirectly, by a public authority for the purpose of financing, in whole or in part, the cost of the construction; (2) whether a public authority owns or retains a possessory interest in the real property upon which the construction takes place at the time the construction commences; and (3) whether the construction is for the benefit of a public authority.

1971 Op. Att'y Gen. No. 71-054 (the trimming and removal of trees along the streets and highways of a city are construction of a public improvement for purposes of R.C. 4115.03(B)). Rather, your first inquiry addresses the meaning of the term "construction" as it is used in R.C. Chapter 4115 and questions whether a contract to "periodically repair, replace, and maintain" traffic signals constitutes "construction." "Construction," as the term is defined in R.C. 4115.03(B), includes not only the initial construction of a public improvement, but also any "reconstruction, improvement, enlargement, alteration, repair, painting, or decorating" of the improvement. See generally 1971 Op. No. 71-054 at 2-185 (there is "no question that repair of an already existing "public improvement" is as much "construction" as is the original opening of a street or erection of a building"); 1938 Op. Att'y Gen. No. 2161, vol. I, p. 648 (ordinary maintenance operations which do not include repair work do not fall within the prevailing wage law, but such activities which may be defined as "construction, reconstruction, improvement, enlargement, alteration or repair" do come under the prevailing wage provisions "regardless of whether the work is performed on new improvements or old ones.") Thus, it is not relevant that the system of traffic signals is already installed and operating. If the contract in question calls for more than routine maintenance of the traffic signals, it will be subject to the prevailing wage requirements. You have indicated that the contract does not define "repair," "replace," or "maintain," but merely uses those terms to imply their common meaning. In 1938, one of my predecessors considered the distinction between activities in the nature of maintenance and activities related to repairs:

> In the ordinary sense of the word, the word "repair" is used to indicate a changing of form, as for example, if a hole in a street is filled in, the substance or form of the street is materially changed. I have no hesitancy in stating that, in my opinion, [the prevailing wage] statutes were not intended to include ordinary maintenance operations and that the employment of labor for purposes other than those enumerated in the statute is not regulated by the statutory provisions.
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> In your communication you refer to "street cleaning." I am of the opinion that this is maintenance; likewise, "street sprinkling and flushing." There is also a reference to "street signs." If by this is meant the erection of street signs, I do not believe there is any reason why such work would not be governed by the statute. Certainly it comes within the term "construction" as that term is defined in [R.C. 4115.03]. You also refer to "waste collection and incineration" in your communication. I do not believe that these operations would constitute repair. Such activities are in the same category as "snow removal" and the cleaning of city buildings and are in the nature of maintenance. However, the repair of city buildings and streets and the repair of the water works plant are functions which have been regularly performed by the municipality and does not alter the fact that such work is "repair" of a "public improvement" as these terms are used in [R.C. 4115.03 and R.C. 4115.06]. I know of no reason to exclude such repair work from the provisions of this legislation merely because it has been regularly performed by the municipality.

1938 Op. No. 2161 at p. 651. Similarly, with regard to the maintenance and repair of a highway, in 1939 Op. Att'y Gen. No. 1494, vol. III, at p. 2210, it was stated that:

> The term "maintenance" has a different meaning than "repairs"....[I]t means the doing of such acts as will preserve the highway from decay and the effects of ordinary use, while "repairs" means the restoration of a street already defective from use and decay. Webster defines the term ["maintenance"] as "to hold, or keep in any particular state or condition, to keep up." From an examination of the cases which have distinguished between the meaning of the words "maintenance" and "repair" with reference to highways, it would appear that the term "maintenance" has an established meaning of performing such acts as will preserve a constructed highway in its original condition and from the effects of use and decay; while the term "repair" means to restore the highway to its original condition after it has become in an unsound or poor condition by reason of decay, injury, dilapidation or partial destruction.
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> In other words, the doing of such acts as would preserve the improvement in its original condition and prevent it from becoming out of repair is maintenance; the returning of the improvement to its original condition after it has been permitted to become damaged constitutes a repair.

My predecessors have consistently followed this reasoning. See 1979 Op. Att'y Gen. No. 79-046 (the reclamation of strip mines, being both a major change in the form of and a physical change in the land, constitutes "construction"); 1977 Op. Att'y Gen. No. 77-076 at p. 2-266 ("the only type of activity that has been consistently excluded from the scope of R.C. 4115.03 is that which is clearly aimed towards maintenance"); 1976 Op. Att'y Gen. No. 76-041 (the removal of turbo-generators and related equipment from a municipal building is "construction" since it entails a major change and alteration of the physical plant);1971 Op. No. 71-054 (tree removal along city streets is work in the nature of repair or alteration). While you have not indicated the specific activities contemplated by this specific contract, activities such as the routine cleaning of fixtures and changing of light bulbs, being "such acts as would preserve the improvement in its original condition and prevent it from becoming out of repair" qualify as maintenance. 1939 Op. No. 1494, vol. III, at p. 2210. Conversely, replacement of a traffic signal or a component part that ceases to operate because of electrical malfunctioning or unexplained inoperability constitutes a repair since it involves "returning...the improvement to its original condition after it has been...damaged." Id.

The contract will therefore presumably involve both maintenance and repair. This duality raises the issue of whether the entire contract must be viewed as "construction," because it may include some repair, or whether the inclusion of maintenance removes the contract from the prevailing wage requirements of R.C. Chapter 4115. The issue is easily resolved. It has been firmly established that the prevailing wage laws may not be avoided by including maintenance within the terms of the contract. In 1971 Op. No. 71-054 at p. 2-186, for example, my predecessor stated:

> Since the contract with which you are concerned involves both trimming and removal and since removal is an alteration or repair within the statutory definition of "construction," I must conclude that the minimum wage provisions of Sections 4115.03 et seq., supra, apply. Otherwise, it could become possible to avoid the requirements of those provisions by including maintenance work with "construction" work in the same contract. In other words, it is my opinion that where two activities are required in one contract and one such activity is "construction" as defined in [R.C. 4115.03], the contract work is subject to the minimum wage provisions.

See also 1976 Op. No. 76-041 (a contract for both the sale and removal of equipment from a municipal building is subject to the prevailing wage provisions since removal constitutes "construction").

In answer to your first question it is my conclusion that a term contract to repair, replace and maintain traffic signals is subject to the prevailing wage requirements of R.C. Chapter 4115 provided that the total overall project cost exceeds the minimum dollar amounts imposed by R.C. 4115.03(B) and R.C. 4115.10(A). I conclude that the contract work described constitutes "construction" as defined in R.C. 4115.03(B) even though some maintenance work is included. I also conclude that the object of the "construction" is a "public improvement" as defined in R.C. 4115.03(C).

I turn now to your second question in which you ask whether each service call, under a term contract to periodically repair, replace, and maintain traffic signals, should be considered a separate "project" for purposes of R.C. 4115.03(B). As previously indicated, R.C. 4115.10(A) prohibits any "person, firm, corporation, or public authority that constructs a public improvement...the total overall project cost of which is fairly estimated to be more than four thousand dollars" from violating the prevailing wage provisions of R.C. 4115.03 to 4115.16. (Emphasis added.) See also R.C. 4115.03(B) ("[c]onstruction means any construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating, of any public improvement the total overall project cost of which is fairly estimated to be more than four thousand dollars..."). Thus, in order for the prevailing wage provisions to apply, the total overall project cost of the public improvement, must be fairly estimated to exceed four thousand dollars. Consequently, you have inquired whether the total value of a term contract for periodic maintenance and repairs is the figure to be considered, or whether the amount submitted on an invoice after each service call is the amount which will define the "project" for purposes of applying the prevailing wage requirements to projects exceeding a total overall cost of four thousand dollars.

"Project," as used under the prevailing wage provisions, is not defined in the Revised Code, nor has it been defined by the existent case law.[4] It appears, however, to be

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[4] The dictionary definitions of "project" are not helpful to this inquiry. See, e.g., Webster's New World Dictionary 1136 (2d college ed. 1978) ("a special unit of work...[or] an extensive public undertaking, as in conservation, construction, etc.").

distinguishable from a contract for the construction of a public improvement. I note that several sections of R.C. Chapter 4115 refer to a contract, see e.g., R.C. 4115.03(A) (defining public authorities who are authorized to enter into a contract for the construction of a public improvement); R.C. 4115.03(C) (defining public improvement as structures or works constructed by or for a public authority pursuant to a contract); R.C. 4115.03(F)(1) (including as an interested party "[a]ny person who submits a bid for the purpose of securing the award of a contract for construction of the public improvement"); R.C. 4115.06 (the contract between a public authority and the successful bidder shall require payment of the prevailing wage rates), while R.C. 4115.10(A) and R.C. 4115.03(B) refer to the "total overall project cost" which is "fairly estimated" to exceed four thousand dollars. If the total contract amount is always synonymous with the "total overall project cost," use of the latter term is superfluous; if the General Assembly had intended for the "total overall project cost" to be equivalent, at all times, to the contract price it would have used the term "contract" as it has done throughout the remaining provisions of the prevailing wage law. Instead, the statutory language appears to leave room for consideration of the type of work to be performed under the specific contract or contracts[5] in determining what constitutes the "project." Thus, depending on the nature of the work to be done, a "project" may be made up of a single contract or a number of contracts. For example, there could be a single contract to paint a room or there could be several contracts for several jobs necessary to complete an addition to a building. The language "total overall project cost" illustrates that there may be one or more contracts constituting the "total overall project cost." However, this does not answer the question of whether there can be more than one project within a single term contract for maintenance and repair.

You have asked specifically, whether each service call, under a contract to periodically repair, replace, and maintain traffic signals, should be considered a separate "project." In other words, you have asked whether there might be one term contract for services with a total dollar amount, which is not intended to represent the total overall project cost, but which is understood to be a total amount not to be exceeded within the term. Arguably, such a contract could be viewed as establishing a total amount to be expended over a term on a series of separate projects.

In the context of a term contract for maintenance and repair, there is some superficial appeal in labeling each service call as a separate "project." However, upon further analysis, such a characterization would serve little purpose other than to encourage contracting parties to establish billing procedures that avoided operation of the prevailing

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[5] The Attorney General is without authority to determine the rights of the parties to a particular agreement or contract. See generally 1986 Op. Att'y Gen. No. 86-039; 1983 Op. Att'y Gen. No. 83-087 at 2-342 ("[t]he determination of particular parties' rights is a matter which falls within the jurisdiction of the judiciary, which I, as an executive officer, am unable and unwilling to usurp").

wage statutes by narrowing each service call in order to keep it within an artificial four thousand dollar boundary. For example, in the situation you have presented, one or more inoperable traffic signals may need to be removed and replaced. Such repairs may necessitate more than one service call over the term of the contract and the cost to do the repairs over more than one service call may exceed four thousand dollars. To construe each service call as a separate project would ultimately defeat the intent of the prevailing wage laws. See generally State ex rel. Evans v. Moore, 69 Ohio St. 2d 88, 91, 431 N.E.2d 311, 313 (1982) ("the primary purpose of the prevailing wage law is to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector"). More specifically, the law seeks to protect the level of wages paid in the private sector for projects exceeding a cost of four thousand dollars. Under the circumstances you have presented, a contractor, who has been awarded a term contract for services and repairs, could submit separate invoices for each service call in amounts of less than four thousand dollars for work actually done on a single "project" exceeding the four thousand dollar amount. Clearly, this result could not have been intended. In addition, in this type of contract, calling for repair and maintenance of an integrated system of traffic signals over a period of time, it is not readily apparent that a single service call or series of calls, that have been artificially subdivided into "projects" for billing purposes so as to avoid the operation of the prevailing wage laws, would be sufficiently separate and distinct from the repair and maintenance of the entire system over the term of the contract to be viewed as a separate project.

In a contract such as the one about which you have inquired, calling for emergency repairs as the need arises, but not defining the specific jobs to be performed over the course of the contract, it is virtually impossible to anticipate at the time of bidding[6] on the contract, how many service calls exceeding four thousand dollars will arise during the course of the contract. Even if the parties were to contractually define each service call as a "project," there would be no way for

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[6] See R.C. 4115.04 ("[e]very public authority...before advertising for bids...shall have the department of industrial relations determine the prevailing rates of wages....Such schedule of wages shall be attached to and made part of the specifications for the work, and shall be printed on the bidding blanks") (emphasis added); R.C. 4115.06 ("[i]n all cases where any public authority fixes a prevailing rate of wages under [R.C. 4115.04], and the work is done by contract, the contract executed between the public authority and the successful bidder shall contain a provision requiring the successful bidder and all his subcontractors to pay a rate of wages which shall not be less than the rate of wages so fixed"). Thus, it is imperative, under R.C. 4115.04, for a public authority to know, prior to advertising for bids, whether the contract contemplates the type of work which necessitates payment of prevailing wages and whether the total overall project cost will, by fair estimation, exceed four thousand dollars. Likewise, the contractor will need to know, before submitting his bid, if the contract is subject to R.C. Chapter 4115. Otherwise, he will be bidding at his peril.

either party to predict the monetary value of each "project" at the time of bidding. Consequently, compliance with R.C. Chapter 4115 would necessitate clairvoyance. Wherever possible, statutes should be construed to produce a reasonable and just result rather than an absurd one. R.C. 1.47(C). Canton v. Imperial Bowling Lanes, 16 Ohio St. 2d 47, 242 N.E.2d 566 (1968). Thus, I conclude that each service call under a term contract for maintenance and repair does not constitute a separate project for purposes of applying the prevailing wage requirements. To the contrary, because of the nature of such a contract, the entire amount of the contract must be the figure considered in assessing the total overall project cost. To decide otherwise would permit abuse of the prevailing wage law by encouraging parties to subdivide contracts into minute "projects" to avoid its operation. Accordingly, I must conclude that a term contract for maintenance and repair may not be divided, by service calls, into separate projects over the term of the contract. When such a contract is advertised for bidding, the total contract price is the figure to be considered for purposes of fairly estimating the "total overall project cost" under R.C. 4115.03(B).

It is, therefore, my opinion and you are advised that:

1. A term contract to periodically repair, replace, and maintain traffic signals is a contract for the "construction" of a "public improvement" as those terms are defined in R.C. 4115.03.

2. Each service call, under a term contract to periodically repair, replace, and maintain traffic signals, is not a separate "project" for purposes of fairly estimating the "total overall project cost" under R.C. 4115.03(B) and R.C. 4115.10(A).

3. Under a term contract to periodically repair, replace, and maintain traffic signals, the total contract price is the figure to be considered when fairly estimating the "total overall project cost" under R.C. 4115.03(B).