

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

99 Pipeline, Inc.

Case No. 14-0666-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor 99 Pipeline, Inc. (99 Pipeline) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the Island Annexation Sanitary Sewer Areas 10, 11, and 14 (Project) performed in the City of Visalia (City). City has requested to participate in this review proceeding as an “interested person” under Rule 8(b) (Cal. Code Regs., tit. 8, § 17208, subd. (d).) The Assessment determined that \$174,180.94 in unpaid prevailing wages and statutory penalties was due. Pursuant to written notice, a Prehearing Conference was held on March 12, 2015, by conference call before Hearing Officer Kim E. Card. D. Zachary Smith appeared for 99 Pipeline and David Cross appeared for DLSE. Pursuant to Order dated March 12, 2015, the parties submitted further information on the Project, and briefing on the issue set forth below.

The issue for decision is:

- Whether the work performed by 99 Pipeline, Inc. was subject to the prevailing wage requirements of Labor Code section 1720, et seq.¹

The Director finds that the work in question is not subject to the prevailing wage requirements of section 1720, et seq. Accordingly, 99 Pipeline has no liability for the

¹ All subsequent statutory references are to the California Labor Code unless otherwise specified.

wages and penalties assessed, and the Assessment is dismissed.

FACTS

The Project entailed the construction of sewer main, sewer laterals and associated infrastructure in existing streets to serve residents located in previous County of Tulare areas that have been annexed into City limits. The Project gives homeowners the ability to discontinue their current on-site septic system use and connect to the City sewer system. The Project takes place entirely in the City boundaries.

The City prepared the bid documents concerning the Project. The City determined that the Project did not require the payment of prevailing wages under the charter city exception to prevailing wage requirements and described it as such in the bid documents.

Visalia is a charter city. The City's Charter contains a "home rule" provision in article 3, section 1 stating that "[t]he City of Visalia shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs..." At all times relevant herein, City of Visalia Municipal Code (COVMC) section 3.37.100, subdivision A, entitled "Payment of Prevailing Wages" was in effect. COVMC section 3.37.100, subdivision A, states in pertinent part:

...[n]o city contract shall require payment of the prevailing wage schedule unless: 1. The prevailing wage is legally required, and constitutionally permitted to be imposed, by federal or state grants pursuant to federal or state law; or 2. The project is considered by the city council not to be a municipal affair of the city; or 3. Payment of the prevailing wage schedule is authorized by resolution of the city council...

The affected contractor, 99 Pipeline, responded to the bid documents as the lowest responsible bidder and was awarded the contract.

The City funded this Project with its Wastewater Treatment Plant Fund (WWTP Fund), an enterprise fund of the City, funded from user fees and charges. This Fund includes fees paid by the Goshen² Community Services District for wastewater treatment. In 1995, City entered into a Wastewater Services Agreement with the Goshen

² Goshen is an unincorporated town adjacent to the City of Visalia, in the County of Tulare.

Community Services District for the collection, transmission, treatment and disposal of neighboring Goshen's wastewater. Pursuant to this Agreement, Goshen constructed a pipe to deliver its wastewater to City. Since 1995, Goshen continues to pay user fees and charges to City, which are held in City's WWTP Fund.

DLSE became aware of the Project after a complaint was filed alleging 99 Pipeline had failed to pay prevailing wages and fringe benefits to workers on the Project. DLSE initiated a full investigation and audit. On September 4, 2014, DLSE mailed a "Notice of Investigation" and "Request for Payroll Records" to 99 Pipeline.

99 Pipeline initially responded on September 24, 2014, and October 3, 2014, by phone and a letter asserting that 99 Pipeline was not required to pay prevailing wages. City also responded by letter on October 27, 2014, asserting that prevailing wages were not required. Payroll records were received by DLSE on November 24, 2014, and December 1, 2014.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 987 [citations omitted] *(Lusardi)*.) DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a), and *Lusardi, supra.*)

Section 1775, subdivision (a) requires, among other things, that contractors and

subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a Civil Wage and Penalty Assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that “[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty Assessment is incorrect.”

The Improvement Work Performed by 99 Pipeline on the Project Site is Not Subject To Prevailing Wage Requirements.

The critical issue for decision is whether the work performed by 99 Pipeline requires the payment of prevailing wages. For the following reasons, the work performed on the Project site is not public work subject to prevailing wage requirements because the charter city status of City does exempt it from the requirement to pay prevailing wages pursuant to Water Code section 8007.

Section 1771 generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1) defines “public works” as [c]onstruction, alteration, demolition, installation, or repair work done under contract, and paid for in whole or in part out of public funds...” It is undisputed by the parties that the Project constitutes public work under this definition. 99 Pipeline and City assert, however, that the City’s charter exempts it from complying with California’s prevailing wage laws, section 1720 et seq. (CPWL), specifically the payment of prevailing wages, because the Project is purely a municipal affair. In addition, 99 Pipeline and City argue that Water Code section 8007 exempts the Project from prevailing wage requirements.

In 2009, Water Code section 8007 came into effect and is directly applicable to the issue at hand. It states in pertinent part:

A capital improvement project undertaken by a charter city to extend that

city's water, sewer, or storm drain system or similar system to a disadvantaged community in an unincorporated area shall be considered a public work for the purpose of Section 1720 of the Labor Code, but any subsequent project to construct, expand, reconstruct, install, or repair such systems that have been so extended and that are conducted within the city's political boundaries shall not be considered a public work for the purpose of Section 1720 of the Labor Code as a result of the extension.

The plain meaning of the statute clearly excludes the work at issue as a public work. There is no dispute that the Project is undertaken by City, a charter city; is construction on such sewer systems that have been previously extended to Goshen, and takes place entirely within City's political boundaries. There is also no dispute that Goshen constitutes a "disadvantaged community in an unincorporated area".

DLSE argues that the legislative history establishes that Water Code section 8007 has no effect on the issues in this case. DLSE specifically cites the historical and statutory notes under Education Code section 17250.30, which state:

(a) The Legislature has previously found that the prevailing wage law addresses statewide concerns (Section 1 of Chapter 892 of the Statutes of 2002; Section 1 of Chapter 868 of the Statutes of 2002) and has reaffirmed its intent that the prevailing wage law apply to all public projects, including the projects of charter cities (Chapter 135 of the Statutes of 2003).

(b) Nothing in Section 8007 of the Water Code shall be interpreted to be inconsistent with that intent. The legal issue whether the Legislature has the constitutional authority to apply the prevailing wage law to the municipal projects of charter cities was declared to be an "open" question by the California Supreme Court in *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 947 and that legal question is presently under submission before the California Court of Appeal in *State Building and Construction Trades Council v. City of Vista*, Case No. D0521181.

(c) The purpose of Section 8007 of the Water Code is solely to provide that, if the Legislature does not have the constitutional authority to apply the prevailing wage law to the municipal projects of charter cities, then the extension of a city's water, sewer, or storm drain system or similar system to a disadvantaged community in an unincorporated area shall not thereby subject future work on that system within that city's boundaries to the prevailing wage law.

DLSE erroneously argues that since the Supreme Court in *State Building and Construction Trades v. City of Vista* (2012) 54 Cal.4th 547 (*City of Vista*) did not state

that the Legislature does not have constitutional authority to apply the prevailing wage law to the municipal projects of charter cities, pursuant to the legislative history, Water Code section 8007 is inapplicable, and DLSE can continue to rely on a 2006 coverage determination issued by the Director of the Department of Industrial Relations. In Public Works Case No. 2005-012, *Sewer and Storm Lift Upgrade Project, City of Visalia/Goshen Community Services District*, the Director found that an upgrade project on the City of Visalia wastewater system was a public work, notwithstanding the City's charter city status, because the work was not a purely municipal affair as the funds used for the project were taken from the WWTP Fund, which included the fees paid by Goshen, and because the Project had extraterritorial effects that extended beyond the City's boundaries to Goshen. DLSE's argument and reliance on this Coverage Determination fails for the reasons stated below.

The California Constitution explicitly authorizes charter cities to govern themselves, free from intrusion of the state legislature, regarding matters deemed municipal affairs. (*City of Vista, supra*, 54 Cal.4th at p. 555; Cal. Const. Art. XI, section 5.) Charter cities "may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." (Cal. Const. Art. XI, section 5(a).) "City charters adopted pursuant to this Constitution shall...with respect to municipal affairs...supersede all laws inconsistent therewith." (*Ibid.*) As to matters which are of statewide concern, charter cities remain subject to and controlled by general state laws regardless of the conflicting provisions of their charters. (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61-62.)

The California Supreme Court recently reiterated the four-part analytical framework for resolving whether a matter falls within the home rule authority of a charter city:

"First, a court must determine whether the city ordinance at issue regulates an activity that can be characterized as a "municipal affair." Second, the court must satisfy itself that the case presents an actual conflict between [local and state law]. Third, the court must decide whether the state law addresses a matter of "statewide concern". Finally, the court must determine whether the law is reasonably related to...resolution" of that concern and "narrowly tailored" to avoid unnecessary interference in local

governance.”

(*City of Vista, supra*, 54 Cal.4th at p. 556; internal quotes and case cites omitted.) The Court in *City of Vista* held that the “wage levels of contractor workers constructing locally funded public works are a municipal affair, and that these wage levels are not a statewide concern.” (*Id.* at pp. 556, 566.) Because the Court in *City of Vista* held that the CPWL is not a matter of statewide concern, the only relevant *City of Vista* factors for purposes of this decision are the first and the second.

To begin, the “[c]ourts must decide under the facts of each case, whether the subject matter under discussion is of municipal or statewide concern.” (*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 292.) In *Southern California Roads Co. v. McGuire*,³ the California Supreme Court considered the following factors in determining whether a project is a municipal affair or a matter of statewide concern: (1) the extent of the non-municipal control over the project; (2) the source and control of the funds used for the project; and (3) the nature and purpose of the project, including its geographical scope and extraterritorial effects.

Regarding the first factor, there is no dispute that the City controlled the design of the Project, the timing of the Project, and oversaw the construction activities. Under these facts, analysis of the first factor supports 99 Pipeline and the City’s assertion that there is no extra-municipal control over the Project.

With respect to the second factor, the source of funds is the WWTP, which includes City and Goshen user fees. City maintains full control of the funds, which in the 2013-14 budget year consisted of \$18,000,000.00 of which \$234,202.00 was user fees from Goshen. Regarding the third factor, the nature and purpose of the Project was to extend a municipal service into areas within City boundaries where Visalia residents currently cannot receive service. The Project may have extraterritorial effects that extend beyond the City’s boundaries to Goshen, because the sewer lines have been so extended.

Here, the user fees paid by Goshen and any extraterritorial effects on Goshen are merely the result of the previous wastewater system extension to Goshen. While these

³ (1934) 2 Cal.2d 115, 120-23.

factors may have been determinative in the 2006 Coverage Determination⁴ upon which DLSE relies, Water Code section 8007 was enacted after the Determination was issued. Under Water Code section 8007, such an extension does not subject a charter city's future work on its own city system, within City boundaries, to a finding that the project is not a municipal affair. The legislative history suggests that an otherwise municipal project will not become subject to the prevailing wage law and will continue to fall within the charter city exception. The Project was designed and overseen by City, paid for by City funds which the City controlled, and was meant to service only City residents. In consideration of Water Code section 8007, and the foregoing factors, this Project is a municipal affair.

The next question is whether there is a conflict between state and municipal law. The California Supreme Court has emphasized the importance of determining whether a state law actually conflicts with local law. (*City of Vista, supra*, 54 Cal.4th at p. 556.) Where a charter city does not demonstrate actual conflict, home rule autonomy does not supersede the obligation to comply with the provisions of state law. (See *Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 51.) Here, there is an actual conflict because City's Municipal Code, at all times relevant, prohibited compliance with the state's prevailing wage law with regard to municipal affairs. (COVMC section 3.37.100, subdivision A.)

Thus, 99 Pipeline and City have asserted a "charter city exception" and, under the *City of Vista* factors, the work at issue is not subject to prevailing wage requirements. Further, this Project is not public work pursuant to Water Code section 8007. Accordingly, the work was not subject to the prevailing wage requirements of Labor Code section 1720, et seq. In view of this conclusion, all other issues are moot.

FINDINGS

1. Contractor 99 Pipeline, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. The work performed by 99 Pipeline's employees was not subject to the

⁴ Public Works Case No. 2005-012, *Sewer and Storm Lift Upgrade Project, City of Visalia/Goshen Community Services District*

prevailing wage requirements of Labor Code section 1720 et seq., and therefore 99 Pipeline has no liability for the wages and penalties set forth in the Assessment.

ORDER

Based on these findings, it is ordered that the Assessment is dismissed in its entirety. The Hearing Officer shall issue a notice of Findings which shall be served with this Decision on the parties.

Dated: 8/25/2015


Christine Baker
Director of Industrial Relations