

DEPARTMENT OF INDUSTRIAL RELATIONS

Christine Baker, Director

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April 23, 2014

Branden Lopez
Center for Contract Compliance
1168 E. La Cadena Dr. #202
Riverside, CA 92507

RE: Public Works Case No. 2013-017
Golf Course Pedestrian Trail and Bridge Improvements
City of Chula Vista

Dear Mr. Lopez:

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 the Golf Course Pedestrian Trail and Bridge Improvements (Project) is public work subject to California prevailing wage requirements, and the charter city status of the City of Chula Vista (Chula Vista or City) does not exempt Chula Vista from the requirement to pay prevailing wages.

Facts

In May 2012, Chula Vista applied to the County of San Diego (San Diego or County) for a grant from the Neighborhood Reinvestment Program (NRP) to fund the installation of a pre-fabricated steel bridge and decorative railings and to complete trail improvements at the City of Chula Vista Municipal Golf Course.¹ San Diego's NRP provides "grant funds to County departments, public agencies, and to non-profit community organizations for one-time community, social, environmental, educational, cultural or recreational needs that serve public purposes...."² The NRP's stated purpose is to "benefit the County's neighborhoods and communities."³

¹ According to City's Response (pp. 2-3), in 2010, County Supervisor Greg Cox received complaints from Chula Vista residents that trail users at the City Golf Course and surrounding trail must either cross a 30-foot wide drainage outfall, frequently inundated with water, or bypass the outfall by using a narrow sidewalk adjacent to a busy highway. Supervisor Cox requested that Chula Vista resolve this issue. Because of a budget shortfall, however, Chula Vista had no funds that could be allocated to a pedestrian bridge project.

² County of San Diego, California Board of Supervisor's Policy B-072.

³ *Id.* at paragraph 1(a).

On August 8, 2012, the County and Chula Vista entered in an NRP Grant Agreement (GA or Grant Agreement) awarding \$185,000 of NRP funds to Chula Vista. The terms of the Grant Agreement indicated that the \$185,000 was solely to be used for the “Chula Vista Golf Course Jogging Bridge and Trail construction project, including planning, engineering, purchase and installation of a prefabricated bridge and jogging trail and related amenities.”⁴ The Grant Agreement contained further conditions and restrictions on the funds including a deadline for completion, documentation of expenditures, inspections by the County, and refunds to the County should the funds not be used according to the Agreement. Specifically, the Grant Agreement requires:

- The City shall spend all grant funds provided by the County within 12 months. (GA, ¶ 4(a));
- The City shall provide documentation to the County setting forth the City’s total actual expenditures of the grant funds including invoices/receipts, credit card statements, check stubs, check copies, copy of canceled checks, copy of bank statements, etc. (GA, ¶ 4(b));
- If the County determines the City has failed to spend all the grant funds or disallows any expenditure, or the grant funds exceed the total actual expenditures, the City must refund that amount back to the County. (GA, ¶ 4(c));
- The County may request a refund in whole or in part if the City failed to provide required documentation of expenditures. (GA, ¶ 4(d));
- The grant funds cannot be used for fundraising activities. (GA, ¶ 5(c));
- The grant funds cannot be used for foods or beverages. (GA, ¶ 5(d));
- The City cannot donate any portion of the grant funds to a third party (GA, ¶ 5(f));
- The City cannot transfer interest in the Grant Agreement without prior written consent of the County. (GA, ¶ 5(g));
- The City must permit the County to inspect, audit and make transcripts of the records, including invoices, materials, payroll, and personnel records with respect to all matters covered by the Grant Agreement. (GA, ¶ 8);
- The County can terminate the Grant Agreement at any time. (GA, ¶ 10).

In addition to the NRP funds provided by the County, Chula Vista expects to spend \$67,000 from its general fund to complete the Project, which amounts to less than 30 percent of the costs of the Project.⁵

On May 29, 2013, Chula Vista issued a “Notice to Contractors” inviting bids for the Project that included the language, “Contractors are not required by bid specifications to pay prevailing wage...to persons employed by them for work on this Contract in accordance with Section 2.58.070 of the Chula Vista Municipal Code.” On July 11, 2013, the Contract was awarded to “Just Construction.”

Chula Vista is a charter city. The City’s Charter contains a “home rule” provision in article 2, section 200 stating that “[t]he city shall have the power to make and reinforce all laws and regulations in respect to municipal affairs...” In 1992, the City Council adopted Chula Vista Municipal Code (“CVMC”) section 2.58.070, entitled “Payment of Prevailing Wages.” CVMC Section 2.58.070 states that “No contract shall require the payment of the prevailing wage

⁴ Grant Agreement, paragraph 2.

⁵ As of August 22, 2013, Chula Vista had spent approximately \$31,000 on staff services to complete the Project.

schedule: unless A. The prevailing wage is legally required, and constitutionally permitted to be imposed, by federal or state grants; or B. The Project is considered by the city council not to be a municipal affair of the city; or C. Payment of the prevailing wage is authorized by resolution of the city council.”

Discussion

Labor Code section 1771⁶ generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (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” It is undisputed by the City that the Project is public work under this definition.

The City asserts, however, that its charter exempts it from complying with California’s prevailing wage laws, section 1720 et seq. (CPWL), specifically the payment of prevailing wages, because the Project is purely a municipal affair. This argument fails for the reasons stated below.

The California Constitution explicitly authorizes charter cities to govern themselves, free from intrusion of the state legislature, regarding matters deemed municipal affairs. (*State Bldg. and Constr. Trades Council of California, AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 555; Cal. Const. Art. XI, section 5.) Charter cities “may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.” (Cal. Const. Art. XI, section 5(a).) “City charters adopted pursuant to this Constitution shall...with respect to municipal affairs...supersede all laws inconsistent therewith.” *Id.* As to matters which are of statewide concern, charter cities remain subject to and controlled by general state laws regardless of the conflicting provisions of their charters. (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61-62.)

The California Supreme Court recently reiterated the four-part analytical framework for resolving whether a matter falls within the home rule authority of a charter city:

“First, a court must determine whether the city ordinance at issue regulates an activity that can be characterized as a ‘municipal affair.’ Second, the court must satisfy itself that the case presents an actual conflict between [local and state law]. Third, the court must decide whether the state law addresses a matter of ‘statewide concern’. Finally, the court must determine whether the law is ‘reasonably related to...resolution of that concern and ‘narrowly tailored’ to avoid unnecessary interference in local governance.”

(*City of Vista, supra*, at p. 556; internal quotes and case cites omitted.) The Court in *City of Vista* held that the “wage levels of contractor workers constructing locally funded public works are a municipal affair, and that these wage levels are not a statewide concern.” (*Id.* at pp. 556, 566.) The analysis of the coverage question for this Project must begin with the first *City of Vista* factor.

⁶ All citations are to the California Labor Code and all subdivision references are to the subdivisions of section 1720, unless otherwise specified.

The Project is not a Municipal Affair under an Analysis of *McGuire* Factors

Although the California Constitution grants charter cities the ability to regulate their own municipal affairs, the California Constitution does not provide a definition of what constitutes a municipal affair. As a result, “courts must decide, under the facts of each case, whether the subject matter under discussion is of municipal or statewide concern.” (*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 292.)

In *Southern California Roads Co. v. McGuire*,⁷ the California Supreme Court considered the following factors in determining whether a project is a municipal affair or a matter of statewide concern: (1) the extent of the non-municipal control over the project; (2) the source and control of the funds used for the project; and (3) the nature and purpose of the project, including its geographical scope and extraterritorial effects.

1. Extent of Non-Municipal Control Over the Project

Regarding the first factor, the City planned the Project, determined scope of work, advertised for bids and awarded the contract. The City also oversaw construction activities, including reviewing plans and specifications.

In its grant application process, however, the County determined if the City met the County’s eligibility requirements for NRP funding, identified the permissible purposes of the grant funds, and allocated the grant funds for the sole specified purposes.⁸ In addition, the County’s Grant Agreement set a deadline to use the grant funds, imposed various other restrictions on the expenditures, and gave the County inspection and audit control over the expenditures, including payroll. These conditions in the Grant Agreement were enforceable by County’s right to terminate the Grant Agreement and obtain refund of the funds. Where over 70 percent of the Project costs were funded by the County, the conditions in the Grant Agreement represent shared control over the Project between City and County. Under these facts, analysis of the first factor does not support the City’s assertion that there is no extra-municipal control over the Project.

2. Source and Control of Funding

With respect to the second factor, the Project is funded by two sources, a NRP grant from the County in the amount of \$185,000 (which the City sought) and up to \$67,000 from the City’s general fund.

The terms and conditions of the County NRP grant include external oversight and control over how and when the County grant funds are spent. Contrary to the City’s assertion that the County has minimal control, the County retained approval authority over all expenditures. Although the City received all grant funds upfront and was not required to submit progress reports, the County

⁷ (1934) 2 Cal.2d 115, 120-23.

⁸ The funds are only to be used for the Chula Vista Golf Course Jogging Bridge and Trail construction project, including planning, engineering, purchase and installation of a prefabricated bridge and jogging trail and related amenities. (GA, ¶ 2.)

has the authority to audit and inspect all fund expenditures at any time. In addition, at the conclusion of the Project, the City must submit to the County a “Documentation of Grant Expenditures” providing invoices/receipts, credit card statements, check stubs, check copies, copies of canceled checks and copies of bank statements. (GA, ¶ 4(b).) The County’s authority to review all expenditures extends to a right to obtain refunds from the City for those expenditures that do not comply with the Grant Agreement. (GA, ¶ 4(c).)

The Project would not have been possible without the assistance of the County and its taxpayers. Indeed, the City states that “the City had no funds in its budget that could be allocated to a pedestrian bridge project.”⁹ The manner in which the County’s tax dollars are spent is of obvious concern to more than just those living within the boundaries of City.

The City attempts to distinguish prior public works coverage determinations issued by the Department by arguing that because the Project is partially funded by the City’s general fund and not solely from non-municipal sources (the County), the Project is still a municipal affair. Case law and prior coverage determinations, however, support the contrary conclusion. A non-municipally funded project is excluded from the ambit of a “municipal affair”. (See, *e.g.*, *Young v. Superior Court of Kern County* (1932) 216 Cal. 512, 516 [a charter city construction project “cannot be deemed a matter of purely municipal concern” in part because it was to be financed from federal, state, and county funds].)

Because the Project was primarily funded by the County, analysis of the second *McGuire* factor does not support City’s assertion that the Project is purely a municipal affair. The Court’s decision in the *City of Vista* is distinguishable on this point because the project in that case was only locally funded. (See *City of Vista, supra*, 54 Cal. 4th at p. 566.) Here, where non-city funds are used, the Project cannot properly be characterized as a locally funded project.

3. The Nature and Purpose of the Project

Regarding the third factor, the installation of a fifty foot bridge and trail improvement located entirely within the City serves a municipal purpose in improving trail crossings within the City. It would also, however, benefit the County’s neighborhoods and communities adjacent to the City. The City’s grant application states that the Project will serve the cities of Chula Vista, Bonita and Sunnyside, and that the Project will increase the experience of hundreds of thousands of trail users annually. Therefore, because the Project, and the County’s grant funds are intended to benefit the entire community, the third *McGuire* factor does not favor finding Project purely a municipal affair undertaken by the City.

In sum, due to the shared control of the Project between City and County, the County’s provision of and control over the vast majority of funding for the Project, and the extra-municipal purposes served by the Project, the Project does not constitute a municipal affair. Therefore, an analysis of the other factors from the *City of Vista* (*City of Vista, supra*, 54 Cal. 4th at p. 556 [i.e., actual conflict between municipal and state law, state law addresses a statewide concern, and if the state law is reasonably tailored and narrowly tailored]), is unnecessary because this Project falls outside the home rule authority of a charter city.

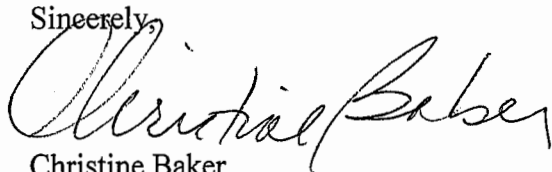
⁹ City of Chula Vista Response, page 3.

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For the foregoing reasons, the Golf Course Pedestrian Trail and Bridge Improvements Project is a matter of statewide concern that comes within the domain and statutes of the general laws of the state. Accordingly, the Project is a public work that is subject to California's prevailing wage requirements.

I hope this letter satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Christine Baker". The signature is written in black ink and is positioned above the printed name and title.

Christine Baker
Director