

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR

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November 3, 2008

Julia Sidhu
Industrial Relations Representative
Department of Industrial Relations
Division of Labor Standards Enforcement
2031 Howe Avenue, Suite 100
Sacramento, CA 95825

Re: Public Works Case No. 2008-030
Lili Valley Water System Improvement Project
City of West Point

Dear Ms. Sidhu:

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 Lili Valley Water System Improvement Project ("Project") is not subject to California's prevailing wage laws.

Facts

The Project entails the installation of approximately 5,000 linear feet of PVC and ductile iron water main line, chlorination system, hydropneumatic tank, electrical system and related appurtenances. The Project is being undertaken by the Lili Valley Water Company ("Company"), a California corporation composed of one class of members, the home-lot owners in the Lili Valley Development Estates ("Estates").

The Project costs \$1.05 million and is being funded by the Rural Utilities Services of the United State Department of Agriculture Rural Development ("USDA") with a \$770,000 grant and a \$280,000 loan under a Water or Waste System Grant Agreement ("Agreement"). After closing costs are paid, the balance of the loan funds are to be deposited into Company's construction account at the Bank of America. The loan funds cannot be disbursed from the construction account without the prior written consent of USDA. Company will repay the loan from user charges, which the home-lot owners pay with their monthly water bill.

Under the Agreement, Company is to undertake Project in accordance with plans and specifications approved by USDA, to permit periodic inspection of construction by a representative of USDA and to provide USDA with periodic reports. In addition, USDA has approval authority over the initial rate schedule to be used to determine the user charge.

Discussion

Labor Code section 1771¹ requires, with certain exceptions, prevailing wages be paid to all workers employed on public work. 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)(1) defines the phrase “paid for in whole or in part out of public funds” to include “the payment of money or the equivalent of money by the state or political subdivision” Section 1721 defines “political subdivision” as “any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts.”

Further, California Code of Regulations, title 8, section 16001(b) provides as follows:

Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort.

Section 1722 defines “awarding body” as “department, board, authority, officer or agent awarding a contract for public work.” Section 1722’s promulgating regulation further defines “awarding body” as follows: “Any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works.” (Cal. Code Regs., tit. 8, § 16000.)

The main issue in this case concerns the applicability of the above regulation governing federally funded or assisted projects. Under that regulation, state prevailing wage rates are required whenever a federally funded or assisted project is controlled or carried out by a California awarding body. Here, USDA is providing both a loan and a grant to fund the entire cost of the Project. As such, the Project is a federally funded project. The Project, however, is under the control of the federal, not state, government. Therefore, the Project is neither controlled nor carried out by a California awarding body and the application of state prevailing wages is not required.²

The result here is consistent with the Decision on Administrative Appeal in PW 2001-046, *Casmalia Resources Hazardous Waste Management Facility* (March 30, 2005). In *Casmalia*, the Director found that an environmental remediation project supervised by the United States Environmental Protection Agency was a federal project under the control of the federal

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

²The Department’s interpretation of the above discussed regulation governing federally funded or assisted projects was upheld in *Southern California Labor/Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 Cal.App.4th 873. In that case, the Department had issued a coverage determination finding that a project awarded by the federal government was beyond the reach of California’s prevailing wage laws. The court affirmed the determination, holding that California’s prevailing wage laws “cannot be applied to a project which is under the complete control of the federal government.” (*Id.* at p. 886.)

government and, therefore, beyond the reach of California's prevailing wage laws.³ Here, USDA controls construction in its approval authority over the contract plans and specifications and the disbursement of construction funds. The Project is under the control of the federal government and, therefore, like *Casmalia*, beyond the reach of California's prevailing wage laws.

It should be noted that the loan repayment mechanism does not alter this conclusion. Public works status under California's prevailing wage laws requires a payment in whole or in part out of public funds by the state or political subdivision as defined by section 1720(b). To fund repayment of the USDA loan, Company collects from home-lot owners a user charge that appears on their monthly water bill. Company is a private, not public, entity. The monies collected by Company are not, at any time, deposited nor contained in a public coffer of the state or political subdivision. (See, *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576.) As such, the repayment mechanism does not entail a payment by the state or political subdivision within the meaning of section 1720(b)(1) and, therefore, does not constitute a basis for subjecting this Project to coverage under California's prevailing wage laws.

For the foregoing reasons, the Project is a federal project under the control of USDA. It is neither controlled nor carried out by a California awarding body and, therefore, is not subject to prevailing wage requirements under California law.⁴

Sincerely,



John C. Duncan
Director

³The Decision on Administrative Appeal in *Casmalia* was affirmed in 2007 by the First District Court of Appeal in an unpublished opinion. (*Southern California Labor/Management Operating Engineers Contract Compliance Committee v. Rea*, Case No. A113481 (2007 WL 417498).)

⁴Whether prevailing wages are required under federal law - the Davis-Bacon Act - is outside the scope of this determination.