

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050



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Desmond C. Lee, Esq.
DeCarlo, Connor & Shanley
533 South Fremont Avenue, 9th Floor
Los Angeles, CA 90071-1706

Re: Public Works Case No. 2009-052
Caltrans Highway Projects
Off-site Fabrication of Stem Panels

Dear Mr. Lee:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced work 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 the off-site fabrication of stem panels by employees of commercial lumber yards for use in specified California Department of Transportation ("Caltrans") highway projects is not subject to prevailing wage requirements.

Facts

The Carpenters Contractors Cooperation Committee ("CCCC") seeks a determination that prevailing wages are required for the off-site fabrication of stem panels for the following Caltrans highway projects: 15 Freeway and 78 Freeway Separation, Caltrans ID # 11-2T0824; 15 Freeway South Escondido, Caltrans ID # 11-2T0104; Ortega Highway, Caltrans ID # D08-0102; and 52 Freeway and 67 Freeway Connector, Caltrans ID # 11-2T0004. The off-site fabrication of stem panels for the first three projects was performed by Squires Lumber Company, Inc. ("Squires"). The off-site fabrication for the remaining project was performed by Van Matre Lumber ("Van Matre").

According to CCCC, stem panels are wooden frames that are cut and formed off-site pursuant to the specifications of an awarding body such as Caltrans. The frames are then delivered to the project site, where they serve two purposes. They are used as forms for concrete pours. Then they are broken down to act as forms to support structures such as bridges.

Squires states that it has been in business as a vendor and material supplier of hardware and lumber products in Colton, California since 1946. Squires operates a permanent 12-acre facility offering a full stocking lumber yard, trucking company, mill products and concrete form fabrication. Squires supplies materials to a number of major contractors throughout California. Squires itself is not licensed as a contractor, and it performs no on-site construction work. It provides wood forms used by others in concrete construction. These forms are delivered to the jobsite by drivers who do no on-

site work. The materials are off-loaded by employees of the on-site contractor at the construction site.

According to Squires, most of the stem panels it makes are designed by the general contractors to whom it supplies materials, not by Caltrans or other awarding bodies. The contractors decide how and out of what raw materials (wood, steel or aluminum) the stem panels are to be made. Contractors choose whichever stem panel or forming system is most cost effective and beneficial for a particular job. Neither Caltrans, nor any other awarding body, provides detailed specifications for the stem panels; rather it is in the discretion of the contractors to choose the type of forming system or stem panel that will be used.

Squires states that stem panels are used only as temporary tools or forms in the pouring of concrete, often in conjunction with bridge construction. They are never installed or broken down to act as structural support. Stem panels typically are removed and discarded, or rendered useless. For this reason, they are made from lower grade materials than those used in permanent structures. For reasons of cost savings and inaccessibility, stem panels are occasionally left in place after the concrete has hardened to form the deck of the bridge. Stem panels left in the hardened concrete provide no structural support to the bridge. Caltrans specifications provide that: "All forms shall be removed except as otherwise provided herein. [F]orms may remain in place when no permanent access is available into the cells or voids. ... When permanent access is available into the cells or voids [forms] shall be removed." (Standard Specifications (May 2006), section 51-1.05 ("FORMS") at p. 366.)

Van Matre describes itself as a full-service building materials supplier specializing in lumber products. It is not, and never has been, a licensed contractor or subcontractor, and does not perform on-site construction work. Its products are produced in its plant facilities, none of which are located at, near, or adjacent to, any public works construction site. Van Matre was formed in 1989, and since that time has sold lumber products to various members of the general public.

Van Matre does not enter into construction contracts providing a detailed description of the "scope of work." Rather, it receives and processes verbal or written purchase orders for materials, including lumber and plywood. Some of the products it sells are ordered for delivery and some are ordered for pickup. Van Matre uses outside delivery services as well as its own truck drivers to make deliveries. It merely produces and delivers lumber products to various construction projects, and performs no on-site work whatsoever.

Discussion

Labor Code section¹ 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:

¹ All statutory section references are to the California Labor Code unless otherwise indicated.

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.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

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:

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.)

Williams and *Sansone* recognized an exemption for material suppliers, basing their analyses in part on *H. B. Zachry Company v. United States* (1965) 344 F.2d 352, 170 Ct. Cl. 115, ("*Zachry*") a federal case that applied to truck drivers a long-standing interpretation of the Davis-Bacon Act generally exempting material suppliers from coverage. In *Zachry*, the court explained that:

Beginning as early as 1942 [fn. omitted], the Solicitor [of the Department of Labor] has excluded from statutory coverage the employees of bona fide materialmen who sell to a contractor engaged in construction contracts covered by the Davis-Bacon Act. The exemption has been qualified to the extent that the materialman 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. [Fn. omitted.] The Solicitor has always held that truck drivers employed by materialmen (exempt from statutory coverage) to transport supplies to the jobsite are no more subject to the provisions of the Davis-Bacon Act and the Eight-Hour Laws than are other employees of the materialmen. [Fn. omitted.]

(*Id.* at p. 359, quoted in *Sansone*, *supra*, 55 Cal.App.3d at p. 442.)

The material supplier exemption also applies under California law because by its terms, section 1772 requires prevailing wages for “[w]orkers employed by contractors or subcontractors in the execution of any contract for public work” (Emphasis supplied.) Applying the *Zachry* analysis, *Sansone* held that the on-hauling of aggregate subbase materials for highway construction was subject to prevailing wage requirements where the materials did not come from an established independent material supplier, but rather “from locations not on the project site but located adjacent to and established exclusively to serve the project pursuant to private borrow agreements between plaintiffs and third parties.” *Id.* at pp. 439, 445.

Thus, a company is a material supplier exempt from prevailing wage requirements if (1) it is in the business of selling supplies to the general public; (2) the facility where the work is performed is not established specially for the particular public works contract; and (3) the facility is not located at the site of the work. Squires and Van Matre are in the business of selling supplies to the general public. The facilities where they fabricated the stem panels were not established specially for the Caltrans public works contracts at issue here, and are not located at the public works sites. Given these facts, Squires and Van Matre are material suppliers exempt from the requirement to pay prevailing wages for the work involved in the fabrication of the stem panels.

In response to Squires’ and Van Matre’s contentions that they are material suppliers under these criteria, CCCC argues that they are instead subcontractors rather than material suppliers because the stem panels are fabricated in separate shops in the back of the companies’ stores, and unlike the front stores, these back shops do not sell any products to the public. Even if this is true, it is immaterial unless the back shops were established specially for the public works projects in question. There is no evidence that they were established for such purposes, or that they are dedicated to the fabrication of products for particular public works projects or public works projects in general. There is no basis to assume that a contractor on a private project could not also purchase stem panels from Squires or Van Matre. The companies sell forms to any contractors wishing to purchase them. The shops in which the forms are fabricated are permanent, off-site, general use facilities not established specially for any public works project. Accordingly, Squires and Van Matre are material suppliers under *Sansone* and *Williams*.²

² This is consistent with the Department’s determination in PW 2008-008, *Sunset Garden Apartments, Imperial Valley Housing Authority* (May 28, 2008). CCCC argues at length that the Department should apply the analysis set forth in PW 2002-064, *Off-site Fabrication by Helix Electric* (2003) to conclude that the fabrication of stem panels is subject to prevailing wage requirements. This argument is without merit for at least three reasons. First, unlike Squires and Van Matre, Helix Electric was found to be an on-site subcontractor for the project at issue and thus not subject to the material supplier exemption. Second, on May 3, 2004, the Department announced that the *Helix Electric* determination was

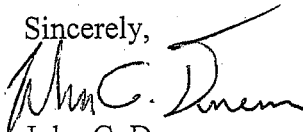
Nonetheless, CCCC contends that off-site work can be subject to prevailing wage requirements if the work is integrally related to the work done on the public works project, citing *Sansone, supra*, 55 Cal.App.3d at p. 445. CCCC misreads *Sansone*, which characterized the trucking companies' hauling of materials from dedicated borrow pits to the project site as an "integral part of plaintiffs' obligation under the prime contract." (*Ibid.*) Apart from the fact that there are no dedicated facilities here, the off-site fabrication of stem panels is no more integral to the prime contractors' obligations than the off-site manufacture of any other tools or supplies used in construction. The manufacturing process is separate and distinct from the construction process, and therefore not integral to it.

In light of the conclusion that Squires and Van Matre are material suppliers, the parties' disagreements regarding specifications and whether stem panels provide permanent structural support are immaterial. Because their employees are not employed by contractors or subcontractors in the execution of a contract for public work within the meaning of section 1772, they are not required to be paid prevailing wages.

For the foregoing reasons, the off-site fabrication of stem panels by Squires and Van Matre for the Caltrans highway projects specified above is not subject to the prevailing wage requirements of the California Labor Code.

I hope this letter satisfactorily responds to your inquiry.

Sincerely,



John C. Duncan
Director

withdrawn "effective immediately." ("Important Notice, Decisions on Appeal" (May 3, 2004), available at <http://www.dir.ca.gov/dlsr/ImportantNoticeOffsite.doc>.) Third, subsequent to *Helix Electric*, the Department decided it would discontinue its prior practice of designating certain public works coverage determinations as "precedential" under Government Code section 11425.60. Public notice of the Department's decision to discontinue the use of precedent decisions can be found at [http://www.dir.ca.gov/dlsr/Notices/09-04-2007\(pwcd\).pdf](http://www.dir.ca.gov/dlsr/Notices/09-04-2007(pwcd).pdf). Consequently, prior determinations are discussed herein only for purposes of addressing the arguments of the parties, and are not to be cited as precedent.