

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF ADMINISTRATION
Office of the Director – Legal Unit
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August 4, 2008

G. Ross Trindle III, Esq.
Best, Best & Krieger
300 South Grand Avenue, 25th Floor
Los Angeles, CA 90071

Re: Public Works Case No. 2008-010
Sewer Line Construction
City of Corona

Dear Mr. Trindle:

This letter 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 construction of sewer lines along Lester Avenue in the City of Corona ("City") is not subject to prevailing wage requirements.

Facts

Three developers, Bristlecone Development Group, LLC ("Bristlecone"), Bill and Carol West, and John Salvatore and Sam Akbarpour (collectively "Primary Developers"), have undertaken to develop three tracts of land in South Corona into single-family residential lots ("Project"). Bristlecone's tract will be developed into eight residential lots at a cost of at least \$11.097 million. John Salvatore and Sam Akbarpour's tract will be developed into five residential lots at a cost of at least \$8.375 million. The Wests' tract will be developed into eight residential lots at a cost of at least \$9.5 million. In total, the development costs to date amount to approximately \$28.972 million.

As a condition of regulatory approval of the Project, City required Primary Developers to construct sewer lines along Lester Avenue with sufficient capacity to accommodate subsequent developments in the immediate area. Primary Developers entered into a construction contract with Richard Lopez Construction to perform this work. The cost of constructing the sewer lines totaled \$123,300.67, which was initially borne by Primary Developers.

As authorized by Corona Municipal Code section 16.23.150, City intends to enter into a Reimbursement Agreement for Sewer Facility Improvements ("Reimbursement Agreement") with Primary Developers that allows Primary Developers to be reimbursed for costs associated with that portion of the sewer line construction over and above what was strictly necessary for development of the Primary Developers' tracts of land. Any subsequent developers ("Secondary

Developers”) would pay for their proportionate share of cost to City. Monies collected by City from Secondary Developers would be held in City’s account, which also holds other City funds, until such monies are released to Primary Developers. City will retain a reasonable amount necessary to cover City’s administrative costs. If there are no Secondary Developers, Primary Developers will receive no reimbursement. To the extent City collects sums in excess of the reimbursement amount, those sums will remain the property of City.

There are no other potential sources of public funds. City requested a coverage determination as to whether the sewer line construction work is subject to prevailing wage requirements.

Discussion

Labor Code section 1771¹ requires that prevailing wages must be paid to workers employed on public works projects. Section 1720(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....” Section 1720(b) defines “paid for in whole or in part out of public funds” to mean, among other things, “[t]he payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.” (§ 1720(b)(1).) Lastly, section 1720(c)(3) sets forth the following exemption:

(c) Notwithstanding subdivision (b):

- (3) 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.

The Project involves construction done under contract within the meaning of section 1720(a)(1). The issues are whether the above-described reimbursement mechanism entails a payment out of public funds as defined by section 1720(b)(1) and, if so, whether the Project is exempt from prevailing wage requirements under the exemption provided in section 1720(c)(3).

Under the draft Reimbursement Agreement, City’s payment to Primary Developers out of funds collected by City from Secondary Developers and held in public coffers would appear to constitute a “payment of money ... by the state or political subdivision directly to ... developer” within the meaning of section 1720(b)(1). City argues, however, that it is merely a “passive conduit” for the transfer of funds from Secondary Developers to Primary Developers, the actual burden of payment falls on Primary and Secondary Developers and not on City and, therefore, there is no payment in whole or in part out of public funds.

¹ All statutory references are to the California Labor Code, unless otherwise indicated.


It is unnecessary to address City's argument because even if the reimbursement mechanism constitutes a payment out of public funds, the exemption in section 1720(c)(3) applies. The Project is a private development project. Total Project costs are \$28.972 million. Under the Reimbursement Agreement, Primary Developers are eligible to receive from City \$123,300.67 (the total cost of the sewer line construction) less Primary Developers' share. While the exact reimbursement amount is unknown because no Secondary Developers have yet been identified, the total cost of the sewer line construction represents only 0.4 percent of overall Project costs. Secondary Developers' share, which comprises the maximum possible reimbursement to Primary Developers, represents an even smaller percentage. The public subsidy is proportionately small enough in relation to the overall cost of the Project, such that the availability of the subsidy does not significantly affect the economic viability of the Project. As such, under section 1720(c)(3), the public subsidy is considered de minimis in the context of the "otherwise private development project" and therefore, the Project is exempt from prevailing wage requirements.²

Conclusion

For the reasons discussed above, any money paid from City's account to Private Developers under the Reimbursement Agreement is de minimis and does not convert this otherwise private development project, including the installation of sewer lines along Lester Avenue, into a public work requiring the payment of prevailing wages.

I hope this letter satisfactorily responds to your inquiry.

Sincerely,



John C. Duncan
Director

² This is consistent with PW 2007-012, *Sand City Design Center, Sand City Redevelopment Agency* (May 15, 2008) [a public subsidy representing 1.4 percent of the total project costs was found to be de minimis] and PW 2004-024, *New Mitsubishi Auto Dealership, Victorville Redevelopment Agency* (March 18, 2005) [a public subsidy representing 1.64 percent of the total project costs was found to be de minimis].