

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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November 24, 2009

Elizabeth Adamson
Labor Compliance Investigator
Drywall/Lathers Union, Local 9109
4421 Pell Drive, Suite I
Sacramento, California 95838

Re: Public Works Case No. 2008-035
Open Item Contract WA00023961
Modular Furniture
County of Sacramento

Dear Ms. Adamson:

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 where work performed under the County of Sacramento's ("County") Open Item Contract WA00023961 entails the affixing of modular furniture to the realty, then the entire frame work, attachment and build-out process constitutes public work subject to prevailing wage requirements. Where work performed under Open Item Contract WA00023961 entails the assembly of free-standing modular furniture, which is not affixed to the realty, prevailing wage requirements do not apply.

Facts

On September 11, 2008, County issued a Request for Bid (the "RFB") on an open item contract that calls for "labor, equipment and supplies for installation and/or knockdown/reconfiguration of office modular furniture" (the "Contract"). On October 9, 2008, County awarded the Contract to Bay Area Installation, Inc., Crown World Wide Commercial Service and SR Trucking, also known as SR Moving & Storage, Inc. ("SRT"). The term of the Contract is from February 1, 2009, through January 31, 2010. County has the option to renew the Contract for up to two additional year-long terms. On January 13, 2009, County adopted Resolution No. 2009-0006 approving the award of the Contract to the above-referenced companies. Work under the Contract is to be performed at various County offices on an "as-required" basis when an office relocates or reconfigures its existing work space. Each County department will fund its own work under the Contract. Work orders greater than \$5,000 must be competitively bid among the three contractors listed above. Work orders for \$5,000 or less will be offered to the three contractors on a rotating basis. The value of the Contract is estimated to be \$257,000 per year.

Herman Miller manufactures the three models of modular furniture typically used by County: the Action Office, Vivo and Ethospace. Work under the Contract is to be performed pursuant to the manufacturer's instructions. According to the Ethospace manual, "Ethospace is a system composed of full and partial height walls, support cabinets, wall-attached and freestanding components, and accessories that may be precisely tailored to support organizational and individual needs. Ethospace is considered to be portable furniture and is subject to applicable local fire, electrical and building codes." Action Office and Vivo have similar features.

Tools necessary for work performed under the Contract include Allen Wrenches, an open end wrench, standard and Phillips-head screwdrivers, a measuring tape, a rubber mallet, a level and an electric drill and drill bits. Additional tools that are not required but can be used to speed up large projects include a chalk line, a panel lifter, an electric screwdriver and pliers.

The following description, based on Herman Miller's manuals, synthesizes the work process for assembling a free-standing modular workstation. The skeletal frame is assembled first. Next, the base cover is attached to the frame followed by the tiles (panels) and trim, including connector covers, top caps and finishing ends. Finally, the overhead storage areas are configured and attached to the frame, and the work surface is set up. The work surface is supported by brackets that are hooked into the frame and attached to the work surface with screws. The components described above are generally fastened together with washers, nuts, screws and/or bolts.

At the option of County, modular workstations can be designed to be affixed to the realty rather than designed to be free-standing. Pursuant to Herman Miller's manuals, the workstations can be attached either to the walls or the floor. For wall attachment, there are two methods. One method involves attaching a wall strip to the wall with screws and then attaching the frame and panels to the wall strip with hooks and screws. The other method involves attaching the skeletal frame directly to the wall with screws or toggle bolts. The remaining components are built out from the affixed portion of the workstation.

For floor attachment, seismic floor anchor plates are attached to the floor with anchor bolts. A finished frame is then secured to the anchor plates with seismic glide bolts. The remaining components are built out from the affixed portion of the workstation.

According to County, all of the work performed under the Contract to date has involved free-standing modular furniture. It is anticipated, however, that future work orders may involve modular furniture that is not free-standing, but is attached to the walls or floor as described above.

Positions of the Parties

The Drywall/Lathers Union, Local 9109 ("Local 9109"), Service West, Inc. ("SWI"), one of the unsuccessful bidders, and The Modular Installers Association ("MIA"), an association representing bidders, argue that the assembly of free-standing modular furniture constitutes "installation"

within the meaning Labor Code section 1720, subdivision (a)(1).¹ Their positions are described in turn below.

Local 9109 contends that the tools and processes used in the assembly of free-standing modular furniture are the same as those used in construction (e.g., the construction of interior office walls). Electric drills, screw guns, saws, wrenches, lasers or building levels and other construction tools are used. The work is integrated into construction planning; the delivery and assembly are coordinated with overall construction schedules; and, workers must read layout plans, blueprints and CAD overlays referencing electrical and HVAC systems. Local 9109 asserts that the work is comparable to other work that is subject to prevailing wage requirements such as the removal or replacement of windows, doors and floor coverings. Local 9109 also asserts that the work is subject to prevailing wage requirements because the Department publishes the scope of work for the 2008-2012 Modular Systems Addendum to the 46 Northern California Counties Carpenters Master Agreement for Northern California ("Carpenters Agreement"), which includes "the handling, installation, removal, relocation and maintenance of free-standing modular office furniture systems" ("Carpenters scope of work").

SWI contends that because the RFB was advertised as an "installation" contract, prevailing wages are required under subdivision (a)(1), which includes installation as a type of covered work. Further, SWI contends that because it performed modular furniture work under prior contracts with County that required the payment of prevailing wages, prevailing wages should also be required under the Contract. Under the prior contracts, SWI mounted, bolted or secured the modular furniture to the realty, tested power duplexes and worked with cabling vendors regarding the placement of data lines.

MIA makes the same argument put forth by Local 9109 relating to the Carpenters scope of work. In addition, MIA contends that the assembly work is subject to prevailing wage requirements for the following reasons: specialized training by the manufacturer is required; the Contractors State License Board ("CSLB") requires a C-61 (Limited Specialty)/D-34(Prefabricated Equipment) contractor's license; the work is part of the construction planning process; and, modular furniture must meet standards or requirements relating to seismic safety, disability accommodation and electrical codes.

Interested parties arguing against coverage include County, SRT, Lewallen's and The California Moving and Storage Association ("CMSA"). Their positions are described in turn below.

County contends that the industry needs a consistent standard for determining coverage of modular furniture work. County also contends that public entities are negatively affected by conflicts between the competing labor organizations. County argues that the prevailing wage rates adopted from the Carpenters Agreement are too high. County also argues that the Carpenters Union does not contribute to manufacturer training. Finally, County contends that because sales tax required for the purchase of personal property applies to the purchase of modular furniture, modular furniture-related work cannot be considered "labor" under California's prevailing wage laws.

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

SRT contends that none of the work it has performed under the Contract has involved the affixing of modular furniture to the realty. As such, as SRT argues, prevailing wages should not be required.

Lewallen's contends that modular furniture-related work is not the same as constructing a building. As such, as Lewallen's argues, prevailing wages should not be required.

CMSA argues that the Teamsters Union and moving companies have been performing modular furniture-related work for thirty years and no special skills or tools are required; CMSA contends it is a matter of simple competence. CMSA also contends that the majority of work performed under the Contract involves mere assembly and the imposition of prevailing wages without legal or policy reasons only serves to drive up costs for awarding bodies and, ultimately, for the taxpayers. Finally, CMSA contends that the issuance of a public works coverage determination would constitute an underground regulation in violation of the Administrative Procedures Act (the "APA") because the Contract is an open item contract for a series of undefined projects in the future. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 ("*Tidewater*").)

Discussion

Subdivision 1720(a)(1) generally 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" The modular furniture-related work described above is done under contract and is paid for in whole or in part out of public funds in the form of County funds. The only issue presented is whether the work constitutes "installation" within the meaning of subdivision (a)(1).

Section 1720 was amended in 2001 by Senate Bill No. 975 ("SB 975"), effective January 1, 2002, to include "installation" within the definition of public works. (Stats. 2001, chap. 938, § 2.) The legislative history of SB 975 indicates that "installation" was added as a type of enumerated covered work to conform to "several precedential coverage decisions made by the Department of Industrial Relations." (Senate 3d Reading, SB 975 (2001-2002 Reg. Sess.) as amended August 30, 2001, p. 4; Senate Rules Committee, Office of Senate Floor Analyses, Unfinished Business of SB 975 (2001-2002 Reg. Sess.) August 30, 2001, p. 5.) The relevant distinction between the pre-SB 975 and post-SB 975 versions of the Labor Code are immaterial. Whether the work is installation rising to the level of construction under the pre-SB 975 version or "installation" under the post-SB 975 version produces the same result. The pre-SB 975 and the post-SB 975 coverage determinations have in common the bolting, securing or mounting of items to the realty as fixtures. (See, e.g., pre-SB 975 determinations in PW 99-034, *Valley View Elementary School* (September 29, 1999); PW 99-060, *Metal Workers and Metal Storage Shelving* (November 30, 1999); and post-SB 975 determinations in PW 2008-034, *Installation of Smart Classroom Technology - Fresno Unified School District* (July 27, 2009); PW 2005-041, *Pre-rinse Spray Valve Program (Phase II) California Urban Water Conservation Council* (May 11, 2006).)

Coverage of modular furniture-related work was specifically addressed by the Department in two prior determinations. In PW 2000-052, *Installation of Modular Furniture, Department of General*

Services (August 18, 2000) (“*Keene*”), the Director found that work involving the securing of modular furniture to the floor and/or ceiling was subject to prevailing wage requirements. In PW 2005-017, *Western Contract Services, Assembly and Disassembly of Free-Standing Modular Furniture* (December 16, 2005) (“*WCS*”), the Director found that the mere assembly and/or disassembly of free-standing modular furniture was not subject to prevailing wage requirements. *WCS* distinguished *Keene* as involving modular furniture that was bolted down, secured or mounted to the realty.

The conclusions reached in prior determinations are consistent with Civil Code section 660. Civil Code section 660 defines a fixture in pertinent part as that which is “permanently attached to what is thus permanent, as by means of cement, plaster, nails bolts or screws” Where modular furniture is mounted, bolted or secured to the floor, ceiling or walls, it becomes part of the building structure. Free-standing modular furniture is materially distinguishable from modular furniture that is affixed to the realty in that free-standing modular furniture more closely resembles personal office furniture such as desks and chairs that do not become part of the building structure.

Here, County anticipates that some of the work under the Contract will involve the affixing of modular furniture to the realty. Herman Miller’s manuals describe the work process as requiring the attaching of either the frame itself or a wall strip to the realty with toggle bolts or screws. If a wall strip is used, the furniture tiles are attached to the wall strip with hooks or screws. If desired, some models can be secured to the floor using a floor anchor plate and bolts. The work process for affixing modular furniture to the realty is integrated into the assembly process because the furniture is built out from the components that have been attached to the realty.

Assembly of free-standing modular furniture, by contrast, merely involves connecting various components together. The skeletal frame is typically assembled first and is held together with nuts, bolts or screws but is not secured to the realty. Side panels and the desk surface are then connected to the frame with brackets and screws.

Consistent with the Department’s prior determinations, the entire frame work, attachment and build-out process undertaken in instances where the modular furniture is being mounted, bolted or secured to the realty constitutes “installation” within the meaning of subdivision (a)(1) and therefore is subject to prevailing wage requirements. Also consistent with the Department’s prior determinations, work involving the mere assembly of free-standing modular furniture does not constitute installation and therefore is not subject to prevailing wage requirements.

The interested parties raise many arguments both for and against coverage. None of the parties, however, directly challenge the Department’s analysis requiring that an item be bolted, mounted or secured to the realty as a condition of coverage, nor do they offer an alternative definition of installation. Nonetheless, the arguments of the parties are addressed collectively below.

Regarding the argument that assembly is akin to construction and therefore is covered work, there are fundamental distinctions in the work processes of assembly and construction that justify a different result in terms of coverage. Construction work involves the addition or removal of materials that are affixed to the realty in some manner whereas the assembly of free-standing

modular furniture does not. Merely because assembly may require the use of tools that are also used in construction does not transform assembly into construction. Similarly, that a particular manufacturer requires vendors to be trained and certified also does not transform assembly into construction. In addition, the reference to "free-standing" modular furniture in the Carpenters scope of work does not mean all work associated with modular furniture meets the type of work requirement in subdivision (a)(1). The Department publishes advisory scopes of work to assist the regulated public in determining appropriate rates of pay, not in determining whether a particular type of work is covered. In sum, assembly is not akin to construction. Modular furniture that is affixed to the realty assumes a different characteristic because it becomes part of the realty and, therefore, is distinguishable from work that involves the mere assembly of free-standing modular furniture.

Regarding the argument that assembly requires coordination with other building trades and therefore is covered, coordination is not a determinative factor. Moreover, there is no indication that any coordination is necessary under the Contract. Whatever coordination may be necessary for the assembly of free-standing modular furniture is not significantly different from the type of coordination that would be necessary for furnishing an office building with desks and chairs.

With respect to the argument that coverage flows from the fact that County advertised the RFB as "installation" work, it appears that County was merely using the term informally, not as a term of art under California's prevailing wage laws. Further, County's use of the term installation is not entirely inaccurate given that some modular furniture is mounted, bolted or secured to the realty.

Regarding the argument that prevailing wages should be imposed under the Contract because prevailing wages were imposed under prior contracts, County's prior contracts for modular furniture-related work with SWI are not at issue. This determination is specific to work performed under the Contract awarded to Bay Area Installation, Inc., Crown World Wide Commercial Service and SRT. The issue raised by SWI that County did not properly advertise the RFB should be addressed to County directly. SWI's reliance on prior contracts is particularly unjustified given uncontroverted representations made that none of the work under the Contract to date has involved the affixing of modular furniture to the realty.

Arguments against coverage concerning the appropriate rate of pay, cost to public entities, the applicability of sales tax to the purchase of modular furniture and competition among labor organizations are irrelevant to the issue whether the work is covered under subdivision (a)(1) as installation. Similarly, arguments for coverage concerning compliance with seismic safety, disability accommodation, CSLB and electrical code requirements are also irrelevant. The aforementioned requirements are not indicative of coverage. Prevailing wage requirements are independent of other statutory requirements.

Finally, CMSA contends that the issuance of a coverage determination concerning an open item contract would constitute an underground regulation. While a state agency is prohibited from making generally applicable policy pronouncements in the course of enforcing its responsibilities without following the rulemaking procedures set forth in the APA, advice letters directed to specific parties addressing specific facts and issues are exempt from the APA under *Tidewater*,

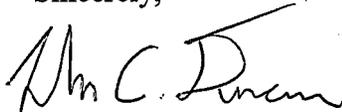
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supra, 14 Cal.4th 557, 571. This determination does not constitute a generally applicable policy pronouncement; rather, the determination is directed to specific parties and addresses a specific set of facts arising out of the RFB and is therefore exempt from the APA.

For the foregoing reasons, under the specific facts of this case, where work performed under the Contract entails the affixing of the modular furniture to the realty, then the entire frame work, attachment and build-out process constitutes "installation" subject to prevailing wage requirements. Where work performed under the Contract entails the assembly of free-standing modular furniture, which is not affixed to the realty, prevailing wage requirements do not apply.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Duncan". The signature is written in a cursive style with a large, stylized initial "J" and "D".

John C. Duncan
Director