

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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August 28, 2012

David A. Rosenfeld, Esq.
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1001 Marina Village Walkway, Ste. 200
Alameda, CA 94501

Re: Public Works Case No. 2012-015
Renovation of Yuba City Office Building
Regional Housing Authority of Sutter & Nevada Counties

Dear Mr. Rosenfeld:

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 renovation of an office building in Yuba City for occupancy by the Regional Housing Authority of Sutter & Nevada Counties (Project) is a public work subject to prevailing wage requirements.

Facts

In 2010, the Consolidated Area Housing Authority of Sutter County (Consolidated)¹ agreed to purchase a two story office building at 1455 Butte House Road in Yuba City, consisting of over 7,000 square feet of space. Consolidated needed the property to combine its various departments in a single location. To finance both the purchase of the building and its rehabilitation, Consolidated borrowed \$940,000.00 from the Yuba City branch of Tri Counties Bank (Lender).² The terms of the loan provide that Lender withhold the sum of \$161,227.00 "for the purpose of improvements to the Real Property commonly known as 1455 Butte House Road, Yuba City" and further provide for the disbursement of such funds "during the construction loan phase." The loan documents describe Consolidated's repayment schedule as well as the method for calculating the interest rate to be charged.

Around this same time period, arrangements were being made to merge Consolidated with the Nevada County Housing Authority. These discussions culminated in the absorption of the Nevada County Housing Authority by Consolidated and the formation of a new entity, the Regional Housing Authority of Sutter & Nevada Counties (Regional), pursuant to Health and Safety Code section 34240.1.

On July 18, 2011, Regional advertised the Project for bids. The successful bidder was Fletcher's Plumbing and Contracting, Inc. (Contractor), which entered into a contract with Regional to carry

¹ Consolidated was created in 1994 by Sutter County, the City of Live Oak, and the City of Yuba City.

² The promissory note, entitled "Business Loan Agreement," is dated April 25, 2011.

out the necessary tenant improvements for \$90,150.00. The scope of work for the Project consists of interior and exterior improvements including painting, carpentry, millwork, cabinetry, and electrical work as well as the installation of tile, carpeting, windows, and wallboard. New construction includes an entry sidewalk and interior office walls and doors. Although the construction contract requires the Contractor to certify the payment of prevailing wage rates on the Project, Regional contends that the Project is not subject to the California Prevailing Wage Law. Regional advertised the Project for bids as a non-prevailing wage rate job and did not require the Contractor to pay prevailing wages to workers employed on the Project. Regional recorded a Notice of Completion for the Project on November 7, 2011.

Discussion

Labor Code section 1771³ generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (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" Section 1720, subdivision (b)(1) provides:

(b) For purposes of this section, "paid for in whole or in part out of public funds" means all of the following:

- (1) The 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.

Regional argues that the Project is not a public work that is subject to prevailing wage requirements under section 1720. It is undisputed that Regional is a political subdivision of the State of California and that the Project entails "construction, alteration, demolition, installation, or repair work done under contract." (§ 1720(a)(1).) Regional, however, asserts that the Project was not paid for out of public funds.⁴ This assertion rests on Regional's argument that the source of the Project's funding was a loan from Lender, a private commercial bank, as opposed to city, county, state or federal funds. Regional stresses that the loan proceeds were always held by Lender and disbursed by Lender directly to the Contractor. Essentially, Regional argues that the money was never held in public coffers. Regional relies solely on the definition of "public funds" in section 1720, subdivision (b) to support its extraordinary assertion that the loan proceeds were never deposited into Regional's bank account. Neither the plain language of section 1720 nor the facts, however, support Regional's argument.

In Regional's view, the proceeds of the loan are properly characterized as private funds because Regional's personnel did not actually handle the funds or write a check to the contractor; the funds

³ Subsequent statutory references are to the Labor Code unless otherwise indicated.

⁴ Paradoxically, Regional concedes that the Project is a public work but contends that the prevailing wage law is nonetheless inapplicable because the source of financing was in the form of private funds. This stance betrays a fundamental misunderstanding of the relevant statutory definition of public works, discussed in the body of this determination.

resided with Lender and were disbursed by Lender to the Contractor. This ignores the fact that once loaned, the funds became the property of Regional regardless of where the funds may have been kept. Whether in the form of legal tender stacked in a bank vault or in the form of digits on a ledger in Lender's secure cyberspace, when the loan transaction was consummated, the loan proceeds were under the control of Regional and thereby constitute public funds. If this were not the case, Regional's obligation to repay Lender would not make sense.⁵

Regional's argument is also contradicted by the explicit terms of the promissory note. On page one of the promissory note, under the section entitled "Advance Authority," only Linda J. Nichols, Executive Director of Consolidated and its successor Regional, is authorized to request advances and payments during the construction phase of the Project. On page four, under "Restriction on Disbursement of Loan Funds," Lender agrees to disburse to *Regional* the \$161,227.00 designated for tenant improvements on the Project. On a "Disbursement Request and Authorization" form dated July 15, 2011, generated by Lender and authorized by Regional, there is an explicit reference to disbursement from "Borrower's account." This belies Regional's assertion that the loan proceeds were never deposited into Regional's bank accounts. Clearly, Regional had at least one account with Lender. Equally clear is the fact that Regional, not Lender, maintained the legal right to control the proceeds of the construction loan regardless of where those funds were said to reside before they were disbursed.⁶

Regional's admission that the Project may properly be considered to be a public work and yet not be subject to the prevailing wage law is a non sequitur. The statutory definition of "public works" in section 1720 subdivision (a)(1) hinges on the existence of public funds to pay for "construction...", in whole or in part. If there is no public funding for a particular construction project, that project will not meet the definition of a public work under subdivision (a)(1).

In sum, funds designated for construction were loaned by a private commercial bank to Regional, a public entity. Those funds were under the control of Regional and disbursed from Regional's account upon Regional's authorization to pay for the Project. Those funds must also be repaid by

⁵ Regional makes a similar argument based on the source of funds to be used to pay off the loan. Regional intends to repay the Lender from rents collected from that portion of its real property holdings characterized as "privately owned" (i.e., properties were not the beneficiaries of State or Federal subsidies). The rents from these particular properties are segregated and deposited into a separate account with Lender, and repayment is by automatic deductions from this account. Regional contends that under this arrangement, no public funds are being used to repay the loan. The flaw in this argument is that once the rents are collected by Regional, whatever their source, such rents become public funds. The rental payments do not lose their character as public funds by virtue of being deposited into a bank account to be used for Regional's repayment obligation.

⁶ See *Azusa Land Partners v. Department of Industrial Relations* (2011) 191 Cal.App.4th 1, 26-27. In that case, the Court rejected the developer's argument that the proceeds from the issuance of Mello-Roos tax bonds never entered the public coffers of the City of Azusa. The developer's argument was based on the fact that the proceeds were wired directly from the underwriter to Wells Fargo bank, the fiscal agent for a Community Facilities District established by the City of Azusa. The developer argued that the fiscal agent merely held the funds in trust, with disbursement of the funds to the developer dictated by contract. The Court disagreed, finding the determinative factor to be the right of control over the funds. Noting that the City of Azusa retained authority over disbursement of the funds held by its fiscal agent, the Court opined that monies are deemed to enter public coffers when the expenditure of such funds is controlled by a governmental entity. The same reasoning applies in the present case, where Regional has authority over the expenditure of the loan proceeds to pay for construction costs.

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Regional to Lender. Therefore, the loan proceeds used to pay for the Project were public, rather than private, funds. Accordingly, the Project is a public work subject to California's prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Christine Baker". The signature is written in black ink and is positioned below the word "Sincerely,".

Christine Baker
Director