

DEPARTMENT OF INDUSTRIAL RELATIONS

Katrina S. Hagen, Director

Office of the Director

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June 1, 2022

Colin K. McCarthy
Lanak Hanna
625 The City Drive South, Suite 190
Orange, CA 92868

RE: Public Works Case No. 2021-006
Anheuser-Busch Los Angeles Brewery Solar Microgrid
California Energy Commission

Dear Mr. McCarthy:

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 Anheuser-Busch Los Angeles Brewery Solar Microgrid Project (Project) is a public work subject to prevailing wage requirements.

Facts

Anheuser-Busch, LLC (Anheuser) and Perma City Construction Corp. (PermaCity) have entered into a \$10 million contract to fund, design, install and operate a microgrid system at the Anheuser Southern California brewery. Part of the funding for this Project is provided by the California Energy Commission (CEC) through the Food Production Investment Program, a grant initiative funded by the California Climate Investments cap-and-trade program² for food processors to implement projects that reduce greenhouse gas (GHG) emissions and onsite energy consumption.

On February 4, 2019, Anheuser applied for a grant from the CEC for the installation of a microgrid at the Los Angeles Brewery. (See Application for CEC Grant.) Anheuser requested funds in the amount of \$5,771,259. (*Ibid.*) The Application consisted

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

² The State's share of proceeds from cap-and-trade auctions is deposited in the Greenhouse Gas Reduction Fund. (Gov. Code, § 16428.8, subd. (b).)

of a project narrative wherein the scope of the project is described as “the installation of a microgrid, consisting of a large roof-mount solar array, and a lithium-ion battery storage system.” (See Project Narrative p. 1.) The CEC narrative form requests information on whether the proposed project address a community need. Anheuser responded as follows: “This project is considered public works under the California Labor Code, and required payment of prevailing wages, which can be significantly higher than non-prevailing wages. Project implementation is expected to create quality jobs, and increase family income, provide access to health insurance, and retirement benefits, with long-term job retention.” (See Project Narrative p. 10.)

On April 8, 2020, the CEC approved agreement number FPI-19-017 (Grant Agreement) granting Anheuser \$5,771,259 to design, install and operate a microgrid system. (See Resolution for Grant Agreement.) The Grant Agreement specifies the scope of work to be completed at each stage of the project to include feasibility studies, development of the microgrid design plan, procuring equipment, and installation of equipment. (See Grant Agreement pp. 12-14.) The language of the Grant Agreement specifically calls for the installation of equipment.³

As part of the Grant Agreement, Anheuser listed PermaCity as the subcontractor who would design and engineer the project as well as procure and install equipment purchased with the CEC grant monies. (See Grant Agreement, Exhibit B, p. 3.) The Grant Agreement requires that Anheuser comply with the State of California’s prevailing wage rules and regulations. (See Grant Agreement, Exhibit C, p. 14.)

The Grant Agreement allows for certain costs to be paid from the CEC-approved grant funds. Anheuser’s project is considered a Tier 1⁴ project and therefore reimbursement will be limited to the cost of equipment that will result in reductions of GHG emissions and any measurement and verification (M&V)⁵ required for validation of GHG emissions reduction. Tier 1 projects can receive grants up to 65 percent of the

³ “The Recipient shall:

- Install the solar photovoltaic system per the engineering design. This includes installing the BSS components including the solar panels, roof-mount racking, solar inverters, battery inverters, battery storage modules, AC & DC disconnects, enclosures, conduit and wiring.
- Perform all required system safety checks including electrical isolation testing, earth ground testing and BSS controller communication testing.
- Start-up and commission equipment and make adjustments as needed to meet stated performance specification.”

⁴ Tier 1 focuses on commercially available, energy efficient, *equipment* upgrades that are drop in replacements or additions to existing equipment or processes that provide greater GHG emission reductions than current best practices or industry standard equipment.

⁵ M&V involves the reporting of measurements of GHG emissions and energy consumption reduction.

eligible costs and require a 35 percent match of eligible costs from the applicant. (See CEC Solicitation Manual p. 10.)

The M&V portion of the project will include development of the M&V protocol for pre-installation measurements (and calculations) of electric, natural gas and/or other fossil fuel consumption and GHG emissions, as well as the preparation of a detailed M&V Plan. (See Grant Agreement p. 13.) The M&V includes performing three months of pre-installation measurements based on the M&V protocol for installation. (*Id.* at p. 14.)

On December 12, 2020, Anheuser and PermaCity entered into a contract wherein PermaCity will “furnish all design, engineering, labor, material, professional services, tools, equipment, fixtures and other services necessary to design, procure, supply, construct, install, commission and warrant [a microgrid system]” (See Contract p. 1.) The contract between the parties states that “Payment to [PermaCity] of all CEC-reimbursed expenses shall be contingent on Owner’s receipt of payments from the CEC. Owner’s receipt of payment from CEC for such expenses is a condition precedent to pay Contractor for such items.” (See Contract p. 33, item 4.1.7.)

Discussion

Section 1720, subdivision (a)(1) (hereafter section 1720(a)(1)) generally 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 . . . ‘construction’ includes work performed during the design, site assessment, feasibility study, and other preconstruction phases of construction, including, but not limited to, inspection and land surveying work, regardless of whether any further construction work is conducted” Section 1771 provides that all workers on public work projects over \$1,000 must be paid at least the general prevailing rate of wages.

PermaCity raises the following issues: 1) The Grant specifies that the public funds shall be used only for the cost of procuring equipment and the M&V of the installed equipment and therefore does not qualify as construction under Labor Code section 1720; and 2) The grant funds provided by CEC are “cap and trade” credits and thereby are not considered public funds and not subject to prevailing wage.

A. The Anheuser Project Is Paid For Out of CEC Funds.

“There are three basic elements to a ‘public work’ under section 1720(a)(1): (1) ‘construction, alteration, demolition, installation, or repair work’; (2) that is done under contract; and (3) is paid for in whole or in part out of public funds.” (*Busker v. Wabtec Corporation* (2021) 11 Cal.5th 1147, 1157 (*Busker*)). The Project easily satisfies the first and second elements. The contract between Anheuser and PermaCity calls for construction or installation, as the terms of the contract require PermaCity to “design, engineer, labor, material, professional services, tools, equipment, fixtures and other services necessary to design, procure, supply, construct, install, commission a microgrid system.” The issue is whether public funds pay for the construction or installation.

PermaCity contends that the Grant Agreement specifically limits the use of CEC funds to exclude payment for labor and therefore the Project is not subject to prevailing wage requirements. However, per the Grant Agreement, Anheuser was granted over \$5 million from the CEC to procure equipment with the requirement that the procured equipment be installed. Anheuser represented in its Application that the scope of the project includes “the installation of a microgrid,” and the Grant Agreement specifically requires Anheuser to: “Install the solar photovoltaic system per the engineering design. This includes installing the BSS components including the solar panels, roof-mount racking, solar inverters, battery inverters, battery storage modules, AC & DC disconnects, enclosures, conduit and wiring.” Accordingly, the Project encompasses not only the purchase of the equipment, but also its installation. (See *Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 549; see also *Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 35 (*Azusa Land Partners*) [The Supreme Court “has specifically rejected a contract-based analysis that would allow a developer and public entity to agree to allocate all public funds to one piece of improvement work instead of applying it, in part, to pay for all required improvements.”])

Because CEC grant money funded the Project, which includes the purchase of equipment *and* the installation of that equipment, the installation was paid for *in part* out of CEC funds. (See *Busker, supra*, 11 Cal.5th at p. 1170 [“all the construction labor, both publicly and privately financed, was done to achieve a “complete integrated object” that was paid for *in part* by public funds,” original italics.])

B. The Funds Provided by CEC Are Public Funds.

Besides arguing that the CEC funds did not pay for construction or installation, PermaCity further contends that the funds CEC provided to Anheuser are considered “cap and trade” credits and are therefore not considered public funds under the prevailing wage law. PermaCity relies on *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289 (*SBCTC*) as support for its argument that funds from the cap and trade program do not constitute public funds. In *SBCTC*, the court determined that state low-income housing tax credits were not public funds within the meaning of the prevailing wage law. Specifically, the court noted that the tax credits at issue were speculative and contingent on future conditions and therefore did not qualify as the payment of the equivalent of money by the state, or as a transfer by the state of an asset for less than fair market price. (*Id.* at p. 311.)

Here, the CEC is awarding cap and trade dollars for food processing companies to install equipment to reduce greenhouse gases. (See Solicitation pp. 8-9.) These funds come from the Greenhouse Gas Reduction Fund, a special fund in the State Treasury. (Gov. Code, § 16428.8.) It is difficult to understand how *SBCTC* supports PermaCity’s position. In making an apples-to-oranges comparison between the CEC grant funding and the low-income housing tax credits at issue in *SBCTC*, PermaCity appears to confuse cap-and-trade credits that may be purchased at auction or sale from the State,⁶ and the

⁶ See Cal. Code Regs., tit. 17, § 95801 et seq.; *California Chamber of Commerce v. State Air Resources Bd.* (2017) 10 Cal.App.5th 604, 615 [“Covered entities must

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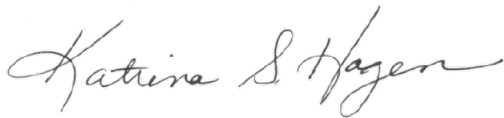
proceeds from the sales of cap-and-trade credits that the State collects to fund this CEC grant. (Gov. Code, § 16428.8.) Anheuser was not given cap-and-trade credits to purchase, install and test equipment. Anheuser was given over \$5 million in grant money – ultimately derived from sales of cap-and-trade credits – to hire a subcontractor to pretest, procure and install equipment at its food processing plant for the purpose of reducing GHG emissions.

Conclusion

For the foregoing reasons, the Anheuser-Busch Los Angeles Brewery Microgrid Project is a public work subject to prevailing wage requirements.

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

reduce their emissions below a threshold point, or obtain offset credits or emissions allowances, either from the Board or the open market. The Board distributes some allowances for free, retains some in a price containment reserve to buffer against unexpectedly high auction prices, and auctions the rest periodically.”]