

DEPARTMENT OF INDUSTRIAL RELATIONS

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August 27, 2020

Howard Wien, Hearing Officer
Office of the Director – Legal Unit
Department of Industrial Relations
355 South Grand Avenue, Suite 1800
Los Angeles, California 90071

Re: Public Works Case No. 2018-039
Otay Water Treatment Plant Concrete Work
City of San Diego

Dear Mr. Wien:

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). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the concrete repair and protective coating application project (Project) at the Otay Water Treatment Plant is a public work; however, the City of San Diego's (City) chartered city status allows it to exempt the Project from California's prevailing wage requirements.

Facts

A. The City's Prevailing Wage Ordinances.

The City of San Diego is a charter city and its charter contains a provision stating that the City "shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs . . ." (San Diego Charter, art. I, § 2.) In 2003, the City adopted Resolution R-298185, which provided in general that the City's public works projects will not require the payment of prevailing wages unless the project is of statewide concern or the payment of prevailing wages is a condition of federal or state grants.² In 2013, the City adopted San Diego Ordinance O-20299 which rescinded Resolution R-

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 Resolution also stated that the City's water and sewer fund public works projects that are estimated to be in excess of \$10 million shall comply with state prevailing wage laws.

298185 and added section 22.3019 to the municipal code, requiring compliance with state prevailing wage laws for all new public works projects as of January 1, 2014.³

B. The Advertisement and Award of the Project.

In the first quarter of 2012, prior to the City's adoption of Ordinance O-20299, the City issued a Request for Proposal to restore concrete and steel surfaces of two basins at the Otay Water Treatment Plant. The purpose of the Project was to replace the existing protective coating in order to preserve and maintain the surfaces from corrosion and erosion, thereby preventing future malfunction or failure. In its Invitation to Bid, the City included a provision stating that "Prevailing wages are not applicable to this project unless specified otherwise on the cover page of these specifications and when included in these specifications." None of the documents submitted to the Department indicate any requirement to pay prevailing wages. On or about February 1, 2013, the City awarded the contract to Orion Construction (Orion) for \$1,287,000.00.⁴ On or about September 26, 2013, Orion entered into a subcontract with Omega II, Inc. dba Omega Industrial Marine. The Project was completed in fiscal year 2018.

C. The Otay Water Treatment Plant.

The City owns its water system and operates the water system through the Water Utility Fund which was established pursuant to the City Charter in 1963. The Charter grants the City power to supply water "for the use of the City and its inhabitants and others" and allows it to regulate the water system "both within and without the territorial limits" of the City. (San Diego Charter, art. I, §§ 1 and 3.) The water system serves the City and certain surrounding areas, including retail, wholesale, and recycled water customers. The system covers 404 square miles, of which 342 square miles are in the City, serving an estimated 1.4 million people.

The Otay Water Treatment Plant (OWTP) is one of three water treatment plants maintained and operated by the City. Constructed in 1989, the OWTP is located in the City of Chula Vista, outside of the City's limits and serves the general area along the

³ The City's amendment was a response to the Legislature's enactment of Senate Bill 7 (2013), which "prohibits a charter city from receiving or using state funding or financial assistance for a public construction project if the city has a charter provision or ordinance that authorizes a contractor to not comply with the state prevailing wage laws. (Lab. Code, § 1782, subd. (a), added by Stats. 2013, ch. 794, § 2.)" (*City of El Centro v. Lanier* (2016) 245 Cal.App.4th 1949, 1500.) Like City of San Diego, many cities have since amended their local ordinances to require compliance with the state prevailing wage law, and the Department currently maintains on its website "a list of charter cities that may receive and use state funding or financial assistance for their construction projects." (See § 1782, subd. (e).)

⁴ In total, the City paid Orion \$2,927,511.88 which included \$1,278,000.00 of the original contract amount, \$617,084.88 from a change order, and \$1,023,427.00 for the settlement of all costs incurred on the Project following a lawsuit filed by Orion in November 2017.

Mexico border as well as the southeastern portions of central San Diego. On January 11, 1999, the City entered into an Agreement for the Purchase of Treated Water with the Otay Water District, currently one of the City's four wholesale customers, to deliver surplus treated water. The Agreement was entered into to benefit the City and the region, and to improve the efficiency of the City's treatment plant operations.⁵ As of fiscal year 2015, the potable water purchased by the Otay Water District represented less than 0.2% of the City's total deliveries.

The Project was funded by the City from ratepayer revenue. As mentioned above, ratepayers include retail, wholesale, as well as recycled water customers and all ratepayer revenue is commingled. As of fiscal year 2015, retail customers accounted for approximately 94% of the total water deliveries and approximately 96% of the revenue from total water sales. Of this group, 91% were single family residential or multi-family residential ratepayers. That same year, wholesale customers accounted for approximately 7.8% of total water deliveries (including recycled deliveries) and approximately 4.1% of the revenue from total water sales. Aside from the Otay Water District, the City has three other wholesale customers: (1) the California-American Water Company, (2) the Santa Fe Irrigation District, and (3) the San Dieguito Water District. Through these wholesale customers, water is distributed from the City's water system to retail customers in the Cities of Coronado, Imperial Beach, and Chula Vista. According to the City, it has an integrated water system where wholesale customers use the entirety of the City's water system except for retail service water lines. The City generally charges a wholesale water rate that includes costs for raw water purchase, maintenance, operation, and capital improvement.

Discussion

A. The Project is a Public Work under Labor Code section 1720.

All workers employed on public works projects must be paid at least the prevailing wage rates applicable to their work. (§ 1771.) "Public work" 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).)

There is no dispute that the Project involves construction done under contract and paid for in whole or in part out of public funds. The City, however, argues that its charter exempts the Project from application of California's prevailing wage laws because the Project is a municipal affair which should be governed by the City's local ordinance. The Division of Labor Standards Enforcement (DLSE),⁶ on the other hand, contends that the

⁵ The Recitals to the Agreement read in part: "Whereas, by making Surplus treated water available to OTAY, the CITY and the region will benefit by increased use of existing resources and potential savings in future regional facilities; and Whereas, by entering into an agreement to provide Surplus treated water to OTAY, the CITY will improve the efficiency of its treatment plant operations and generate additional income."

⁶ As authorized under section 1741, DLSE conducted an investigation and issued civil wage and penalty assessments against Orion, the contractor, and its subcontractors.

Project is not purely a municipal affair, due to the nature of the sources of funding and the geographical and extraterritorial effects which extended beyond the City's boundaries.

B. California's Home Rule Doctrine.

Under the "home rule doctrine," cities operating under home rule charters have supreme authority as to "municipal affairs," as charter cities have been "specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs." (*State Bldg. and Constr. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 555 (*Vista*); Cal. Const., art. XI, § 5, subd. (a).) However, this autonomy is not unlimited. Charter cities remain subject to and controlled by general state laws regardless of the conflicting provisions of their charters where the matters are of "statewide concern." (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61-62; *Pacific Tel. & Tel. Co. v. City & Cnty. of San Francisco* (1959) 51 Cal.2d 766, 769 [citations omitted].)

The California Supreme Court in *Vista* applied a four-part test for resolving whether a matter falls within the "home rule" authority for charter cities. First, the city ordinance at issue must regulate an activity that can be characterized as a "municipal affair." Second, there must be an actual conflict between the city ordinance and state law. Third, the state law must address a matter of "statewide concern." Finally, a court must determine whether the state law is reasonably related to the resolution of that statewide concern and whether it is "narrowly tailored" to "avoid unnecessary interference in local governance." (*Vista, supra*, 54 Cal.4th at p. 556.) If the state law satisfies those criteria, "then the conflicting charter city measure ceases to be a 'municipal affair.'" (*Ibid.*) This analytical framework is applied here to assess whether the City's charter supersedes state law.

i. Whether the activity being regulated can be characterized as a "municipal affair."

Although the California Constitution grants charter cities the ability to regulate their own municipal affairs, it does not provide a definition of what constitutes municipal affairs, leading to much difficulty in determining what is categorized as such. Case law that has developed over the years offers some clarification.

In general, the California Supreme Court has long recognized that supplying water by a city to its inhabitants is a municipal affair. (*Heilbron v. Sumner* (1921) 186 Cal. 648, 650-651 (*Heilbron*); *City of S. Pasadena v. Pasadena Land & Water Co.* (1908) 152 Cal. 579, 594 (*Pasadena Land & Water*); *City of Pasadena v. Charleville* (1932) 215 Cal. 384, 389 (*Charleville*), overruled on other grounds by *Purdy and Fitzpatrick v. State* (1969) 71 Cal.2d 566, 585-586.))

Orion and a number of subcontractors filed requests for review of the assessments under section 1742. The City sought, and was granted permission to participate as an interested person in the request for review proceeding. (See Cal. Code Regs., tit. 8, § 17208, subd. (d).) After Orion, subcontractors, and the City disputed coverage of the Project under the California prevailing wage law, the matter was referred for a coverage determination.

In *Heilbron*, the issue centered on whether the acquisition, construction, and completion of the Barrett dam, located outside the City of San Diego but a part of the city's water system, constituted a municipal affair. There, the court concluded that "[i]t is obvious . . . the matter of erecting a dam for the purpose of impounding water for use in the public water system carried on by the city of San Diego for the benefit of itself and its inhabitants is exclusively a municipal affair." (*Heilbron, supra*, 186 Cal. at pp. 650-651.)

In *Pasadena Land & Water*, one of the issues concerned the transfer of water, water rights, and water systems from a quasi-public corporation to the City of Pasadena. Pasadena's charter authorized the supply of water to its inhabitants as well as to persons who live outside of the city's limits. Relying on that charter provision, the court held that the city has the "power to acquire and carry on a water system outside the city so far as it may be necessary or convenient to do so in order to accomplish the main purpose of furnishing water to the city and its inhabitants." (*Pasadena Land & Water, supra*, 152 Cal. at p. 590.) Since water supplies are seldom obtained within the limits of a city, the court reasoned that the "supplying of water to outside territory, being necessarily a matter incidental to the main purpose of supplying water to its own inhabitants, is as much a municipal affair of Pasadena, as is the main purpose." (*Id.* at p. 594.)

In *Charleville*, the city manager of Pasadena refused to execute a contract for the construction of a wire fence around a city-owned and operated reservoir on the basis that the contract did not mandate compliance with state prevailing wage law requirements. Pasadena sought to compel the city manager to sign the contract, arguing that the state prevailing wage law did not apply because the construction was a municipal affair. Citing *Pasadena Land & Water* and *Heilbron*, the *Charleville* court reaffirmed the view that the supplying of water by a city to its inhabitants is a municipal affair, as is erecting a dam for a municipal water system, and concluded that the wire fence construction for the city-owned and operated reservoir funded by local funds was also a municipal affair. (*Ibid.*)

In the present case, the City's charter, much like the City of Pasadena's charter in *Pasadena Land & Water*, grants the City power to supply water "for the use of the City and its inhabitants and others" and allows the City to regulate the water system "both within and without the territorial limits" of the City. (San Diego Charter, art. I, §§ 1 and 3.) The City contracted with Orion to make improvements to a City-owned and operated water treatment plant with City funds. Like the City-owned Barrett dam in *Heilbron*, the OWTP is located outside the City's limits, but operates as an integral part of the City's local water supply system. *Heilbron* held that construction work on the Barrett dam was a municipal affair. As the facts are substantially similar here, there is no compelling reason to reach a contrary conclusion with respect to construction work on the OWTP.

DLSE contends that the Project is not purely a municipal affair due to the geographical and extraterritorial effects of the City's water system and the OWTP, which extend beyond the City's boundaries. DLSE correctly points out that the City's water system supplies water to customers outside the City's limits, and that the City-owned OWTP, which is located in the City of Chula Vista, is an integral part of that system. However, the City's water system primarily serves the City's residents, covering 342 square miles within the City and serving an estimated 1.4 million people. The court in *Pasadena Land & Water* recognized that water supplies are seldom obtained within the

geographic limits of a city, and that supplying water to outside territories is “a matter incidental to the main purpose of supplying water to its own inhabitants.” (*Pasadena Land & Water, supra*, 152 Cal. at p. 594.) The same is true here. While OWTP’s geographic location outside of City limits is a consideration in determining whether the OWTP is a municipal affair, it is not a dispositive factor. Selling water to wholesale customers who then distribute that water to their own retail customers located outside the City’s limits is likewise not determinative. The fact remains that the City’s water system, of which the City-owned OWTP is an integral part, is a municipal affair under controlling California Supreme Court precedent, because delivering some amount of water to non-City residents is incidental to the primary purpose of providing the City’s own residents with water. *Heilbron, Pasadena Land & Water*, and *Charleville* make clear that neither the geographic location of a component of the City-owned water system nor its service base is sufficient to convert what is otherwise a municipal affair into one of statewide concern.⁷

Besides arguing that the extraterritorial effects of the City’s water system take the Project out of the ambit of “municipal affairs,” DLSE also contends that the Project was funded in part by revenue from other entities including external water districts and a private water company. While it is true that the City has different types of ratepayers, the water system itself is owned by the City and maintained by the City. The Project was wholly funded by ratepayer revenue collected by the City and deposited in the City’s public coffers. In PW 2007-018, *Zoo Improvements – City of Merced* (May 2, 2008/Dec. 17, 2007), the Department was presented with the argument that construction of a City of Merced-operated zoo was not solely a municipal affair since the construction was funded in part by fees, gift shop receipts, and member dues from individuals who do not reside in Merced. Rejecting that argument, the *Zoo Improvements* determination concluded that, “even if private revenues collected by Society [a non-profit organization formed to assist City with the zoo] were used to fund the Project, once such revenues are transferred to the City, they become City funds, irrespective of whether a portion of them can be traced to non-resident Zoo patrons.”

This reasoning can be applied here. The City has retail, wholesale, and recycled water customers, a small portion of whom reside outside the City. Ultimately, all rates collected by the City are commingled and then expended to improve the City’s water infrastructure. Irrespective of exactly how much revenue could be traced to ratepayers outside the City – which is low relative to the revenue contributed by City residents – the

⁷ The circumstances here are markedly different from those where a state law authorizes the formation of a regional special district for an activity, which, if carried out exclusively by a city, would be a municipal affair. (See *City of Pasadena v. Chamberlain* (1928) 204 Cal. 653, 659-660 [metropolitan water district formed under state law for the common purpose of acquiring large quantities of water from outside sources; district’s acquisition of water not a municipal affair]; *Pasadena Park Improvement Co. v. Lelande* (1917) 175 Cal. 511, 515 [while preventing overflows of streams is generally a municipal affair, state law authorizing multi-jurisdiction protection district to achieve overflow prevention is statewide concern]; see also *City of Santa Clara v. Von Raesfeld* (1970) 3 Cal.3d 239, 247) [while disposal of sewage is generally a municipal affair, construction of regional water pollution control facility that protects the health of the entire region’s inhabitants and directly financed by several cities is not municipal affair.]

funds are City funds when paid to the City for the purchase of City water. Where “participation” in the Project from outside the City is limited to paying for water purchased from the City’s water system, there is no convincing basis to transform the City’s municipal affair of supplying water to its residents into a statewide concern.

In sum, the City has a municipal water system, financed by the City’s ratepayers, and operated by the City for the benefit of the City’s inhabitants. The improvements to the City-owned OWTP undoubtedly benefit the City’s inhabitants while offering incidental benefits to customers outside the City. Therefore, the public work improvement on the City’s water treatment plant, like the construction of the two city-operated fire stations at issue in *Vista*, is a municipal affair. (*Vista, supra*, 54 Cal.4th at p. 559.)

ii. Whether the City’s charter actually conflicts with California’s prevailing wage law.

California’s prevailing wage law does not exempt charter cities from its scope. Prior to 2013, the City’s ordinance prohibited compliance with state prevailing wage law unless the project fell into one of the following: (1) project is of statewide concern; (2) payment of prevailing wages is a condition of federal or state grant; or (3) the project is a City water or sewer fund project in excess of \$10 million. The City asserts that the Project in question did not fall under any of the three exceptions. Thus, an actual conflict existed between state law and the City’s ordinance.

iii. Whether California’s prevailing wage law addresses a matter of “statewide concern.”

Where state law and the City ordinance actually conflict, there must be a “convincing basis for legislative action originating in extramunicipal concerns, one justifying legislative supersession based on sensible, pragmatic considerations.’ [citation omitted.] In other words, for state law to control there must be something more than an abstract state interest, as it is always possible to articulate some state interest in even the most local of matters.” (*Vista, supra*, 54 Cal.4th at p. 560). The *Vista* court held that the “wage levels of contract workers constructing locally funded public works are a municipal affair . . . and that these wage levels are not a statewide concern.” (*Id.* at p. 556.) As there is no statewide concern presented justifying the state’s regulation of wages on the City’s Project, there is no need to determine whether the state’s prevailing wage law is “reasonably related to . . . resolution” of that concern and “narrowly tailored” to avoid unnecessary interference in local governance. (*Id.* at p. 566.)

The OWTP improvements at issue here, like the two city-operated fire stations in *Vista*, constitute a municipal affair. Because wage levels of contract workers constructing locally funded public works are not a statewide concern, the City’s charter allows the City to exempt the Project from California’s prevailing wage laws. (*Id.* at p. 556.)

Conclusion

For the foregoing reasons, the concrete repair and protective coating application at the Otay Water Treatment Plant is a public work but the City of San Diego's chartered city status allows it to exempt the Project from California's prevailing wage laws.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Katrina S. Hagen".

Katrina S. Hagen
Director of Industrial Relations