STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
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April 4, 2024

Jesse Jimenez
Executive Director
Foundation for Fair Contracting
3807 Pasadena Avenue, Suite 150
Sacramento, California 95821

Re: Public Works Case No. 2022-006
Repair Work on the Parking Lot at 5669-5671 Gibraltar Drive
County of Alameda

Dear Mr. Jimenez:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Labor Code section 1773.5[1] and California Code of Regulations, title 8, section 16001, subdivision (a). Based on my review of the facts of this case and an analysis of applicable law, it is my determination that the Repair Work on the Parking Lot at 5669-5671 Gibraltar Drive, Pleasanton in the County of Alameda is public work subject to prevailing wage requirements.

Facts

A. The County's Lease.

On February 26, 2019, the County of Alameda leased the entire building totaling 67,680 square feet located at 5669 and 5671 Gibraltar Drive in Pleasanton (Building C)[2] for a ten-year term from Hacienda Portfolio Venture, LLC. In August 2019, Sunol Ventures, LLC purchased Building C and took over the lease. Sunol Ventures owned only Building C and did not have any ownership or control over any parcels or buildings adjacent to Building C. The adjacent buildings contain their own parking lots.

The lease defined the County's use to include Building C, the parking lot, and the common areas. (Lease, Part One, pp. 2-3.) The lease provided the County with the use of

[1] Unless otherwise indicated, all further statutory references are to the California Labor Code and all subdivision references are to the subdivisions of section 1720.

[2] Plans submitted by Sunol Ventures identify the building as "Building C."

270 parking spaces. Under the lease, the lessor agreed to maintain and repair the leased premises, including the parking area. (Lease, Part Two, p. 2.)

The monthly rent commenced at $169,200 (at $2.50 per square foot) with specified annual increases. Rent was defined as including the monthly rent, "basic operating costs" and "additional rent." Basic operating costs are defined generally as:

> all expenses and costs (but not specific costs which are separately billed to and paid by particular tenants of the Project) which Lessor shall pay or become obligated to pay because of or in connection with the day-to-day management, ownership, maintenance, repair, replacement, preservation and operation of the Premises, the Project and its supporting facilities directly servicing the Project (determined in accordance with generally accepted accounting principles, consistently applied) including, but not limited to, the following . . . .

(Lease, Part Two, p. 5.)

A non-exhaustive list of examples of basic operating costs include, notably:

> (a) Wages, salaries and related expenses and benefits of all on-site and off-site employees and personnel engaged in the day-to-day operation, maintenance, repair and security of the Project.
>
> . . .
>
> (c) All supplies, materials, equipment and equipment rental used in the day-to-day operation, maintenance, repair, replacement and preservation of the Project.
>
> . . .
>
> (i) Repairs, replacements and general maintenance (except to the extent paid by proceeds of insurance or by County or other tenants of the Project or third parties).
>
> . . .
>
> (k) Amortized costs (together with reasonable financing charges) of capital improvements (over the useful life of such improvements) made to the Project subsequent to the Term Commencement Date which are intended to reduce Basic Operating Cost, or (ii) which may be required by governmental authorities, in connection with rules, laws, regulations or ordinances applicable to the Building and not in effect as of the Term Commencement Date (including, but not limited to, any improvements required by governmental authorities under post Term Commencement Date rules, laws,

> regulations or ordinances for energy conservation or for the benefit of individuals with disabilities).
> . . .

(Lease, Part Two, pp 5-7.)

The lease specifically excludes from basic operating costs "the cost of any improvements or equipment which would be properly classified as capital expenditures (except for any capital expenditures expressly included in Paragraph 5(B)(5)(k) above)." (Lease, Part Two, p. 8.)

B. Parking Lot Repair.

Sunol Ventures hired On-Site Commercial Services, Inc. (On-Site) to perform the repairs to the parking lot. The repair work was completed on June 1, 2022 and cost $72,711.11.

The scope of work called for asphalt repair, which included demolition and removal of asphalt in the failing section down to the existing base material, compacting existing base material, importing new base rock as needed, paving back with new hot-mix asphalt, rolling for compaction, and re-striping all stalls affected. Additional asphalt repair included demolition and removal of asphalt in the failing sections near the trash enclosure down to the existing base material, grinding down 1.5 inches of asphalt in the drive-lane of the deteriorated section, and paving back areas with new hot-mix asphalt.

According to Sunol Ventures, the repair work was undertaken to "protect owner's liability and to protect the safety, welfare and use by others."

Contentions

Requester Foundation for Fair Contracting simply states that the repair work is public work subject to prevailing wage requirements because the work satisfies the requirements of section 1720.2.

Sunol Ventures takes the position that the "limited re-surfacing work" of the parking lot is not public work because Building C is privately owned and the repair work was paid for out of private funds. Sunol Ventures claims that it did not require the County to pay for the work done as it was a "capital expenditure." Sunol Ventures further claims that it was contractually prohibited from seeking charges for the work done as a maintenance cost because the annual cap for common area maintenance was fully exhausted.

Sunol Ventures contends that section 1720.2 does not apply because other private tenants have access to the parking lot, in addition to the County, under their lease agreement. Sunol Ventures also contends that section 1720.6 does not apply.

The County states that it was aware that repair work to the parking lot would be done but was not involved in contracting for the work, and has no position on whether the repair work is subject to prevailing wage requirements. The County does point out,

however, that "Section 10(C) of Part 2, concerning alterations after taking occupancy, requires such [tenant improvement] work when performed by the landlord to include a requirement that workers be paid prevailing wage."

Discussion

All workers employed on public works projects must be paid at least the applicable prevailing wage rates. (§ 1771.) The prevailing wage law contains several distinct definitions of public works. (See, e.g., §§ 1720, subds. (a)(2), (a)(3), (e); 1720.2; 1720.3; 1720.6; 1720.9.) One of the definitions is provided in section 1720, subdivision (a)(1) (hereafter section 1720(a)(1)), which defines "public works" to mean: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds . . . ." "There are three basic elements to a 'public work' under section 1720(a)(1): (1) 'construction, alteration, demolition, installation, or repair work'; (2) that is done under contract; and (3) is paid for in whole or in part out of public funds." (*Busker v. Wabtec Corporation* (2021) 11 Cal.5th 1147, 1157.)

A. Cost of the Repair Work May Be a "Basic Operating Cost" Under the Lease and May Be Paid for out of Public Funds, but the Department Need Not Decide this Issue.

The first two elements to a public work under section 1720(a)(1) are met here, as the repair work involves "construction" that is "done under contract." The issue presented is whether the repair work is "paid for in whole or in part out of public funds."

Sunol Ventures claims that this "limited re-surfacing" work "pertained to a small part of the private parking lot for safety re-surfacing to protect owner's liability [sic] and to protect the safety, welfare and use by others" and was paid for entirely out of private funds. Sunol Ventures further claims that the lease barred it from charging the cost of the repair work because this work constitutes a "capital expenditure."

The lease does indeed exclude passing any portion of "the cost of any improvements or equipment which would be properly classified as capital expenditures" to the County. However, certain types of capital expenditure costs are basic operating costs that the County is obligated to pay a share of, including capital expenditure costs "which are intended to reduce Basic Operating Cost." Sunol Ventures states that the limited re-surfacing work was done to protect itself from liability and also to protect the safety of those who use the parking lot. This appears to be a type of capital expenditure that is intended to reduce basic operating costs, and the County bears responsibility to pay a portion of the parking lot repairs under the lease.

Furthermore, basic operating costs include costs for operation, maintenance, repair, replacement, security, and preservation. (Lease, Part Two, ¶ 5(B)(5)(a), (c), (i), pp. 5-7.) A "limited re-surfacing" appears to fall under the category of maintenance, repair, replacement, or preservation. In fact, one section of the lease describes paving of the parking lot as a type of maintenance and repair. (Lease, Part Two, ¶ 9(A)(8), pp. 18.)

On the other hand, a capital improvement or a capital asset is generally understood to include "major maintenance, reconstruction, demolition for purposes of reconstruction of facilities, and retrofitting work that is ordinarily done no more often than once every 5 to 15 years or expenditures that continue or enhance the useful life of the capital asset." (Gov. Code, § 16727, subd. (a) [defining capital asset for purposes of issuance of state general obligation bonds].) While the "limited re-surfacing" described by Sunol Ventures sounds like maintenance, the scope of work's description of the work (to demolish and remove asphalt in the failing section down to the existing base material, to compact existing base material, import new base rock as needed, pave back with new hot-mix asphalt, roll for compaction, and re-stripe all stalls affected) seems much more involved than maintenance or simple repair work.

What constitutes a capital improvement as opposed to maintenance or repair under the lease is not well defined. Sunol Ventures provided argument, with some supporting documentation, that the County did not pay for the parking lot repairs because the County had hit its "cap," though not necessarily that the repairs did not qualify as basic operating costs under the lease. The argument appears to be that even if the repairs can be characterized as basic operating costs, the County may not have actually *directly* paid for any of the repairs. And, because the County had already reached its maximum share for maintenance services and other basic operating costs, Sunol Ventures could not contractually charge the cost of the repair work to the County.

This argument is similar to one made by the landlord in PW 2019-015, *1000 South Fremont Avenue Tenant Improvements - County of Los Angeles* (Nov. 9, 2020/Feb. 3, 2022) (*1000 South Fremont*), which the Department rejected. As with *1000 South Fremont,* the County was contractually obligated to pay for a share of maintenance and repair as basic operating costs. The reason that the County was not charged for the parking lot repair work was because Sunol Ventures already spent the County's allotment for other basic operating costs. This presents a problem. Accepting Sunol Ventures' characterization that no public funds paid for the repair work would incentivize gamesmanship in how the basic operating costs are charged. The landlord might first deplete the County's allocation for basic operating costs that would not carry prevailing wage requirements, and only then, perform maintenance and repair work, which normally would require prevailing wages, but would no longer carry those requirements simply because the public funds set aside for public work were already deliberately exhausted for other expenses. While this may not be what occurred in this case, the potential for such strategic accounting to sidestep prevailing wage requirements would defeat the overall purpose of the prevailing wage law, which is to "benefit and protect employees on public works projects." (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.) Addressing this question definitively is a difficult task given the limited record available.

The Department, however, need not decide the coverage determination question under section 1720(a)(1) in this case, because the parking lot repair work fits more neatly into another definition of public work.

B. The Repair Work on the Parking Lot Is Public Work Under Section 1720.2.

Under section 1720.2, "public works" also includes any construction work done under private contract when all of the following conditions exist:

> (a) The construction contract is between private persons.
>
> (b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.
>
> (c) Either of the following conditions exist:
>
> (1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.
>
> (2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work.

The repair work appears to satisfy all the elements of section 1720.2. Sunol Ventures contracted with On-Site to perform the repairs. (§ 1720.2, subd. (a).) Upon completion of the repairs, the County continues to lease 100 percent of the assignable square footage of Building C, which is privately owned by Sunol Ventures. (§ 1720.2, subd. (b).) In addition to exclusive occupancy of the entirety of Building C, the lease also assigned to the County the use of 270 out of a total of 273 parking spaces. The County approved the lease on February 26, 2019. While it is unclear when Sunol and On-Site entered into the contract to repair the parking lot, it was likely signed shortly before May 31, 2022, when On-Site submitted its invoice, and well after the 2019 lease. (§ 1720.2, subd. (c)(1).) None of these facts have been disputed.[3]

Sunol Ventures contends that section 1720.2 does not apply because other private tenants have access to the parking lot. While this contention may be true, it does not appear to be relevant. Sunol Ventures also argues that it paid for all of the work with private funds. Again, even if true, section 1720.2 does not require a direct payment of

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[3] The Department requested any and all contractual agreements related to the repair work. However, Sunol Ventures claimed a right to financial privacy and refused to turn over the documents. The Department advised the parties of the consequences of failing to produce a requested document. (See Cal. Code Reg., tit. 8, § 16001, subd. (a)(3) ["Where any party or parties' agent has a document in their possession, but refuses to release a copy, the Department shall consider that the documents, if released, would contain information adverse to the withholding party's position and may close the record and render a decision on the basis of that inference and the information received."])

public funds for construction. The lease payments from the public entity to the private landlord are deemed to be a source of indirect subsidy for the private construction.

Judicial guidance on section 1720.2 is sparse, but the Court of Appeal has examined a similar factual situation and applied section 1720.2 to find the disputed work subject to the prevailing wage law. In *Plumbers and Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083 (*Local 290*), a county leased roughly 63 percent of a privately-owned building. The landlord hired a private contractor to perform internal plumbing work in the county's space (tenant improvement work) and to perform external plumbing work in parts of the building not leased to the county (shell improvement work). The contractor paid prevailing wages for the tenant improvement work but not for the shell improvement work. (*Id.* at p. 1087.) The argument for not paying prevailing wages under the shell improvement contract was that construction work is subject to prevailing wage requirements under section 1720.2 only if the work was performed in areas leased by the public entity.

The *Local 290* court rejected that argument. The court held that "property" as used in section 1720.2 refers to "the entire structure, not simply the space that is subject to the lease." (*Id.* at p. 1091.) The court reasoned that there was a "functional relationship" between the external plumbing work and the county-leased space, even if the external plumbing work under the shell improvement contract may benefit other tenants. (*Id.* at p. 1092.) "The external plumbing work, however, unquestionably is essential to the operation of the internal plumbing in the county-occupied areas of the building." (*Ibid.*) The court disagreed with the argument that a contractor would be required to pay prevailing wages for work performed in space leased exclusively to a private tenant in the same building that has no connection to the public entity, because a court can construe construction work, as used in section 1720.2, to "refer to anything that has to do with the public entity occupancy or use of the building." (*Id.* at p. 1093.)

Here, the County leased all of Building C and was granted use of the parking lot. County employees and visitors who have business with the County need to park their cars in order to access Building C. In the area where Building C is located, which is a suburban location, a parking lot is absolutely necessary for the County's full use of Building C under the lease. (See *Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 214-215 [A parking lot was necessary for a theater and was part of the same project for prevailing wage purposes.]) Thus, the parking lot and repair work to ensure the safety of those who use the parking lot certainly "has to do with the public entity occupancy or use of the building." (*Local 290, supra,* 157 Cal.App.4th at p. 1093.) The repair work to allow County employees and visitors to reach Building C and conduct business "unquestionably is essential" to the County's use of Building C, and there is a "functional relationship" between the repair work and the public's business in Building C. (*Id.* at p. 1092.) This is the case even if a functioning parking lot may benefit neighboring tenants or visitors conducting private business in other buildings, as Sunol Ventures contends. Because there is a "functional relationship" between the repair work on the parking lot and the County's occupancy of Building C, the Department concludes that the conditions in section 1720.2 are met.

Conclusion

For the foregoing reasons, the Repair Work on the Parking Lot at 5669-5671 Gibraltar Drive, Pleasanton in the County of Alameda is public work subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Katrina S. Hagen
Director of Industrial Relations