

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR

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June 26, 2007

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Re: Public Works Case No. 2005-025
Canyon Lake Dredging Project
Lake Elsinore and San Jacinto Watersheds Authority

Dear Mr. Carroll:

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 California Code of Regulations, title 8, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the Canyon Lake Dredging Project ("Project") is a public work subject to prevailing wage requirements with the exception of the off-hauling of the dredged material. The off-hauling is not a public work and, therefore, is not subject to prevailing wage requirements.

Facts

Canyon Lake is a water storage reservoir, owned by the Elsinore Valley Municipal Water District ("EVMWD") and located between the Cities of Perris to the north and Lake Elsinore to the south. The reservoir is virtually surrounded by a privately owned residential development, which has incorporated itself as the City of Canyon Lake ("City"). The residential property owners form the membership of the Canyon Lake Property Owners Association ("POA").

In 1968, Temescal Properties, Incorporated (POA's predecessor-in-interest) entered into a 55-year lease with the Temescal Water Company (EVMWD's predecessor-in-interest). That lease let the exclusive right to use the reservoir only for boating, fishing and water sports, while prohibiting the lessee from making any use of it that would interfere with its operation as a storage reservoir for agricultural and domestic water. The lease also grants the lessee the right to dredge the reservoir, subject to certain conditions.

In 2000, the voters of California passed Proposition 13, the Safe Drinking Water, Clean Water, Watershed Protection and Flood Protection Bond Act, authorizing funding of \$1.97 billion for projects within its purview. Of the authorized funds, \$15 million was allocated to the Lake Elsinore and San Jacinto Watersheds Program. Wat. Code, § 74104.100 et seq. Water Code section 79104.110 provides that the funds appropriated pursuant to these provisions were to be "allocated to a joint powers agency ... for the implementation of programs to improve the water quality and habitat of Lake Elsinore, and its back basin consistent with the Lake Elsinore Management Plan."

In 2000, pursuant to the above statute, a Joint Powers Agreement created the Lake Elsinore and San Jacinto Watersheds Authority ("LESJWA"). This agreement was entered into by City, EVMWD, the City of Lake Elsinore, the County of Riverside, the Riverside County Flood Control and Water Conservation District and the Santa Ana Watershed Project Authority.

On May 31, 2003, the California Department of General Services approved a contract between the California State Water Resources Control Board ("Board") and LESJWA. The contract makes LESJWA the "contractor" to provide the Board subvention service to rehabilitate and improve the Lake Elsinore Watershed and the San Jacinto Watershed and the water quality of Lake Elsinore. Pursuant to that contract, the Board issued Task Orders No. 8 and No. 8.1, providing for LESJWA to remove 100,000 cubic yards of sediment that had accumulated in the East Bay of Canyon Lake from San Jacinto Watershed storm runoff. Both Task Orders describe the "Scope of Work" as follows:

Canyon Lake Dredging Project

Approximately 100,000 cubic yards of the 225,000 total cubic yards of sediment will be removed during the June 17, 2004, through March 31, 2006 performance period. The sediments will be pumped out of the lake by a self-propelled floating dredge to a dewatering site. ... The dewatered sediment will be hauled to the Audie Murphy Ranch development property for disposal. Other land development sites may be used for disposal of dewatered sediment. The project will conform with applicable rules, regulations, and permitting requirements of local, state and federal agencies.

Effective July 15, 2004, LESJWA, City and POA entered into an agreement providing that POA would do the work LESJWA contracted with the Board to do. That agreement recites that:

C. Canyon Lake is tributary to Lake Elsinore. Canyon Lake is owned and operated by the Elsinore Valley Municipal Water District ("EVMWD") a Member Agency of LESJWA. EVMWD leases Canyon Lake to the Canyon Lake Property Owners Association for recreation purposes.

D. LESJWA has been awarded a \$15 million grant from the Safe Drinking Water, Clean Water, Watershed Protection and Flood Protection Bond Act of 2000 (the "Bond Act"). Pursuant to the Bond Act, LESJWA and the California State Water Resources Control Board entered into a contract designating LESJWA as the program manager for funds expended thereunder.

E. After study, the Board of Directors of LESJWA found and determined that the water quality in Lake Elsinore would be improved if the bottom of Canyon Lake was dredged of silt that has accumulated as the result of stormwater inflows to the Lake.

Paragraph 3 of the agreement provides that: "The ASSOCIATION shall perform the services required hereunder in the ASSOCIATION's own way as an independent contractor, and not as an employee of LESJWA."

POA estimates the total cost of the Project to be \$26,755,559. LESJWA agreed to contribute approximately \$1.2 million to the Project.

Before beginning the work, POA obtained a required permit from the Department of the Army. POA applied for the permit on February 23, 2004. Attached to the application was a "Canyon Lake East Bay Sediment Removal Project Description and Work Plan," ("Project Description") dated September 2003, prepared by PBS&J. This document provides a detailed description of the work to be done. It explains that the dredge is a self-propelled floating platform equipped with a diesel engine-powered centrifugal pump to remove the sediment from the lakebed. The dredged sediment is conveyed from the dredge to the dewatering site via a temporary 8-inch pipeline. The dredged sediment is dewatered by means of a solids concentrator and 33 gravity dewatering bins. The solids concentrator has three chambers with hopper bottoms, from which the thickened sediment is discharged through a piping manifold to the dewatering bins. The dewatering process increases the concentration of the dredged solids from approximately 15 percent solids by volume when dredged to over 90 percent solids by volume inside the gravity dewatering bins. The dewatering equipment is located at the eastern-most reach of the lake, near the boat launch facility, covering an area of approximately 1.4 acres. The equipment is laid out so that roll-off container trucks can be easily loaded for sediment hauling. The dewatered sediment is loaded onto the trucks, hauled to the Audie Murphy Ranch, and dumped. The Project Description states that a staff of five full-time employees was planned for the project: A supervisor, a dredge operator, two dewatering equipment operators, and a roll-off container truck driver.

On March 5, 2003, POA and Audie Murphy Ranch LLC entered into an "Agreement to Place Dredged Fill Material," which sets forth the terms and conditions under which POA is permitted to deposit the dredged material at the Audie Murphy Ranch. This agreement does not provide for either party to compensate the other, but expressly provides that Audie Murphy Ranch LLC shall incur no costs or liability arising from or in connection with the dredging work.

Discussion

Labor Code section 1771¹ generally requires the payment of prevailing wages to workers employed on public works. Section 1720(a)(1) defines public works to include: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds" Additionally, section 1720.3 provides: "For the limited purpose of Article 2 (commencing with Section 1770), 'public works' also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency ... or any political subdivision of the state." Section 1772 provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public work are

¹Subsequent statutory references are to the Labor Code unless otherwise indicated.

deemed to be employed upon public work.” Finally, under section 1774, such contractors or subcontractors “shall pay not less than the specified prevailing rates of wages to all work[ers] employed in the execution of the contract.”

It appears to be undisputed that the dredging work entails alteration within the meaning of section 1720(a)(1). “To ‘alter’ is merely to modify without changing into something else,” and that term applies “to a changed condition of the surface or the below-surface.” *Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 756. “Alter” as defined by Webster’s Third New International Dictionary (2002) at page 63 is “to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else.” Thus, with regard to land, under these definitions to alter under section 1720(a)(1) is to modify a particular characteristic of the land. The dredging work involved here is performed by removing sediment from the bed of the lake with a self-propelled floating dredge. In so doing, the dredging modifies a particular characteristic of the land in that it expands the storage capacity of the lake and increases navigability. As such, the dredging work meets the definition of alteration within the meaning of section 1720(a)(1).

POA asserts that the Project is not being done “under contract” within the meaning of section 1720(a)(1). In support of this assertion, POA notes that no “contractors” are involved. Rather, POA is a private corporation using its own labor and equipment to dredge its own leased premises. According to POA, in order to satisfy the “under contract” element, the contract must contain a specification as to the minimum number of cubic yards of sediment to be dredged or the price to be charged for the hauling the dredged sediment, and there is no such contract specification here.

This contention must be rejected. The alteration is being done under two contracts: the agreement between the Board and LESJWA; and the agreement among LESJWA, POA and City (accurately characterized by LESJWA as “[t]he three-party contract”). The fact that these agreements may lack the above provisions mentioned by POA is immaterial to the status of the agreements as contracts. The fact that POA is a private corporation using its own labor and equipment is likewise immaterial. The same is true of most public works contractors. Here, contrary to POA’s assertion that no contractors are involved, POA itself is acting in the capacity of a contractor.

LESJWA asserts that the Project does not meet the “under contract” element because it is not an “awarding body” within the meaning of section 1722 and this Department’s regulations. Section 1720(a)(1) does not require a public entity to be party to a particular kind of contract, or any contract. See PW 98-005, *Goleta Amtrak Station* (November 23, 1998); PW 99-052, *Lewis Center for Earth Sciences Construction* (November 12, 1999). That section requires only that the alteration be done under contract, not that the contract be awarded by a public entity. The Attorney General has interpreted section 1720(a) as applying when public funds are used to reimburse construction costs irrespective of whether the construction contract was awarded by a public “awarding body.” Op.Atty.Gen. No. 99-804 (83 Ops.Cal.Atty.Gen. 231, October 23, 2000) at pp. 4-5. See also PW 93-054, *Tustin Fire Station* (July 1, 1994). Accordingly, the Project entails alteration done under contract for purposes of section 1720(a)(1).

The third element of section 1720(a)(1)'s definition of "public works" is that the work is "paid for in whole or in part out of public funds." This Project is paid for in part out of public funds in the form of a \$1.2 million payment from LESJWA. LESJWA argues that the Project is a private work of improvement and that partial funding from a grant of public funds does not make it a public work. The \$1.2 million grant is unquestionably a payment of public funds within the meaning of section 1720(b)(1), which defines the phrase "paid for in whole or in part out of public funds" to include "[t]he payment of money or the equivalent of money." This is consistent with longstanding Department interpretation. *See, e.g.,* PW 2001-054, *Tauhindauli Park and Trail Project/City of Dunsmuir* (March 28, 2002) [when construction and alteration on public land leased to a private organization is paid for in part with grants of public funds, the project is a public work].

Citing PW 2001-021, *One Harbor Plaza, Suisun City Redevelopment Agency* (June 24, 2002), LESJWA argues that:

Over its 8-year life, the dredging project is expected to cost more than \$26 million, all of which the POA will be responsible for, except for the \$1.2 million grant made by LESJWA to the POA. Thus, LESJWA's equity substantially exceeds its investment such that there is no net expenditure of "public funds" on this project. (Aklufi & Wysocki letter of July 15, 2005, at p.3.)

In this case, LESJWA has made no showing that it will realize *any* return on investment. The mere fact that POA is putting up most of the money does not mean that LESJWA will recoup the public funds it is paying. Moreover, even if there were a factual basis for LESJWA's argument, it would have no legal basis. The fact that a public entity might in future years derive revenue from a project would not negate the fact that the project was paid for out of public funds.

Thus, the Project meets all three elements of a public work under section 1720(a)(1). It involves alteration done under contract and paid for in part out of public funds. In addition to the alteration work involved in the dredging of the lakebed, the scope of work for the Project also includes the dewatering of the dredged material, the loading of the dredged material onto trucks and the off-hauling of the dredged material to the Audie Murphy Ranch. Whether any of this work is also subject to prevailing wage requirements turns on an analysis of sections 1771, 1772 and 1774.

Work falls within the scope of sections 1771, 1772 and 1774 when it is "functionally related to the process of construction" and "an integrated aspect of the 'flow' process of construction." *See* PW 2005-037, *Off-Site Testing and Inspection Services, Jurupa Unified School District - Glen Avon High School* (January 12, 2007), citing *O.G. Sansone Co. v. Dept. of Transportation* (1976) 55 Cal.App.3d 434, 444, quoting *Green v. Jones* (1964) 23 Wis.2d 551, 128 N.W.2d 1, 7. The same test applies to the "process of alteration." Here, both the dewatering of the dredged material and the loading of it onto trucks are functionally related to, and an integrated aspect of, the alteration process. ~~The dredged-sediment is immediately piped from the dredge to the dewatering equipment, and the dewatering bins are arranged so that the sediment can be promptly and easily emptied into trucks for off-hauling as soon as the dewatering is completed. The uninterrupted~~

operation of the dredge depends upon the dewatering of the dredged material and the emptying of the dewatering bins. Thus, the workers performing these tasks are deemed to be employed in the execution of the public works contract within the meaning of sections 1771, 1772 and 1774.

Regarding the off-hauling of the dredged material, a further analysis is required. In *O.G. Sansone v. Dept. of Transportation, supra*, 55 Cal.App.3d 434, the Court of Appeal analyzed the circumstances in which prevailing wages must be paid for *on-hauling* work. As stated in PW 2004-023, *Richmond-San Rafael Bridge/Benica-Martinez Bridge/San Francisco-Oakland Bay Bridge* and PW 2003-046, *West Mission Bay Drive Bridge Retrofit Project, City of San Diego* (July 31, 2006) ("*Towboats*"): "*Sansone* stands for the proposition that prevailing wages are to be paid for hauling to a public works site based on the individual worker's 'function' (whether the hauling is from a dedicated site or the hauler is involved in the immediate incorporation into the site of the materials hauled)" By similar logic, workers engaged in *off-hauling* from a public works site generally are not engaged in the execution of the public works contract within the meaning of sections 1771, 1772 and 1774 unless the off-hauling work is "functionally related to the process of construction" and "an integrated aspect of the 'flow' process of construction." *O.G. Sansone Co. v. Dept. of Transportation, supra*, 55 Cal.App.3d 434, 444, quoting *Green v. Jones, supra*, 23 Wis.2d 551, 128 N.W.2d 1, 7.

Thus, only under the following limited exceptions is off-hauling work subject to prevailing wage requirements. Hauling within a single public works site is subject to prevailing wages, whether it is for the purpose of hauling materials, personnel, tools or equipment, because such work is closely tied to the construction process by virtue of the fact that it is performed on-site. Hauling from a public works site to a temporary, adjacent site set up for and dedicated to the public works site is subject to prevailing wages for the same reason that on-hauling from a temporary, adjacent dedicated site such as a batch plant or borrow pit was found to be subject to prevailing wages under *Sansone*. Hauling from one public works site to a second public works site is subject to prevailing wages because the first site is similar in function to the temporary, adjacent dedicated site under *Sansone*. Finally, prevailing wages are required for any work done by haulers participating in the construction process on the public works site, but not for off-hauling from the site. As *Towboats, supra*, found, "when the hauler leaves the pure hauling role and participates in the on-site construction activity of incorporation of the material hauled, the worker is entitled to prevailing wages." The inverse proposition is equally true. When the hauler leaves the pure hauling role and participates in the on-site alteration or demolition process of "de-incorporation" such as when trucks are staged and loaded as material or debris is being excavated or removed from the public works site, the worker is similarly entitled to prevailing wages for such on-site work.²

²The precedential Decision on Administrative Appeal in PW 2003-049, *Williams Street Widening, City of San Leandro* (August 23, 2005) affirmed the initial determination of January 6, 2005 regarding coverage of off-haul work. The January 6, 2005 determination has since been de-designated as precedential. The determination herein reiterates the Department's longstanding view, as expressed in *Williams Street Widening*, that off-hauling is generally not covered; it does not, however, carry forward the following two-exceptions enumerated in *Williams Street Widening*: (1) "where there is a specification in a contract that the hauling be accomplished in a specific manner or to a specific location;" and (2) "where the hauling is to return such things as tools, equipment or materials to the contractor's facility." These

Here, the dredged material is being hauled to the Audie Murphy Ranch, a private development site, to be used as clean fill. The off-hauling from the public works site at Canyon Lake to the Audie Murphy Ranch does not constitute work done in the execution of the public works contract because it does not fall under any of the exceptions noted above. The off-hauling is not within a single public works site; it is not to a temporary dedicated, adjacent site; and, it is not to a second public works site.³

In addition, the Legislature made another exception to the general rule against coverage of off-hauling by enacting section 1720.3 to define as public works the off-hauling of refuse from a public works site to an outside disposal location. The American Heritage Dictionary of the English Language (New College Ed. 1979 at p. 1095) defines "refuse" as: "Anything discarded or rejected as useless or worthless; trash; rubbish."⁴ Here the dredged material is not being discarded as useless or worthless because it is being put to use as clean fill. Presented with a similar factual situation, the Department determined that: "Because the dirt excavated ... is being put to a useful purpose, i.e., the covering of the garbage at the landfill sites, it would not be considered refuse under these circumstances. A fact that clearly supports this conclusion is that [contractor] was not charged for dumping the dirt at the landfills." PW 2000-078, *Rosewood Avenue/Willoughby Avenue Sewer Interceptor, City of Los Angeles* (August 6, 2001).⁵ Here, too, the fact that POA is not being charged to dump the dredged material at the Audie Murphy Ranch strongly supports the conclusion that the material is not refuse. Accordingly, the off-hauling of the material does not fall within section 1720.3's definition of "public works."

POA contends that the Project is exempt from prevailing wages under section 1720(c)(3), which states:

two exceptions are inconsistent with the principles set forth in *Sansone* that the hauling be functionally related to, and integrated with, the construction process in order for it to be subject to prevailing wages. Therefore, the Decision on Administrative Appeal in *Williams Street Widening* is also de-designated as precedential. Accordingly, it will no longer be followed by the Director and should no longer be considered guidance by the regulated public after the date of this determination.

³ To the extent, if any, the roll-off container truck driver leaves the pure hauling role and participates in on-site activities such as loading the dredged material onto the roll-off container truck, such on-site work performed by the truck driver is subject to prevailing wages even though the off-hauling performed by the same truck driver is not.

⁴This Department has long used the above definition. See PW 99-059, *Route 30 Asbestos Pipe Removal Project, California Department of Transportation* (March 20, 2000). See also PW 2000-036, *Carlson Property Site Lead Affected Soil Removal and Disposal Project* (May 31, 2000): "Refuse is defined as 'the worthless or useless part of something' (Webster's Third New International Dictionary (3d ed. 1967) p. 1910)."

⁵The *Rosewood Avenue* determination found that the off-hauling of the dirt to landfills did not meet section 1720.3's definition of public works because the material did not meet the definition of refuse. The off-hauling was found to be nonetheless subject to prevailing wages for it was deemed performed in the execution of the public works contract under section 1772. Given the conclusions reached herein that off-hauling generally is not done in the execution of a public works contract unless it falls within the limited exceptions noted above, *Rosewood Avenue's* discussion of section 1772 as it relates to off-hauling, and any similar discussion of section 1772 in other precedential determinations, is disavowed.

If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

POA argues that the first exception of the above provision applies because the cost of the Project would normally be borne by the public. It also contends that the second exception applies because LESJWA's payment constitutes only 4.63 percent of the total cost and, therefore, "is de minimis in the context of the project." LESJWA makes a similar "de minimis" argument.

Neither POA nor LESJWA has provided any legal authority for their assertions that the terms "private developer" and "private development project" are applicable to the facts at hand. Webster's Third New International Dictionary (2002), at page 618, defines "developer" as:

[A] person who develops something, esp. habitually or as an occupation: as ... b: a person who develops real estate, often one that improves and subdivides land and builds and sells residential structures thereon ...

The Legislature obviously used the phrase "private developer" to refer to one who builds structures on real estate. POA is acting in the role of a contractor, not a developer. Webster's Third New International Dictionary, *supra*, provides several definitions of "development." The one most relevant to public works is: "[A] developed tract of land, esp. a subdivision having necessary utilities (as water, gas, electricity, roads)." The dredging of a lakebed does not fall within this definition, and is not a "development project" within the meaning of section 1720(c)(3). Moreover, the Project cannot be deemed purely private given that the lakebed is owned by a public entity and the dredging serves the public purpose of expanding the storage capacity of the lake. Accordingly, the exceptions set forth in section 1720(c)(3) do not apply, and it is therefore unnecessary to determine whether or not the public funding involved here is a reimbursement for "costs that would normally be borne by the public" or is "de minimis in the context of the project."

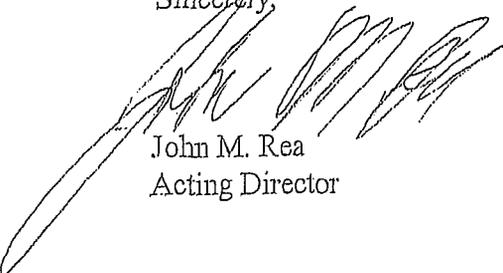
Conclusion

For the foregoing reasons, this Project entails alteration done under contract and paid for in part out of public funds. Thus, the Project is a public work subject to prevailing wage requirements with the exception of the off-hauling of the dredged sediment. The off-hauling is not done in the execution of a contract for public work within the meaning of sections 1771, 1772 and 1774; it does not meet the definition of "public works" within the meaning of section 1720.3; therefore, the off-hauling is not subject to prevailing wage requirements.

Letter to Donald C. Carroll, Esq.
Re: Public Works Case No. 2005-025
Page 9

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John M. Rea
Acting Director