

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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October 31, 2008

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Re: Public Works Case No. 2008-027
On-Haul and Off-Haul to and from the Friendly Inn/Senior Center
Abatement and Demolition Project
City of Morgan Hill

Dear Mr. Simpson:

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 Code of Regulations, title 8, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that, under the particular facts of this case, the off-hauling of demolition debris and materials whether performed by the on-site demolition contractor's employees or by an independent trucking company is subject to prevailing wage requirements. In addition, the on-hauling of material for backfill performed by the on-site demolition contractor's employees is also subject to prevailing wage requirements.

Facts

On August 12, 2008, the City of Morgan Hill ("City") advertised a public works contract for the abatement and demolition of a building known as the Friendly Inn/Senior Center located on Crest Avenue ("Project"). On August 22, 2008, the Department received a request for a coverage determination from Randazzo Enterprises, Inc. ("Randazzo"), a licensed demolition contractor and prospective bidder on the Project.¹

The Project is to be completed in accordance with a document prepared by City's Public Works Department and Weston Miles Architects entitled Specifications and Contract Documents ("Contract"). The Contract calls for the demolition of existing buildings and the interior abatement, removal, handling and disposal of various hazardous materials. Section 024119, subsection 3.6, "Disposal of Demolished Materials," requires the contractor to "transport demolished materials off Owner's property and legally dispose of them." Pursuant to section 017419, "Demolition Waste Management and Disposal," disposal is defined as "[r]emoval off-site of demolition waste and subsequent sale, recycling, reuse or deposit in landfill or incinerator

¹The bid due date was originally August 26, 2008; it was then extended to September 4, 2008. On October 1, 2008, City awarded the contract to Asbestos Management Group of California, Inc. Although Randazzo was not the successful bidder, Randazzo was likely to bid on the work at the time the request for a coverage determination was submitted and, therefore, is an interested party. (Cal. Code Regs., tit. 8, § 16000.)

acceptable to authorities having jurisdiction.” Section 017419, subsection 3.5, “Disposal of Waste,” requires the removal of waste materials from the site of the Project and disposal of the materials in a legally acceptable landfill, incinerator or recycling facility. Also, pursuant to Section 017419, subsection 1.6(C), the contractor is responsible for submitting a “Waste Reduction Work Plan” to City documenting, among other things, each type of waste generated by the demolition and whether it will be salvaged, recycled or disposed of in a landfill or incinerator. The Waste Reduction Work Plan must also include documentation of the receipt and acceptance of waste from properly licensed disposal facilities, including but not limited to, manifests, weight tickets, receipts and invoices.

Section B4, subsection 4.01, “Control of Materials,” requires the contractor to furnish all materials required to complete the work. City’s engineer has approval authority over the source of the material supply and the materials must be approved prior to delivery. The contractor may also be required to submit duplicate delivery tickets to City’s appointed engineer at the time of delivery showing the quantity and type of materials to be used on the Project.

Discussion

Labor Code² section 1720(a)(1) defines “public works” as “[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds” Section 1771 provides:

Except for public works projects of one thousand dollars (\$1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

....

Under section 1720.3, “‘public works’ also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including ..., or any political subdivision of the state.”

Section 1772 provides that: “Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.” Section 1774 provides that: “The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.”

The statutory term “execution” was interpreted by the First District Court of Appeal in *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, 749-750:

²All further statutory references are to the California Labor Code unless otherwise indicated.

In determining legislative intent, courts are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. [Citations and quotation marks omitted.] The familiar meaning of "execution" is "the action of carrying into effect (a plan, design, purpose, command, decree, task, etc.); accomplishment" (5 Oxford English Dict. (2d ed. 1989) p. 521); "the act of carrying out or putting into effect," (Black's Law Dict. (8th ed. 2004) p. 405, col. 1); "the act of carrying out fully or putting completely into effect, doing what is provided or required." (Webster's 10th New Collegiate Dict. (2001) p. 405.) Therefore, the use of "execution" in the phrase "in the execution of any contract for public work," plainly means the carrying out and completion of all provisions of the contract.

The analysis in *O.G. Sansone Co. v. Department of Transportation* [1976] 55 Cal.App.3d 434, 127 Cal.Rptr. 799 ("*Sansone*") of who is, and who is not, a subcontractor obligated to comply with the state's prevailing wage law also informs our assessment of the intended reach of the prevailing wage law to "[w]orkers employed ... in the execution of any contract for public work." (§ 1772.)

Sansone, as interpreted by *Williams*, recognized a "delivery exemption" from prevailing wages for bona fide material suppliers. (*Williams v. SnSands Corporation, supra*, 156 Cal.App.4th at p. 752.) Under *Williams*, employees of on-site construction contractors who are carrying out and completing the provisions of the public works contract, however, are entitled to payment of prevailing wages under section 1772. Such work is deemed performed "in the execution of" the contract.

It is undisputed that the Project is a public work under section 1720(a)(1) as it involves demolition work done under contract and paid for with public funds. Randazzo presents the following seven questions concerning whether the payment of prevailing wages is required for various off- and on-haul work.

1. Is prevailing wage required for truck drivers performing off-haul of demolition debris that is delivered to an established landfill location to be determined by the contractor?
2. Is prevailing wage required for truck drivers performing off-haul of demolition debris that is to be delivered to an established recycle facility to be determined by the contractor that recycles said material?
3. Is prevailing wage required for truck drivers performing off-haul of concrete or asphalt pavement that is to be delivered to an existing recycle facility to be determined by the contractor?
4. Is prevailing wage required for truck drivers performing off-haul of metal that is to be delivered to an established recycle facility to be determined by the contractor?

5. Is prevailing wage required for truck drivers performing off-haul of tree/wood/vegetation material that is to be delivered to an established recycle facility to be determined by the contractor?
6. Is prevailing wage required for truck drivers delivering import purchased from a supplier for backfill purposes? The import will be stockpiled on the construction site.
7. Is the answer to any of the foregoing questions different if Randazzo contracts with an independent trucking company to off-haul materials?

The coverage request specifies that questions one through five involve off-haul performed by employees of the on-site demolition contractor. Question six involves on-haul performed by employees of the on-site demolition contractor. Question seven asks whether the results in questions one through five would be any different if the off-haul were performed by an independent trucking company instead of the on-site contractor. Because question seven concerns off-haul only, the response to question seven will be integrated into the responses to questions one through five.

Question one posits that employees of the on-site demolition contractor will off-haul demolition debris from the site of the Project to an established landfill. The off-haul of "refuse" from a public works site to an outside disposal location is subject to prevailing wage requirements under section 1720.3. "The apparent intent of the Legislature in enacting section 1720.3 was to include within the definition of 'public works' the hauling of any refuse that was part of the construction project." (83 Ops. Cal. Atty. Gen. 166, 168-169 (2000).) Consistent with long-standing Department interpretation, the term "refuse" encompasses "anything discarded or rejected as useless or worthless; trash." (See American Heritage Dict. (new college ed. 1979) p. 1095.)

Here, per the terms of the Contract, demolition debris will be hauled from the public works site to an outside disposal location such as a landfill or incinerator facility. The Waste Reduction Work Plan refers to manifests, weight tickets, invoices and receipts from properly licensed disposal facilities. References to invoices and receipts indicate that the contractor will be charged for disposing of the debris, which is evidence that the debris is worthless. As such, the off-haul of demolition debris by employees of the on-site demolition contractor is subject to prevailing wage requirements under section 1720.3.

An additional basis for coverage of off-haul of demolition debris to an outside disposal facility is found in section 1772, which provides that "[w]orkers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work" Under *Williams*, work is performed "in the execution of" a contract for public work when such work is necessary for the carrying out and completion of the provisions of the contract. Here, the contractor is indisputably a "contractor" within the meaning of section 1772 because it is performing on-site demolition and abatement work. The Contract requires that the demolition debris be transported off-site for disposal at a landfill or incinerator. Under the *Williams* definition of "execution," employees of the on-site demolition contractor who haul demolition

debris off-site for disposal are performing work that is necessary for the carrying out and completion of the provisions of the Contract. Therefore, the payment of prevailing wages is required for such off-haul work under sections 1772 and 1774 in addition to 1720.3.

Question seven asks whether the result in question one would be any different if the on-site demolition contractor contracted out this type of off-haul work to an independent trucking company. Section 1720.3, concerning the off-haul of refuse, does not differentiate between work performed by an independent trucking company and an on-site construction contractor. Therefore, the result as to coverage under section 1720.3 would be no different. Under section 1772, the court in *Williams* states that “what is important in determining the application of the prevailing wage law is not whether the truck driver carries materials *to* or *from* the public works project site.” As the court explains, “[w]hat is determinative is the role the transport of the materials plays in the performance or ‘execution’ of the public works contract.” (*Williams v. SnSands Corporation, supra*, 156 Cal.App.4th at p. 752.) Specifically, the relevant factors discussed by the court in *Williams* for determining whether the independent trucking company is a subcontractor performing off-haul work in the execution of the contract include: “whether the transport was required to carry out a term of the public works contract; whether the work was performed on the project site or another site integrally connected to the project site; and, whether work that was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract.” (*Ibid.*) In addition, the court in *Williams* acknowledged two of the Department’s prior coverage determinations concerning off-haul. In PW 1999-081, *Granite Construction Company* (March 16, 2000) (“*Granite*”), the public works contract obligated the prime contractor to remove excavated pavement and dirt. The court in *Williams* noted that the off-haul was specifically incorporated into the public works project. In PW 2000-078, *Rosewood Avenue* (August 6, 2001) (“*Rosewood*”), the project involved the installation of a sewer pipe. To properly execute the contract, the contractor was required to remove excess dirt displaced by the installation work. Thus, the off-haul was found to be functionally related to the construction work. The analysis in *Rosewood* focused on the nature of the public works project.

Similar to the analysis in *Granite* and *Rosewood*, the nature of this Project is to tear down a structure and remove the resulting debris from the property. To fulfill Section 017419, subsection 3.5, “Disposal of Waste,” the on-site demolition contractor must remove the debris from the site, either for disposal or recycling. Pursuant to the Waste Reduction Work Plan requirement, the contractor must document the removal and disposal with manifests, weight tickets, receipts and invoices. The requirement to transport the demolition debris off-site is a substantive element of the Contract. Although the disposal locations are not specified by name, the contractor is not permitted to dispose of the debris at any facility or location it chooses. Pursuant to the Waste Reduction Work Plan requirement, the demolition debris must be disposed of *only* at facilities licensed to accept the specific type of debris being transported and the contractor must document the delivery/receipt of the debris at each facility. As such, the off-haul of debris from the site of the Project to an outside disposal location such as a landfill or incinerator by an independent trucking company plays an essential role in the performance or execution of the Contract. Therefore, under section 1772, this work is subject to prevailing wage requirements.

Questions two through five involve the off-haul of demolition debris and materials (concrete or asphalt pavement, metal and tree/wood/vegetation material) by employees of the on-site demolition contractor to an established recycling facility. The only difference between question one and questions two through five is that the off-hauled debris/materials will be taken to a recycling facility instead of a landfill or incinerator. Because the demolition debris and materials referenced in questions two through five will be recycled, the items are not worthless and, thus, would not be considered "refuse." There is, therefore, no coverage under section 1720.3. With respect to section 1772, however, the Contract terms expressly require the transport of demolition debris and materials from the site of the Project to a legally acceptable recycling facility. Although the Contract does not identify the specific debris to be off-hauled (e.g., metal, concrete, asphalt, etc.), the contractor is required to submit a Waste Reduction Work Plan that specifically identifies all debris and materials that are transported off-site for recycling and the specific location where the debris and materials are deposited. Therefore, the off-haul of demolition debris and materials for recycling by employees of the on-site demolition contractor is necessary to carry out and complete the provisions of the Contract and is therefore performed in the execution of the Contract within the meaning of section 1772.³

Question seven asks whether the result in questions two through five would be any different if the on-site demolition contractor contracted out this type of off-haul work to an independent trucking company. For the same reasons discussed above in response to question one, under the analysis in *Williams*, the result would not change. Similar to the off-haul of debris to a landfill or incinerator, the off-haul of debris or materials for recycling purposes plays an essential role in the performance or execution of the Contract. Therefore, under section 1772, this work is subject to prevailing wage requirements.

Regarding question six, the on-site demolition contractor's employees will be hauling import purchased from a material supplier to the Project for backfill and stockpiling it at the site. The Contract terms require the demolition contractor to furnish all materials necessary to complete the Project. As mentioned above, *Sansone*, as interpreted by *Williams*, establishes a "delivery exemption," not applicable to on-site construction contractors, for on-hauling performed by trucking entities that meet the material supplier test.⁴ Such hauling is not considered work performed "in the execution of the contract." (*Williams v. SnSands Corporation, supra*, 156 Cal.App.4th at p. 752.) Here, however, the delivery exemption is inapplicable because the on-haul work is performed by the on-site demolition contractor's own employees rather than by an

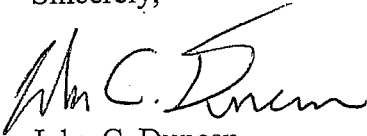
³The analysis set forth herein in response to questions one through five is consistent with PW 2005-025, *Canyon Lake Dredging Project, Lake Elsinore and San Jacinto Watersheds Authority* (March 28, 2008) in which the Director found that the delivery exemption for bona fide material suppliers did not apply to employees of the on-site construction contractor who, pursuant to the terms of the public works contract, off-hauled dredge material.

⁴For the delivery exemption to apply, the material supplier "must be selling supplies to the general public, the plant must not be established specially for the particular contract, and the plant is not located at the site of the work." (*Sansone, supra*, 55 Cal.App.3d at p. 442, quoting *H. B. Zachry Company v. United States* (1965) 344 F.2d 352, 359.)

independent trucking company or bona fide material supplier. As such, the on-haul of the import as provided for in the Contract - regardless of whether the import is being stockpiled - is performed in the execution of the public works contract within the meaning of section 1772.⁵

I hope this letter satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Duncan". The signature is fluid and cursive, with the first name "John" and last name "Duncan" clearly legible.

John C. Duncan
Director

⁵The analysis set forth herein in response to question six is consistent with PW 2008-008, *Sunset Garden Apartments, Imperial Valley Housing Authority* (May 28, 2008) in which the Director found that the "delivery exemption" discussed in *Sansone* and *Williams* did not apply to work performed by employees of the on-site construction subcontractor who on-hauled manufactured components from the factory to the project site.