

DEPARTMENT OF INDUSTRIAL RELATIONS

Katrina S. Hagen, Director

Office of the Director

1515 Clay Street, 17th Floor

Oakland, CA 94612

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



November 9, 2020

Mirna Solis, 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. 2019-015
1000 South Fremont Avenue Tenant Improvements
County of Los Angeles

Dear Ms. Solis:

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 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 tenant improvement work at Building A-9 of 1000 South Fremont Avenue (Project) for the County of Los Angeles is a public work, and therefore subject to prevailing wage requirements.

Facts

A. Building A-9 of 1000 South Fremont Avenue (The Alhambra).

1000 South Fremont Avenue in the City of Alhambra is the site of a mixed-use development with offices, residences, and retail. The development is known as “The Alhambra,” and is owned by the Ratkovich Company. According to a statement on its website, the Ratkovich Company’s mission “is to profitably produce developments that improve the quality of urban life.” The Alhambra is described by the Ratkovich Company as a “40-acre mixed-use, health-and-wellness-focused community which features tenants such as the USC Keck School of Medicine, various County of Los Angeles departments, [sic] spans over a dozen commercial buildings. Amenities include walking loops, a full-service gym, and a 9-hole putting green.”

Located near the geographic center of The Alhambra is Building A-9, which has an east and a west wing connected by the main structure. The wings are referred to, respectively, as Building A-9 East and Building A-9 West. Building A-9 East has a ground

¹ Unless otherwise indicated, all further statutory references are to the Labor Code.

floor and floors one through six. Building A-9 West contains a lower level, a ground floor, and floors one through five.

B. Lease No. 78546.

On November 15, 2016, the Ratkovich Company² and the County of Los Angeles entered into Lease No. 78546 for the County to lease approximately 55,583 square feet in Building A-9, including the Ground Floor of Building A-9 East and the First, Second, and Third Floors of Building A-9 West. On December 5, 2017, Lease No. 78546 was amended to provide for the County to lease an additional 5,780 square feet in Building A-9 East, bringing the total leased area to 61,363 square feet.

The base rent was set at \$2.30 per square foot for a total of \$141,134.90 per month. The monthly rent is increased annually at least 2%, but no more than 5%, through a prescribed formula that is tied to the Consumer Price Index. The County pays separate rent for 272 parking spaces (\$35.00 each for 234 unreserved parking spaces and 10 reserved parking spaces, and \$65.00 each for 28 supplemental reserved parking spaces). The initial term of the lease is 8 years.

In addition to these terms, Lease No. 78546, as amended, provided that the Ratkovich Company would provide the County with \$3,436,328 (\$56.00 per square foot) as a "Tenant Improvement Allowance." This is a sum that the Ratkovich Company agreed to spend for improvements to the office space leased by the County.

Lease No. 78546 also provided for an "Additional Tenant Improvement Allowance" of \$2,792,016.50 (\$45.50 per square foot), for "the cost of the design and construction of the Tenant Improvements per the terms and conditions of the Landlord's Work Letter executed concurrently with this Lease." Any amounts in the "Additional Tenant Improvement Allowance" used to pay for the cost of the tenant improvement work would be paid by the County to the Ratkovich Company. If the total cost of the tenant improvement work exceeded both the Tenant Improvement Allowance and the Additional Tenant Improvement Allowance, the County would be solely responsible for the additional cost. In other words, taken together, the provisions of Lease No. 78546 provided that the Ratkovich Company would foot the cost for tenant improvements up to \$3,436,328, and any additional amounts for tenant improvements beyond that sum would be borne by the County.³

² The Alhambra's landlord is identified in lease documents as The Alhambra Office Community, LLC, which, through several subsidiaries (AIGGRE-TRC Alhambra Stabilized Project, LLC, AIGGRE-TRC Alhambra, LLC, and Ratkovich 1000, LLC) is ultimately owned by Ratkovich Investment Company, LLC. "The Ratkovich Company" is used to refer to the legal entity that owns The Alhambra.

³ The tenant improvement allowance is structured in this way because the County was granted the option to pay out the "Additional Tenant Improvement Allowance" (essentially its potential \$2.8 million share of the cost of the tenant improvements) in monthly installments amortized over the first 7 years of the lease term at 7.5% interest.

The County has stated that the total cost of the tenant improvements was \$4,778,778. For its share of the cost, the County was responsible for reimbursing the Ratkovich Company \$1,342,450 (\$4,778,778 less the \$3,436,328 Tenant Improvement Allowance).

C. Landlord's Work Letter.

The Landlord's Work Letter is attached as an exhibit to Lease No. 78546. The Landlord's Work Letter contains provisions that demonstrate the County's close involvement with every step of the tenant improvement process. For example, the Ratkovich Company and the County were required to "jointly open and review" proposals from qualified licensed architects and engineers and "mutually agree upon the most cost effective, responsive and responsible Architect and Engineer to be awarded the job." In addition, the Ratkovich Company and the County were to "jointly open and review the bids" from construction contractors and "select the most cost effective, responsive and responsible contractor," and the winning contractor was to enter into a construction contract with the Ratkovich Company "consistent with the terms of the bid to construct the Tenant Improvements." Within five business days after the winning bidder was selected as the contractor, an initial construction meeting was to be held between the contractor, the County, and the Ratkovich Company. During the course of construction, "meetings [were to] be held between the Contractor, Landlord and Tenant at least once per week, unless Tenant directs otherwise, at a time and place which is mutually convenient." The County was also required to "approve" the construction budgets submitted by the contractor and the Ratkovich Company before tenant improvement work commenced.

In executing the Landlord's Work Letter, the Ratkovich Company also demonstrated it had read and understood the following statement:

Construction of the Tenant Improvements shall comply with all applicable laws and regulations and shall be subject to the general inspection of Tenant. The Premises shall comply with all applicable city, county, state and federal building codes, regulations and ordinances required for beneficial occupancy, including, but not limited to, all provisions of the Labor Code of the State of California. Under the provisions of the Labor Code, the State Department of Industrial Relations will ascertain the prevailing hourly rate in dollars and details pertinent thereto for each craft, classification or type of workman or mechanic needed for the construction of the improvements.

The Ratkovich Company and the County selected contractor Cannon Constructors South, Inc. as the "most cost effective, responsive and responsible contractor." Cannon engaged subcontractor G Brothers, Inc. to perform work on the tenant improvements. The tenant improvement work under Lease No. 78546 began in February 2017 and was substantially complete on November 26, 2017.

Any costs beyond the base and additional tenant improvement allowances, however, must be paid by the County in a lump sum.

D. The County's Other Leases at Building A-9.

In addition to Lease No. 78546, the other space that the County leases in Building A-9 is governed by a number of separate lease agreements. The following chart summarizes those leases:

Department	Lease	Address	Initial Term⁴	Sq. Ft.
Public Health	77987	A-9 West, 4th Floor	7/16/13 – 5 years	17,107
Auditor-Controller	78434	A-9 East, 1st Floor	12/1/15 – 5 years	19,803
Health Services	78435	A-9 East, Ground and 2nd Floors	12/1/15 – 5 years	38,501
Public Health	78436	A-9 East, Ground and 3rd Floors	12/1/15 – 5 years	42,250
Public Works	78437	A-9 East, Ground, 1st, and 4th Floors	12/1/15 – 5 years	42,808
Consumer & Business Affairs	78438	A-9 East, 1st Floor	12/1/15 – 5 years	3,107
Human Resources	78438	A-9 East, 1st Floor	12/1/15 – 5 years	1,978
Parks and Recreation	78546	A-9 East, Ground Floor A-9 West, 1st, 2nd, and 3rd Floors	12/5/17 – 8 years, as amended	55,583
Public Health	78625	A-9 East, 5th and 6th Floors	2/21/17 – 8 years	34,357
Health Services	78625	A-9 East, 5th and 6th Floors	2/21/17 – 8 years	16,168

Total square footage leased: 271,662

For Lease No. 78625, a Commencement Date Memorandum memorializes the fact the Ratkovich Company delivered possession of the leased premises on the Fifth and Sixth Floors at Building A-9 East to the County on December 12, 2017, which is also the commencement date for that lease. For Lease No. 78546, a separate Commencement Date Memorandum set the lease commencement date as December 1, 2017.⁵

⁴ The actual commencement date of each lease varies, but is generally based on either the date of execution or when tenant improvements were substantially complete. Leases No. 78434 through 78438 commenced on the date of execution. The remaining leases commenced on substantial completion of the tenant improvements or other separately agreed upon date close to the substantial completion date.

⁵ The Ratkovich Company actually delivered possession on November 29, 2017, but the parties agreed that December 1, 2017 is deemed the lease commencement date for Lease No. 78546. As discussed previously, Lease No. 78546 was amended on December 5, 2017.

Discussion

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

Separately, section 1720.2 provides that “public works” also includes construction work done under private contract when all of the following conditions exist:

- (a) The construction contract is between private persons.
- (b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.
- (c) Either of the following conditions exist:
 - (1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.
 - (2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work.

A. The Tenant Improvement Work was Paid for Out of Public Funds.

The tenant improvement work at issue here indisputably involves construction work done under contract, as contractors Cannon and G Brothers performed the tenant improvement work under contract with the Ratkovich Company. The issue under section 1720 is whether the tenant improvement work was paid for “in whole or in part” out of public funds.

Lease No. 78546 provides for the County to pay or reimburse the Ratkovich Company up to the \$2,792,016.50 (\$45.50 per square foot) “Additional Tenant Improvement Allowance.” The description of the payment in Lease No. 78456 shows that it was earmarked for the tenant improvement work at Building A-9. The County had the option to pay this amount either as a lump sum or “as *additional rent* calculated in the manner so as to amortize such amount over the first seven (7) years of the Lease Term at the rate of seven and one-half percent (7.5%) per annum to be paid as equal amortized monthly payments over the initial eighty-four (84) month Term of the Lease.” Any argument that the additional payments under this provision were merely for rent is unpersuasive. If these additional payments had been truly part of the rent, they would have been incorporated into the base rent and paid monthly as due and without interest or any connection to the tenant improvements. Here, however, the “Additional Tenant Improvement Allowance” is tethered to the cost of the tenant improvement work and has no relation to the County’s rent payments under Lease No. 78546.

As noted above, the County reported that the final cost of the tenant improvements was \$4,778,778, and that it was required to pay the Ratkovich Company \$1,342,450 as

reimbursement for its share of the cost of the tenant improvement work, pursuant to the terms of Lease No. 78546. This payment from the County was a “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.” (§ 1720, subd. (b)(1).) Because this payment of public funds was made for construction done under contract, the tenant improvement work at Building A-9 of 1000 South Fremont Avenue (The Alhambra) was a public works project under section 1720, subdivision (a)(1).

B. The County Leased More Than Half of the Assignable Square Footage.

The County is leasing space in Building A-9 of The Alhambra, which is privately owned by the Ratkovich Company. (§ 1720.2, subd. (b).) The Ratkovich Company and the County entered into Lease No. 78546 before the private construction contract for the tenant improvement work at Building A-9 of The Alhambra. (§ 1720.2, subds. (a), (c)(1).) The tenant improvement work was done according to the County’s plans and specifications. (§ 1720.2, subd. (c)(2).) None of these facts are disputed. Construction work includes renovations or tenant improvement work. (See *Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083, 1089 (*Local 290*).) Consequently, the only issue under section 1720.2 is whether “upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased” to the County for its use. (§ 1720.2, subd. (b).)

“The ‘property’ to which this subparagraph refers is the entire structure, not simply the space that is subject to the lease.” (*Local 290, supra*, 157 Cal.App.4th at p. 1091.) Per the chart above, at the relevant time the County leased approximately 271,662 square feet at Building A-9. Documents submitted by the County, as well as photographs of the building itself, demonstrate that the County leased the majority of the floors in Building A-9, including the ground and first through fifth floors of Building A-9 East (six floors), and the first through fourth floors of Building A-9 West (four floors). The Division of Labor Standards Enforcement (DLSE)⁶ claims that Building A-9 contains a total of 306,330 assignable square feet. This claim is undisputed by any party.

With the exception of Lease No. 78625 for the Public Health and Health Services departments, and Lease No. 78546, which is at issue here, all of the County leases at Building A-9 were entered into in 2013 and 2015 and continued through the completion of the tenant improvement work that is the subject of this dispute. Taking into account the square footage of all of the leases, including Lease No. 78546, it is evident that “upon completion of the construction work” (§ 1720.2), the County leased a total of 221,137 square feet in Building A-9 (271,662 total square feet, including Lease No. 78546, less 50,525 square feet leased under Lease No. 78625, for which occupancy occurred slightly later in December of 2017).

⁶ As authorized by section 1741, DLSE conducted an investigation and issued a civil wage and penalty assessment against the contractors. After coverage of the work under the prevailing wage law was disputed in a section 1742 proceeding to review the assessment, the matter was referred for a coverage determination.

“Both the language and the legislative history of the provision thus confirm a legislative determination that construction work performed on a property that is mostly leased by a public agency should be considered public work for purposes of the prevailing wage law.” (*Local 290, supra*, 157 Cal.App.4th at p. 1091.) While the Department has been unable to ascertain the exact total amount of assignable square feet⁷ at Building A-9, it is clear the County leases more than half of that assignable square footage. For the County to fail to meet that percentage threshold, Building A-9 would have to contain at least 442,274 (221,137 x 2) assignable square feet. As noted, DLSE’s estimate of 306,330 square feet, based on information gleaned from lease and project documents, is undisputed. It is also undisputed that the County leased 10 of the 14 floors, combined, in the East and West wings of Building A-9.

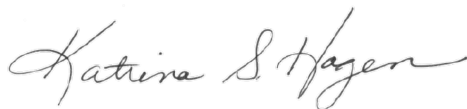
Accordingly, it is apparent that upon completion of the tenant improvement work under Lease No. 78546, more than half of the assignable square feet of Building A-9 was leased to the County. Because the other elements under section 1720.2 are also satisfied, the tenant improvement work at Building A-9 of 1000 South Fremont Avenue (The Alhambra) constituted “public works” under section 1720.2.

Conclusion

For the foregoing reasons, under section 1720, subdivision (a)(1), and section 1720.2, the tenant improvement work at Building A-9 of 1000 South Fremont Avenue for the County of Los Angeles is public work subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Katrina S. Hagen
Director of Industrial Relations

⁷ “Assignable square feet” is not defined in the statute or case law, but guidance from other sources defines the term generally to mean space that a tenant can actually use. (See, e.g., Cal. Code Regs., tit. 5, § 20430, subd. (oo) [In regulations governing the California Library Construction and Renovation Program, “assignable square footage” means usable space excluding any non-assignable space. Non-assignable space, in turn, is defined as “utility areas of a building required for the function of the building, including stairways; elevators; corridors and interior walkways; public lobbies; restrooms; duct shafts; mechanical rooms; electrical closets”])