

DEPARTMENT OF INDUSTRIAL RELATIONS

Victoria Hassid, Chief Deputy Director

Office of the Director

1515 Clay Street, 17th Floor

Oakland, CA 94612

Tel: (510) 286-7087 Fax: (510) 622-3265



April 25, 2019

John J. Korbol
Hearing Officer
Office of the Director – Legal Unit
Department of Industrial Relations
355 S. Grand Avenue, Suite 1800
Los Angeles, CA 90071

Re: Public Works Case No. 2018-020
Vernon Village Park Apartments
City of Vernon

Dear Mr. Korbol:

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 Labor Code section 1773.5¹ and California Code of Regulations, title 8, section 16001, subdivision (a). This matter was referred for a determination in relation to a coverage dispute in an appeal from a civil wage and penalty assessment filed pursuant to Labor Code section 1742. 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 Vernon Village Park Apartments (Project) is a public work and therefore subject to prevailing wage requirements.

Facts

The Project entails the construction of Vernon Village Park, an affordable and energy efficient apartment development in the City of Vernon (City). Since 2011, the City adopted various reforms and committed to double its residential population and in turn the voting electorate, by amending the City's zoning ordinances to permit housing. On February 19, 2013, the City entered into a Disposition and Development Agreement (DDA) with Meta Housing Corporation (Developer), which included, *inter alia*, a ground lease whereby Developer, as lessee, will lease a 2.06-acre City owned lot located at 4675 52nd Drive for 65 years at \$1.00 per year², and an agreement by Developer to construct a rental housing complex containing 45 housing units with associated

¹ Unless otherwise indicated, all further statutory references are to the California Labor Code and all subdivision references are to the subdivisions of section 1720.

² The ground lease contains an option to extend the lease term for an additional ten years. It also allows for additional rent in six limited circumstances: (1) refinancing; (2) sale or assignment of lease interest; (3) expiration of Tax Credit Regulatory Agreement; (4) extension of the lease term; (5) foreclosure; and (6) bankruptcy. No evidence was submitted to suggest that more than \$1.00 per year has been charged.

parking, landscaping, and community facilities. The DDA, and the Regulatory Agreement attached to the DDA, specified that out of the 45 units built, 22 would be restricted to lower income households.³

The record reflects that in order to fund the Project, it was necessary for the Developer to obtain a tax credit. According to the DDA, Developer was given two opportunities to submit an application to the California Tax Credit Allocation Committee (TCAC), which administers low-income housing tax credit programs.⁴ (Cal. Code Regs., tit. 4, § 10300.) The initial tax credit application filed in the first cycle of 2013 did not score high enough to receive funding. During the next cycle on June 18, 2013, the City Council approved a 65-year \$650,000 loan to Developer that was increased to \$1.5 million at a special council meeting on July 3, 2013. In a July 31, 2013 report by the City's Independent Reform Monitor, it was specifically noted that council members voted to increase the City's financial contribution to the Project in order for Developer to gain the necessary tax credit allocation from the TCAC. Based on new funding, a second application to the TCAC was submitted and approved. According to the TCAC Project Staff Report, the Project was estimated to cost \$15,206,561 and would be funded by the following sources:

California Community Reinvestment Corporation	\$2,416,000
City of Vernon – Ground Lease	\$3,230,000
City of Vernon – Loan	\$1,500,000
Deferred Developer Fee	\$232,142
Tax Credit Equity	\$7,828,419
	\$15,206,561

Prevailing wage requirements were stated in various Project documents. In section 310 of the DDA, the City specifically required prevailing wages: "With respect to the construction of the Housing Development set forth herein and in the Scope of Development, Developer and its contractors and subcontractors shall pay prevailing wages and employ apprentices in compliance with Labor Code Section 1770, *et seq.*, and shall be responsible for keeping of all records required pursuant to Labor code Section 1776." Attachment number seven to the DDA further specified the Developer's obligations to pay prevailing wages. Moreover, in the Proposal Instructions, the public was put on notice that the Project was a "prevailing wage project." Of the eight items a proposal was required to include, item number six required the following: "This is a prevailing wage project. The determination to be used is 2014-1. This is a state funded project and hiring requirements are in place. This information is available on the FTP site."

On March 12, 2014, 52nd Drive Apartments, L.P., an entity formed by Developer for the purpose of obtaining tax credits, contracted with RAAM Construction, Inc., (RAAM) the general

³ Specifically, two were restricted to "extremely low income households," fourteen were restricted to "very low income households," and six were restricted to "lower income households," as defined by the Housing and Urban Development (HUD). All three categories are households earning no more than 80 percent of the area median income. (See 24 C.F.R. § 5.603 (2016).)

⁴ Section 404 of the DDA specified: "In the event that the Developer and the City do not approve further Tax Credit applications after the second round of Tax Credit allocations, either party shall have the right in its sole and absolute discretion to terminate this Agreement . . ."

contractor. As part of the construction contract, RAAM initialed “Exhibit E – Qualification,” which stated among other things that “Work is based on Prevailing Wage.” RAAM then contracted with RBT Electric Inc. (RBT).⁵ The Project was completed in 2015.

Discussion

All workers employed on public works projects must be paid at least the prevailing wage rates applicable to their work. (§ 1771.) Labor Code section 1720, subdivision (a)(1), 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. It is undisputed that the construction of the Project meets the first and second requirements for public works coverage, in that it constitutes “construction” that is “done under contract.” Thus, the only issue presented is whether the Project is “paid for in whole or in part out of public funds.”

Public funds in this context are not limited to a direct payment of money from a public entity to a contractor. Instead, subdivision (b) provides in relevant part that “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.
...
- (3) Transfer by the state or political subdivision of an asset of value for less than fair market value.
- (4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.
...

Subdivision (c), however, provides that:

- (c) Notwithstanding subdivision (b):
...

- (5) Unless otherwise required by a public funding program, the construction or rehabilitation of privately owned residential projects is not subject to the requirements of this chapter if one or more of the following conditions are met:
...

⁵ Agreements between RAAM and RBT were not provided.

(E) The public participation in the project that would otherwise meet the criteria of subdivision (b) is public funding in the form of below-market interest rate loans for a project in which occupancy of at least 40 percent of the units is restricted for at least 20 years, by deed or regulatory agreement, to individuals or families earning no more than 80 percent of the area median income.

The City did not expressly state a position⁶ as to whether the Project was a public work. While the City emphasized that “the Project is not a City Project,” it confirmed that the lot being leased to Developer for this Project is City-owned. In addition, the City pointed to terms of the DDA requiring Developer to comply with applicable state labor standards, including the requirement to pay prevailing wages.

RBT provided minimal information about the Project and its funding sources, citing the limited evidence it possessed. RBT does acknowledge that the Project was funded by federal low-income housing tax credits, but correctly argues that low-income housing tax credits are not considered “public funds” as that term is used in section 1720. (See *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 311 [holding that providing state low-income housing tax credits “does not amount to paying out public funds.”])

Division of Labor Standards Enforcement (DLSE) does not present any argument regarding the tax credits. Instead, DLSE insists that the lease of the City lot at \$1.00 per year for 65 years, as well as the \$1.5 million loan from the City to Developer are public funds under subdivisions (b)(3) and (b)(4). Like the City, DLSE quoted DDA provisions mandating compliance with prevailing wage requirements.

Although RBT’s response is equivocal, it appears to concede that there is some public funding involved, in the form of a below-market interest rate loan. Despite that public funding, RBT asserts that the exemption under subdivision (c)(5)(E) applies to the Project. In its position statement, RBT argues, “If there is a city loan it appears to have been in the form of a below market interest rate loan subject to the exemptions under . . . Labor Code § 1720(c)(6)(E)⁷ in effect in 2013.” RBT, however, does not address the Developer’s lease from the City for \$1.00 per year.⁸

A. The Affordable Housing Exemption under Subdivision (c)(5)(E).

The exemption under subdivision (c)(5)(E) is interpreted narrowly and limited to affordable housing projects where the public funding is “in the form of below-market interest rate loans.” (*Housing Partners I, Inc. v. Duncan*, (2012) 206 Cal.App.4th 1335, 1345 (*Housing Partners I*).

⁶ The City did not file a new position statement, opting to resubmit to the Department two letters it previously submitted to the Labor Commissioner.

⁷ Assembly Bill 2272 (2014) renumbered subdivision (c)(6)(E) to subdivision (c)(5)(E) without any substantive change in the statutory language.

⁸ RAAM did not file a separate position statement from RBT. Developer also did not submit a position statement to clarify its position. However, Developer submitted its contract with RAAM, including Exhibits E (Qualifications & Exclusions) and F (Prevailing Wage Determination).

To qualify for the exemption, an affordable housing project must meet specific earnings and occupancy criteria where at least 40 percent of the units are restricted for 20 years to individuals or families earning no more than 80 percent of the area median income. (§ 1720, subd. (c)(5)(E).) The earnings and occupancy criteria of subdivision (c)(5)(E) appear to be satisfied for this Project. Based on the Regulatory Agreement submitted, 22 of the 45 units built were restricted for 65 years to extremely low, very low, and lower income households, all earning no more than 80 percent of the area median income.

In addition to the affordability criteria, however, the subdivision (c)(5)(E) exemption also requires that the affordable housing project's "public funding [be] limited to below-market interest rate loans." (*Housing Partners I, supra*, 206 Cal.App.4th at p. 1339.) The parties did not present the loan agreement, and the actual terms of the City loan to Developer are unknown. Ultimately, however, the specific terms of the loan are not relevant, because public funding for the Project was not limited solely to the City's loan, which takes the Project outside the scope of the (c)(5)(E) exemption. Where only part of an affordable housing project's public funding consists of below-market interest rate loans, the exemption does not apply.⁹

B. The Subdivision (c)(5)(E) Exemption Does Not Apply Because Public Funding for the Project Includes a Below-Market Rate Lease.

Here, the Project's public financing was not limited to the \$1.5 million loan. To support the development of the Project, the City also leased a 2.06-acre City owned lot to Developer for 65 years at a cost of only \$1.00 per year.¹⁰ There is no contention that \$1.00 per year constitutes fair market value rent. The City's lease of land to Developer for "less than fair market value" constitutes a payment of public funds under subdivision (b)(4). (See *Hensel Phelps, supra*, 197 Cal.App.4th at p. 1039 ["a public agency may pay for construction out of public funds either by reducing rent *or* by charging *rent at less than fair market value*," first italics in original, second italics added.]) The Project is receiving a substantial public subsidy in the form of this below-market rate lease, which, based on the TCAC Project Staff Report, was valued at \$3,320,000.

⁹ In *Housing Partners I*, the court rejected the developer's argument that, "if an affordable housing project receives any [public] funding from low-interest loans it qualifies for an exception from the prevailing wage law, even when the project has other [public] funding sources." (*Housing Partners I, supra*, 206 Cal.App.4th at p. 1345.) The court reasoned that this argument did not comport with the express language of the statute which is silent about projects partly funded by below-market public loans in combination with other public funding. Because the project was funded by a combination of below-market public loans and an interest free loan that was essentially a grant from the city's Redevelopment Agency, the court held that the project was not subject to the exemption.

¹⁰ It is apparent that the nominal \$1.00 per year rent was meant to subsidize construction and "serve[s] to reduce a developer's project costs." (*Hensel Phelps Construction Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, 1034 (*Hensel Phelps*)). The DDA specifies that the City agrees to ground lease the site "for the Developer to agree to develop a housing project [on the site]." The ground lease states that its purpose is for "the lease of the [City-owned lot] to Lessee for the development and operation thereon of a forty-five unit multifamily apartment complex [the Project]." This statement of purpose makes clear that the ground lease calls for the construction of the Project.

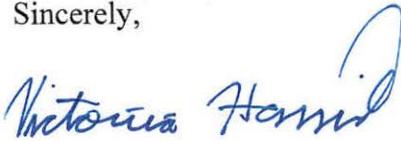
Even if the \$1.5 million loan from the City to Developer is a below-market interest rate loan, the Project was funded by a combination of this below-market public loan *and* a substantial payment of public funds in the form of the \$1.00 per year lease of the City owned lot. Accordingly, the Project is not exempt under subdivision (c)(5)(E) because the statute exempts projects funded solely by public funds in the form of below-market interest rate loans and no other type of public financing. Because the work is done under contract and paid for in part out of public funds, the construction of the Project is a public work.

Conclusion

For the foregoing reasons, the construction of Vernon Village Park Apartments is public work subject to prevailing wage requirements.

I hope this letter satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in blue ink that reads "Victoria Hassid". The signature is written in a cursive style with a large, looping initial "V".

Victoria Hassid
Chief Deputy Director¹¹

¹¹ See Government Code sections 7 and 11200.4.