

DEPARTMENT OF INDUSTRIAL RELATIONS

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April 16, 2020

Gayle Oshima
Hearing Officer
Department of Industrial Relations
Office of the Director – Legal Unit
1515 Clay Street, Suite 701
Oakland, California 94612

Re: Public Works Case No. 2016-023
Flume Repairs and Replacement for Hydroelectric Department
El Dorado Irrigation District

Dear Ms. Oshima:

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 to the Director for decision as part of a civil wage and penalty assessment appeal proceeding, wherein the question of coverage under prevailing wage laws was disputed. For the reasons discussed below, it is my determination that the workers at issue who were employed by MJT Enterprises, Inc. dba Blue Ribbon Personnel Services, and who performed work on the Flume Repairs and Replacement project for the Hydroelectric Department of the El Dorado Irrigation District were entitled to be paid prevailing wages.

Facts

A. The El Dorado Irrigation District and Project 184.

The El Dorado Irrigation District is a special district organized in 1925 under the Irrigation District Law, codified at Water Code section 20500 et. seq. As reflected in its mission statement, the District is "dedicated to providing high quality water, wastewater treatment, recycled water, hydropower, and recreation services in an environmentally and fiscally responsible manner." The District operates the 21-megawatt (MW) El Dorado Hydroelectric Project No. 184 under a license issued by the Federal Energy Regulatory

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.

Commission (FERC). Project 184 is located on the South Fork of the American River and its tributaries in El Dorado, Alpine, and Amador counties, and occupies federal lands administered by the United States Forest Service. (*El Dorado Irrigation Dist.* (Oct. 18, 2006) 117 FERC ¶ 62044, 64094.)

According to the FERC order issuing the license, Project 184 “includes: (1) four storage reservoirs (Echo, Aloha, Caples, and Silver Lakes), impounded by a total of 16 dams ranging in height from 1.5 to 69.5 feet, that divert water to the South Fork American River; (2) a 20-foot-high diversion dam on the South Fork American River that diverts water into the 22.3-mile-long El Dorado Canal; (3) a 70-foot-long, 9.5-foot-high concrete diversion dam on Alder Creek; (4) 6 small diversion dams that divert water from 6 creeks (Mill, Carpenter, Ogilby, No Name, Bull, and Esmeralda Creeks) into the El Dorado Canal; (4) the 91-foot-high El Dorado Forebay Dam that diverts water from the canal into a 2.8-mile-long pipeline and penstock; (5) a powerhouse containing two generators having a total installed capacity of 21 MW; and (6) a switchyard.” (*Id.* at p. 64095.) The District states that the 22.3-mile-long El Dorado Canal consists of “flumes, canals, siphons, and tunnels.” A local newspaper has described the El Dorado Canal as a “combination of concrete lined ditches, tunnels and flumes. The newer flumes are precast concrete sections. The older flumes are wood”

The District’s Hydro/Watershed Management Division is responsible for operations and maintenance of the District’s hydroelectric facilities, including Project 184. The District’s website describes this hydroelectric division as responsible for maintaining “22 miles of canals, flumes, and tunnels, three miles of pipes and conduit, and operat[ing] five dams including two diversion dams.” Because of the severe winter climate and the remote geographic location of the facilities, most ongoing maintenance or repair work must be completed during the summer and fall. Repair and maintenance activities that require dewatering the facilities must be done during an annual facilities outage, which typically occurs during the months of October and November. In order to keep the outage period as short as possible, additional workers are needed to complete the repair and maintenance activities.

The Hydro/Watershed Management Division employs, as of the time materials were submitted in relation to this matter, eight full time construction and maintenance workers, one full time utility worker, and one full-time supervisor for construction and maintenance-related work, among others. During summer and fall periods, and particularly during the annual facilities outage, the District typically hires an additional three to ten temporary workers to supplement the District’s full-time regular employees. The temporary workers might perform work at any location throughout the Division, depending on the District’s needs at the time, which are sometimes determined on a day-to-day basis.

B. Blue Ribbon and the Professional Services Agreement.

MJT Enterprises, Inc. dba Blue Ribbon Personnel Services (Blue Ribbon) is a temporary staffing agency based in Placerville. On April 22, 2013, Blue Ribbon entered into a Professional Services Agreement (Agreement) with the District for "Temporary Employees and Payroll Services." The scope of services² to be provided under the Agreement includes "temporary employee and payroll services in the areas of clerical/finance, park maintenance/ranger, and utility worker/meter technician to be used on an as-needed basis throughout the District. The District expects to receive temporary employees that are skilled and capable of fulfilling these positions and any other positions as may be required." Two of the "required positions" are described as:

b. Construction & Maintenance Worker I: \$10.00/hour pay scale.³ Under supervision performs a variety of maintenance and construction tasks associated with the installation, repair and maintenance of water distribution and collection systems, canals and water conveyance system used for the operation of the hydroelectric power plant, irrigation ditches, and lakes; and operates light and moderately heavy power driven equipment.

...

e. Utility Worker: \$10.00 to \$12.00/hour pay scale. Under general supervision performs field duties to ensure that District hypalon reservoir covers are in proper condition, accessible and free of contaminants; adjusts irrigation time clocks; and performs routine landscape maintenance functions.

In its proposal in response to the RFP (Proposal), which is incorporated into the Agreement's scope of work, Blue Ribbon describes its extensive recruiting, screening, testing, and interviewing of employees. Blue Ribbon also refers to organizations like the District as Blue Ribbon's "client" or "client company." Item 5 in the Proposal states that

² The full scope of work is elusive and is scattered across various documents. The scope is first described in an appendix to the Agreement. The appendix states that Blue Ribbon "shall provide all the Services described in District's Request for Proposals (RFP 13-02 Temporary Employee and Payroll Services) ("RFP") and [Blue Ribbon's] proposal submitted in response thereto RFP." Under the RFP's "Scope of Work" section, the reader is directed to "Exhibit A attached to this RFP and Section VI. A. Section 2 (pages 5-8)." The contents of Exhibit A, described *infra*, appears to be the most succinct description of the scope. Section VI also refers to Blue Ribbon's proposal in response to the RFP and contains 14 categories ranging from pay scales and employee benefits to recruiting and interviewing, all of which are "services" the District requires from Blue Ribbon.

³ This wage would be below minimum wage currently, but is the wage reflected in the 2013 Agreement.

when “a Blue Ribbon employee calls in unavailable for work,” a Blue Ribbon manager “will relay that information to the appropriate individual at [the District], and proceed according to the needs and policies of [the District.]”

Item 6, titled “Temporary Agency Employees” reiterates: “All temporary employees provided through Blue Ribbon are our agency’s employees, who are provided appropriate payroll withholdings as required by all federal, state, and local laws.” It continues: “Employees assigned to [the District] through Blue Ribbon are W-2’d employees of Blue Ribbon Personnel Service.” Item 7 speaks about “temporary employee benefits” and boasts that each temporary employee is given access to health benefits, overtime pay, a yearly bonus, paid holidays that are *not billed* to the District, and other benefits such as “emergency advances of earnings.” Item 11 is a “conversion policy” that appears to bar the District from directly hiring Blue Ribbon’s employees unless the employee has been leased from Blue Ribbon for at least 480 hours. Alternatively, the District may pay a sliding scale fee if the employee has been leased for less than 480 hours. Other items in the Proposal relate to temporary employee pay scales, drug-free workplace and background check policies, and a monthly staffing report that must be submitted by Blue Ribbon to the District. Towards the end of the Proposal is a Certificate of Liability Insurance issued to Blue Ribbon as policyholder and held by the District.

C. Work under the Professional Services Agreement.

On May 31, 2013, the District issued a “Notice to Proceed” on the Agreement. The District describes the process of hiring of a worker from Blue Ribbon under the Agreement:

When the District determines it has a need for temporary or seasonal employment, the District sends Blue Ribbon a request to fill a position. [citation omitted.] The “request to fill” indicates the type of position and term of appointment, and provides a brief description of the type of duties required. [citation omitted.] Blue Ribbon then conducts a recruitment, which may include soliciting and interviewing candidates and conducting background checks, drug screening, and other duties. [citation omitted.] Blue Ribbon then sends one or more candidate’s information, including application, resume, and other materials to the District for review. The District reviews and evaluates the candidate information it receives from Blue Ribbon and for certain positions, including utility worker positions in the District’s Hydro/watershed Division, the District may conduct its own interviews of the candidates proposed by Blue Ribbon. [citation omitted.] The District then selects a candidate to fill its position. When the selected candidates report to the District for employment, District human resources staff perform a basic orientation which includes a review of District policies and procedures the temporary employees are required to follow. [citation omitted.] The temporary employees then report to their District supervisors for duty. [citation omitted.]

In a series of "Requests to Fill Position" issued to Blue Ribbon, the District called for workers to fill Construction & Maintenance Worker I positions. Those positions included the following job tasks: "Flume repairs and replacement, install support beams on some flumes, demo and replace other flume sections" and "Sets up traffic control including signs and barricades, directs traffic around work sites. Excavates concrete, pavement, and dirt, in order to make repairs with in [sic] the water distribution system. Perform weed abatement." The term of the requested positions ranged from three to four months.

According to the District, seven workers were sent from Blue Ribbon for the flume repair and replacement work at issue in the underlying prevailing wage assessment proceeding for which this coverage determination was requested. Each of those workers performed "some, though not all, of the duties of a basic District utility worker, including hauling lumber to remote locations, digging trenches with shovels, and installing wattles to prevent storm water pollution at different locations." Much of their work was performed on or near various sections of the El Dorado Canal, including its flumes. Each worker worked alongside the District's other employees in the Hydro/Watershed Management Division, performing routine maintenance and repair to a variety of District facilities.

Discussion

Under the California Prevailing Wage Law (§ 1720, et seq.), "public works" is generally defined as construction, alteration, demolition, installation, or repair work that is done under contract and paid for in whole or in part out of public funds. (§ 1720, subd. (a)(1).) All workers employed on public works projects must be paid at least the prevailing wage rates applicable to their work. (§ 1771.) The requirement to pay prevailing wages applies to "contracts let for maintenance work" and "to work performed under contract," but "is not applicable to work carried out by a public agency with its own forces." (*Ibid.*)

The flume repair and replacement work that at issue in this Determination was done by Blue Ribbon employees placed as temporary workers with the District and involved hauling lumber, digging trenches, and installing wattles, and routine maintenance and repair to District facilities. This work was indisputably construction or repair work paid for out of public funds. The dispute here centers on whether the work was done "under contract" within the meaning of the prevailing wage law, or whether it was performed by the District's "own forces." (§§ 1720, subd. (a)(1), 1771.)

The Division of Labor Standards Enforcement (DLSE), which issued the underlying civil wage and penalty assessment, contends that the work was not performed by the District's own forces because the Agreement through which the workers were placed requires the workers to be Blue Ribbon employees, and it is therefore "clear that the workers provided by Blue Ribbon were not employees of the El Dorado Irrigation District." The District disagrees, insisting that because the District exercised supervision

and control, the workers were considered District employees and constitute the District's "own forces."

A. Temporary Staffing Agencies.

The California Supreme Court has recognized that "public employers must occasionally hire additional workers for projects lasting an extended period of time" and that public employers acquire this labor through contracts with "private labor suppliers." (*Metropolitan Water Dist. v. Superior Court (Cargill)* (2004) 32 Cal.4th 491, 496.)

"Private labor suppliers" have been referred to as "staffing agencies," "staffing companies," "leasing employers," "temporary services employers," "temporary employment agencies," "labor contractors," and "professional employer organizations," among other names.⁴ In a typical arrangement, the client employer "pays each agency an agreed-upon hourly rate for each hour of labor worked by the [worker]; the agency, in turn, pays the [worker] a separate hourly rate." (*Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 705.) That appears to be the arrangement between the District and Blue Ribbon. A sworn declaration from Nancy Dixon, Blue Ribbon's president, confirms that Blue Ribbon pays wages directly to the temporary workers, who "are covered by Blue Ribbon's workers compensation insurance policy." Her declaration further adds that Blue Ribbon "invoices the District at a rate sufficient to recoup the hourly costs paid to the employee, along with a markup to cover Blue Ribbon's insurance, overhead, and profit." These statements are consistent with the terms of the Agreement, under which Blue Ribbon "must provide the billing rate and mark-up percentage of each temporary employee and confirm with the District" and that "the District expects [Blue Ribbon] to pay temporary employee staff." In Blue Ribbon's Proposal, a "Cost Proposal Sheet" lists \$15.20 as the "Proposed Total Hourly Rate" and 52% as the "Mark-Up %" for Construction & Maintenance Worker I and Utility Worker. Those numbers suggest that Blue Ribbon paid the temporary workers around \$10.00 per hour.

While employee leasing relationships, and the terms of art "general" and "special" employment to describe those relationships, have existed for many years (see, e.g., *Employers' Liability Assur. Corp., Limited, of London, England v. Industrial Acc. Com'n of California* (1918) 179 Cal. 432, 439), a leasing relationship in which "a labor supplier *is in the business* of providing workers to consumers temporarily in need of certain services" is a relatively new phenomenon. (*Cargill, supra*, 32 Cal.4th at p. 514 (conc. & dis. opn. of Brown, J.), original italics; see also *Kimco Staffing Services, Inc. v. State of California*

⁴ See *Serrano v. Aerotek, Inc.* (2018) 21 Cal.App.5th 773, 776 [staffing agencies]; *Benton, supra*, 220 Cal.App.4th at p. 705 [staffing companies]; *Martinez v. Combs* (2010) 49 Cal.4th 35, 59 [temporary employment agencies]; Unemp. Ins. Code, § 606, subd. (c) [leasing employers or temporary services employers]; Lab. Code, § 201.3, subd. (a) [temporary services employer]; Cal. Code Regs., tit. 2, § 11008, subd. (c)(5) [temporary services agency]; Lab. Code, § 2810.3, subd. (a)(3) [labor contractors]; Lab. Code, § 3701.9 [professional employer organization].

(2015) 236 Cal.App.4th 875, 886 [“[Temporary services employers and leasing employers] are in the business of providing employees to other businesses.”])

Justice Brown, in her concurring and dissenting opinion in *Cargill*, described this type of “three-sided relationship” as a “new labor paradigm” and characterized the dispute as one where “workers who have willingly entered into employment contracts with labor *suppliers* then seek the rights and benefits of employment with the labor *consumers*.” (*Id.* at p. 517, original italics.) Many of the reported cases involving a leasing arrangement follow a similar pattern: a worker seeks redress against the labor consumer, asserting a theory of joint employment or misclassification.⁵

In somewhat of a twist here, the District – a labor consumer in this case – is attempting to affirmatively assume the mantle of employer in order to characterize the workers at issue as its “own forces” so as to support Blue Ribbon’s appeal of the civil wage and penalty assessment and negate its obligation to pay prevailing wages (the increased cost for which would likely be passed on to the District). The District’s central claim must be considered in light of the purposes of the prevailing wage law.

B. Public Agency’s Own Forces and “Under Contract.”

California’s prevailing wage requirements do not apply to “work carried out by a public agency with its own forces” and apply only to “work performed under contract.” (§ 1771.) The principle that wage requirements on public works projects apply only to work performed under contract is longstanding. According to the Department’s research, the Legislature first recognized this principle when it enacted “An Act fixing the minimum rate of compensation for labor on public work,” approved March 9, 1897. The legislation required a flat rate of \$2.00 per day to workers on public works, but with an exception for “persons employed regularly” by a public agency. (Stats. 1897, ch. 88, § 1, p. 90.) The 1897 legislation was repealed in 1931 (Stats. 1931, ch. 396, § 1, p. 909) and replaced with the Public Wage Rate Act of 1931, the precursor to California’s Prevailing Wage Law. (Stats. 1931, ch. 397, § 1, p. 910; see *State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 554.)

The Public Wage Rate Act of 1931 did not include the “persons employed regularly” language in the 1897 legislation, but mandated that the “contractor to whom the contract is awarded, and upon any subcontractor under him,” pay prevailing wages to workers *employed by them* in the execution of the *contract*. (Stats. 1931, ch. 397, § 2, pp. 910-911, emphasis added.) Numerous references to the existence of a “contract” are scattered throughout the Public Wage Rate Act. Also, the definition of “public works”

⁵ See, e.g., *Martinez, supra*, 49 Cal.4th 35 [strawberry pickers filed wage and hour claims against merchants who purchased strawberries from employer]; *Noe v. Superior Court* (2015) 237 Cal.App.4th 316 [employer allegedly misclassified food vendors as independent contractors; vendors sought penalties for misclassification against entertainment venue owners].

itself was defined in part as “any construction or repair work *done under contract*, and paid for in whole or in part out of public funds.” (Stats. 1931, ch. 397, § 4, p. 912, italics added.) This definition of public works was adopted as section 1720, subdivision (a), in 1937, when the Legislature established the Labor Code. (Stats. 1937, ch. 90, § 1720, p. 241; *Vista, supra*, 54 Cal.4th at p. 555.)

In *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, the California Supreme Court reviewed the question of whether civil service employee electricians who performed electrical work for the City of San Jose were entitled to prevailing wages. The *Bishop* court analyzed the statutory scheme and concluded that, by using “under contract” in section 1720, subdivision (a)(1), and referring to contracts being awarded in section 1724, the Legislature intended that the prevailing wage law is “applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces.” (*Id.* at p. 64.) The Legislature later adopted verbatim this language from *Bishop* by amending section 1771 to expressly exclude work done by an agency’s own forces. (Stats. 1974, ch. 1202, § 1, p. 2593; *O. G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 459, fn. 5; see also *Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 20 [section 1720, subdivision (a)(1) requirement means that work must be done “‘under contract’ (i.e., not by the public entity’s own employees).”])

In the exception’s original formulation which existed from 1897 to 1931, only “persons employed *regularly*” by a public agency were excluded, which is consistent with one of the statute’s purposes “to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.” (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 (*Lusardi*)). A temporary employee placed through a staffing agency, as the District must concede, does not enjoy the job security or benefits afforded to permanent public employees.⁶

The progression of this legislation from 1897 to the present indicates that the “under contract” language in both sections 1720 and 1771 is intertwined with section 1771’s language excluding work performed by a “public agency’s own forces,” indicating that construction and related work, when performed for a public agency, is either one or the other (“under contract” or by the agency’s “own forces”). The central question then, which appears to be one of first impression, is whether the “own forces” exception applies when a public agency has contracted for temporary workers placed by a staffing agency or similar business entity, which per the contract is the employer of the workers at issue.

⁶ The District’s representative states in his declaration that a regular utility worker employee was paid a total hourly rate of \$32.12 in wages and benefits. DLSE asserts that the temporary workers performing work on flumes were paid \$14.00 per hour. District documents show hourly rates between \$10.00 and \$14.00 for temporary workers.

C. Work Performed by Blue Ribbon's Employees for the District is Subject to Prevailing Wage Requirements, Even if They Might Also be Joint/Temporary Employees of the District.

The Agreement at issue expressly provides that Blue Ribbon was the employer of the temporary employees. The District concedes that Blue Ribbon paid wages directly to the temporary workers. Blue Ribbon also recruited and hired the workers by "soliciting and interviewing candidates and conducting background checks, drug screening, and other duties." Blue Ribbon selected which candidates to send to the District, and ultimately decided what hourly rate to pay them. Blue Ribbon provided health benefits, paid holidays, and bonuses to the workers, and made sure to pay them legally-required overtime. The District was not even permitted to hire a worker as one of its employees, unless it either paid a fee or "lease[d]" them from Blue Ribbon for at least 480 hours. And as discussed, Blue Ribbon also had a workers compensation policy that expressly covered the workers. Under these facts, Blue Ribbon had "control over wages" and "the power or authority to negotiate and set an employee's rate of pay," which are indicia of an employer (as opposed to a company that simply processes payroll). (*Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432.)

Despite these facts, the District nevertheless contends⁷ that the workers were part of the District's "own forces" because they were "exclusively supervised and controlled by the District in the performance of all of their duties," even though they were hired through Blue Ribbon. According to the District, Blue Ribbon "perform[ed] merely an administrative booking keeping function" and "perform[ed] no function other than recruiting and bookkeeping."

In support of its arguments, the District focuses on demonstrating that it was the employer of the temporary workers because the District had the right to exercise control over the activities of these workers. DLSE takes the diametrically opposite position by contending that Blue Ribbon was the only employer, because the Agreement required Blue Ribbon to affirm that the workers were Blue Ribbon's employees. Though the District does not deny that Blue Ribbon was also an employer of the temporary workers, the District fails to discuss the effect or significance, if any, of the existence of a joint employer relationship. DLSE similarly does not acknowledge the possibility of a joint employer relationship.

Although neither side explores joint employment, various statutory schemes recognize multi-employer arrangements and set forth the consequences of such arrangements. For example, under the workers compensation law, "an employer [i.e. the District] may secure the payment of compensation on employees provided to it by agreement by another employer [i.e. Blue Ribbon] by entering into a valid and enforceable agreement with that other employer under which the other employer agrees to obtain, and has, in fact, obtained workers' compensation coverage for those employees. In those cases, *both*

⁷ Blue Ribbon joined in the District's brief and incorporated all of the District's arguments.

employers shall be considered to have secured the payment of compensation" (§ 3602, subd. (d)(1), italics added.) General and special employers are both potentially liable for work injuries under the workers compensation law. (*County of Los Angeles v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 391, 405.)

With regard to the employee leasing arrangement here, the workers compensation law recognizes that both the District and Blue Ribbon may be employers, although they may contract for only Blue Ribbon to have responsibility for obtaining workers' compensation insurance. (See *InfiNet Marketing Services, Inc. v. American Motorist Ins. Co.* (2007) 150 Cal.App.4th 168, 178-179.) Indeed, the arrangement, whereby Blue Ribbon is responsible for paying and providing workers compensation coverage, appears to recognize that the District is the "special" employer and Blue Ribbon is the "general" employer, and through this employee leasing arrangement, workers compensation liability is being deliberately shifted to Blue Ribbon.⁸

In the wage claims context, the California Supreme Court in *Martinez* explored the concept of joint employment and concluded that "to employ" under the Industrial Welfare Commission's wage orders has three alternative definitions. "It means: (a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." (*Martinez v. Combs, supra*, 49 Cal.4th at p. 64, emphasis in original.) Further, *Martinez* noted that multiple entities may be employers when they "control different aspects of the employment relationship, as when one entity, which hires and pays workers, places them with other entities that supervise the work." (*Id.* at p. 59.)⁹

This Determination assumes, without deciding, that the District could have been a joint employer of the workers at issue for some purposes. The existence of a potential joint employment relationship, however, does not resolve the particular issue presented under Labor Code section 1771, which is whether the workers constituted the District's "own forces" for purposes of the prevailing wage law. In light of the statutory language of the Prevailing Wage Law, and the purposes of the "own forces" exception discussed in the case law, this Determination finds that the workers at issue in this matter, who were paid by Blue Ribbon and employees of Blue Ribbon under the contract, were not part of the District's "own forces," even if the District exercised control over their work and could potentially have been considered a joint employer for some purposes.

⁸ If the District had these temporary workers on its own payroll (which it did not), it may be solely liable for workers compensation. (Ins. Code, § 11663.)

⁹ In 2018, the California Supreme Court issued *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, which adopted the "ABC" test (in place of the *Borello* "right to control" test) for purposes of determining whether a worker is an independent contractor or employee in the wage order context. And, in 2019, the Legislature passed Assembly Bill No. 5, enacting new Labor Code section 2750.3, which among other provisions, codified the "ABC" test, for specified circumstances, and with certain exceptions. Neither section 2750.3 nor *Dynamex* are applied here, where the issue is not whether the workers were employees or independent contractors, but whether there was potentially joint employment.

In *Lusardi, supra*, the Supreme Court explained that “[t]he overall purpose of the prevailing wage law, . . . is to benefit and protect employees on public works projects,” and further:

This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; *and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.*

(*Lusardi, supra*, 1 Cal. 4th, at p. 987, emphasis added.)

These important policies would be undermined if temporary workers employed by staffing agencies, who are not paid the same wages, do not have the same benefits and do not have the same job security as public employees, were considered a public agency’s “own forces” simply because their work was supervised or controlled by the public agency.

Many public agencies assert a considerable amount of control over a contractor or subcontractor’s employees on public works projects. If the Director were to accept the District’s argument in this matter, public agencies that do exercise control over the work of a contractor’s employees, and often necessarily so for various reasons, could declare that the contractor’s employees are *also* the public agency’s employees through a joint employment relationship, and claim that such employees are no longer entitled to prevailing wages by virtue of the section 1771 “own forces” exception. Allowing a public agency and/or contractor to avoid the obligation to pay prevailing wages in this manner could not have been the Legislature’s intent. (*Lusardi, supra*, 1 Cal.4th at p. 987.)

The case law does establish that a public agency retains its own exceptions to wage laws when in a public-private joint employment arrangement. (See, e.g., *Morales v. 22nd District Agricultural Association* (2018) 25 Cal.App.5th 85, 95 [“we are aware of no authority . . . that supports the counterintuitive proposition that a public employee who is *not* entitled to overtime compensation when employed *solely* by a public entity, *is* entitled to such overtime compensation *from the public entity* when the employee is *jointly* employed by the public entity and a private entity”], original italics.) It does not follow, however, that when such a joint employment relationship exists, the *private-entity* joint employer is entitled to claim the public agency’s exception by proxy. Here, Blue Ribbon was the employer of the temporary workers performing construction or related work, under contract, and paid for out of public funds. Those workers must be paid the applicable prevailing wages. (§ 1771.)

D. The District's Other Arguments Are Unpersuasive.

The District also argued that prevailing wage requirements do not apply because Blue Ribbon is not a "contractor," it did not bid on any public works contract, and the work performed was not "under contract." These arguments are unpersuasive. Although the contract between the District and Blue Ribbon was not like a typical contract for construction or related services, it nevertheless was a contract paid for with public funds for the provision of services by workers, including various types of work to be performed by construction, maintenance and utility workers. (See discussion, *supra*.) As noted, the Prevailing Wage Law distinguishes between work done "under contract" and work done by an agency's "own forces;" it does not appear to contemplate a third category of covered work – when performed for a public agency – that falls into neither category. (§§ 1720; 1771.) Because the work at issue here was not performed by the District's own forces, and occurred pursuant to a contract, prevailing wages were required, even though the applicable contract was not a typical contract for construction or related work.

The District also argues that Blue Ribbon does not meet the definition of "contractor" under the prevailing wage law.¹⁰ The reasoning is that the Business and Professions Code governing building contractors requires such contractors to be licensed by the Contractors State License Board (CSLB), (see Bus. & Prof. Code, § 7026,) and a provision in the prevailing wage law defines a "contractor," in a rather circular fashion, as a "contractor." (§ 1722.1.) Therefore, a "contractor" for prevailing wage purposes, the District reasons, is equivalent to a "contractor" under the Business and Professions Code, and therefore must hold a CSLB license. As Blue Ribbon does not hold a CSLB license, the District concludes that Blue Ribbon is not a "contractor" for any purpose.

A "contractor" performing work on public works projects, however, does not necessarily need to hold a CSLB license, a fact implicit in several provisions of the Prevailing Wage Law. For instance, public works contractors must be registered with the Department, regardless of whether they hold a CSLB license. (See § 1725.5, subd. (a)(1)(B) [*"If applicable, the contractor is licensed in accordance with Chapter 9 (commencing with Section 7000) of the Business and Professions Code," italics added.*]). Also, ready-mixed concrete companies do not normally hold a CSLB license, but are nonetheless considered contractors for purposes of the prevailing wage law. (See § 1720.9, subd. (e) [*"The entity hauling or delivering ready-mixed concrete shall be considered a subcontractor solely for the purposes of this chapter. Nothing in this section shall cause any entity to be treated as a contractor or subcontractor for any purpose other than the application of this chapter."*].) Under the provisions of section 1720, the definition of "public works" requires only that construction work be done under contract and paid for in whole or in part out of public funds (as defined). (§ 1720, subd. (a)(1).) Under the plain terms of

¹⁰ The District also contends that *Contractors Labor Pool, Inc. v. Westway Contractors, Inc.* (1997) 53 Cal.App.4th 152 provides further support for its position that a "contractor" for prevailing wage purposes must be licensed. *Contractors Labor Pool* is inapposite as it stands only for the unremarkable proposition that a labor supplier in that particular case was not a CSLB contractor. (*Id.* at p. 167.) It says nothing about prevailing wages.

the statute, there is no requirement that an employer be a licensed contractor in order for a project to constitute "public works."

The District's arguments in this regard confuses "public works" under the prevailing wage law and "public works" under the Public Contract Code and other areas of the law. Public works projects may need to be competitively bid under other provisions of law, but need not be put out to bid for prevailing wages to apply. The prevailing wage law provisions the District cites to that refer to bids, apply when public works projects *are* bid. They do not create an additional requirement that a project must be bid in order to qualify as public works under the prevailing wage law; the definition of public works in section 1720 contains no such requirement.

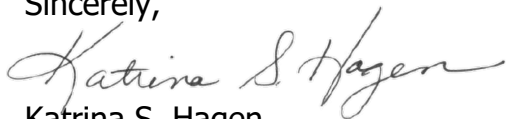
Finally, the District argues that applying prevailing wage requirements to its arrangement for temporary workers is too onerous and would be unjust, and further, that other public agencies use similar arrangements. Such arguments are more appropriately addressed to the Legislature. There no provision in the Prevailing Wage Law the prohibits an agency from employing temporary workers directly as its "own forces," but that is not what occurred here.

Conclusion

For the foregoing reasons, the repair and replacement work on the flumes on the El Dorado Canal for which the civil wage and penalty assessment was issued constituted public works and was subject to prevailing wage requirements.

I hope this letter satisfactorily answers your inquiry.

Sincerely,



Katrina S. Hagen
Director of the Department of Industrial Relations