

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL
RE: PUBLIC WORKS CASE NO. 2014-023
MOBILE MODULAR
LIVERMORE VALLEY JOINT UNIFIED SCHOOL DISTRICT

I. INTRODUCTION

On November 6, 2014, the Director of the Department of Industrial Relations (DIR) issued a public works coverage determination (Determination) in the above-referenced matter finding that the dismantling and removal of modular units (Project) was public work subject to prevailing wage requirements.

On December 5, 2014, Mobile Modular Management Corporation (Mobile Modular) timely filed a notice of appeal of the Determination pursuant to section 16002.5(b) of title 8 of the California Code of Regulations (Appeal).

In responding to this appeal and to avoid repetition, the original Determination is incorporated herein by reference. For the reasons stated below, the Appeal is denied and the Determination is affirmed.

II. RELEVANT FACTS AND CONTENTIONS

The facts as described in the Determination are undisputed and, to that extent, they are incorporated by reference in this Decision. At issue are some of the work activities described in two Lease Agreements entered into between Livermore Valley Joint Unified School District (District) and Mobile Modular. The work activities include delivery, installation, and eventual dismantling and removal of six modular classrooms and restrooms for District schools, Joe Mitchell K-8 School and Junction Avenue K-8 School. The leased modular classrooms remain

the property of Mobile Modular and are returned to Mobile Modular upon expiration of the lease. The Lease Agreements have a length of twenty four (24) months, with the option to renew on a month-to-month basis.

According to Mobile Modular, upon delivery of the modular units, Mobile Modular's contractors assemble wooden supports and then place each modular unit on top of the supports. The contractors then attach the modular unit to the wooden supports and install the ramps and skirting which are attached to the modular units. Mobile Modular does not dispute that this work constitutes "installation" and is public work for purposes of California's prevailing wage law.

Upon the expiration of the contract term, the District is responsible for disconnecting any utilities attached to the modular units. As stated in its Appeal, Mobile Modular then engages in "de-installation" activities by detaching the modular unit from its wooden supports, removing the ramp and skirting, and then placing the modular classrooms on trucks for return delivery.

The Lease Agreements list "Charges Upon Return" for each modular classroom and restroom. Charges are included for "Prepare Equipment for Removal," "Removal, Ramp Skirting," and "Return Haulage Lowboy 12 Wide." (Lease Agreement 1, p. 2; Lease Agreement 2, p. 2.) There are no prevailing wages indicated under "Charges Upon Return". (*Ibid.*) The charges indicated in the Lease Agreements are paid by the District with public funds.

On Appeal, Mobile Modular contends that the "removal activities", the dismantling and removal of the modular units, are not public work subject to California prevailing wage requirements. The Appeal is based on the following grounds:

1. The removal activities do not constitute "demolition" under Labor Code section 1720¹ because Mobile Modular is not "tearing down" or demolishing modular classrooms. Mobile Modular argues that Public Works Case No. 2005-018 (February 28, 2006) *Eastside High School* has no precedential or analytical value, and de-installation does not constitute demolition.
2. The removal activities are not part of the "execution" of a public works contract because the removal activities are not part of a public works contract, and the removal activities are "independent" of, and not "integral" to, installation of modular classrooms.

¹ All subsequent references are to the Labor Code unless otherwise specified.

III. DISCUSSION

A. The Dismantling and Removal of Modular Units Constitutes “Demolition.”

Labor Code section 1771 generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1), defines “public works” generally under a three pronged definition: [c]onstruction, alteration, demolition, installation, or repair work done under contract, and paid for in whole or in part out of public funds...”

Mobile Modular first argues that the “removal activities” do not meet the definition of “demolition” because Mobile Modular is not tearing down or demolishing classrooms. While Mobile Modular argues that the definition of “demolition” is limited to “extensive destruction”, previous attempts to arbitrarily limit the scope of terms in section 1720, subdivision (a) have been denied. (*Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 554.) The *Oxbow* Court refused to adopt a proposed definition of “construction” relying on *Priest v. Housing Authority of Oxnard* (1969) 275 Cal.App.2d 751 (*Priest*). In *Priest*, the appellant tried to parse the meaning of the term “demolition” under section 1720, arguing the undefined term only encompassed destruction of objects above ground. (*Id.* at pp. 755-756.) The Court refused to limit the meaning of demolition to words not stated in the statute, finding that if appellant’s definition were followed, “then the word is to be given a limitation not spelled out by the Legislature.” (*Id.* at p. 756.)

In *Priest*, the contract required the removal “from premises all surface and above-surface materials, including concrete, blacktop and debris. This material is in the form of pavement, curbs, gutters, sidewalks, foundations, piers, trees, shrubs, clothes poles, etc....Underground pipe up to a depth of three feet and any other foreign material detrimental [sic] to farm operation shall be removed to the same depth.” (*Priest, supra*, 275 Cal.App.2d at p. 755.) The Court contemplated “construction” to include the entire process, “including construction of basements, foundations, utility connections and the like, all that may be required in order to erect an above-ground structure”. (*Id.* at p. 756.) The Court concluded that “demolition” included, tearing down and removing things previously constructed, above or below surface. (*Ibid.*)

The Determination is in line with *Priest* as “demolition” has not been limited by the courts to “extensive destruction” and the dismantling and removing of modular units previously installed above the surface fit within *Priest*’s inclusive definition. The Determination is also consistent with a prior coverage determination, *Installation and Removal of Temporary Fencing and Power and Communications Facilities/Eastside High School-Antelope Valley Union High School District*, Public Works Case No. 2005-018 (February 28, 2006) (*Eastside High School*). Although not precedential, *Eastside High School* applied *Priest* in the same manner to find that the removal of temporary fencing and power and communication facilities after previously being installed fit within the definition of “demolition”.

In *Eastside High School*, the contractor was responsible for installation and removal of temporary perimeter fencing and temporary power and communications facilities at the construction site and performed this work for the contractor on a purchase order and an invoicing basis. Similarly, Mobile Modular is responsible for the initial installation, and subsequent de-installation activities of detaching the building from its wooden supports, removing the ramp and skirting, and then placing the modular classrooms on trucks for return delivery. As with *Eastside High School*, the personal property is not destroyed and the work activities are charged for when they occur. Therefore, the dismantling and removal work here constitutes “demolition” under *Priest*.

A reasonably broad interpretation of a “public work” as used section 1720(a)(1) is also in keeping with the purpose of prevailing wage law. (*Oxbow, supra*, 194 Cal.App.4th at p. 549.) The object that a statute seeks to achieve is of primary importance in statutory interpretation. (*Id.* at p. 550 (citing *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987).) The overall purpose of the prevailing wage law...is to benefit and protect employees on public works projects. (*Ibid.*) Labor Code section 1720 embodies the long-standing public policy of California to require employers engaged on public works projects to pay the prevailing wage to their workers if the project is ‘paid for in whole or in part out of public funds’. (*Id.*, (citing *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 294 (*Local 104*)).)

Mobile Modular further argues that “installation” and “construction” are distinct concepts given the enactment of SB 975 which added “installation” to the definition of public works.

Mobile Modular then argues that “demolition” is the antonym of “construction”; and de-installation and disassembly are the antonyms of “installation”, which are not included in section 1720(a)(1).

In fact, “installation” and “construction” are not distinct concepts. For years prior to the addition of “installation” to section 1720, the Department found that installation work could rise to the level of construction for purposes of section 1720. See, e.g., pre-SB 975 determinations in PW 2000-052, *Installation of Modular Furniture/Department of General Services* (August 18, 2000), PW 99-034, *Valley View Elementary School* (September 29, 1999), PW 99-061, *Toilet Partition/Bathroom Accessories Installation/Zanker Elementary School* (November 10, 1999), PW 99-060, *Metal Workers and Metal Storage Shelving* (November 30, 1999), and PW 99-012, *Caltrans, San Diego Border Patrol and California Highway Patrol Facility, Installation of Fencing, National Fence* (September 23, 1989).

The distinction between the pre-SB 975 and post-SB 975 versions of section 1720 are immaterial. Whether the work is installation rising to the level of construction under the pre-SB 975 version of section 1720 or “installation” under this post-SB 975 version of section 1720 produces the same result. This is borne out of the legislative history of SB 975, which indicates that the insertion of “installation” as a type of covered work in section 1720, among other changes, was meant to conform to “several precedential coverage decisions made by the Department of Industrial Relations.” (Senate 3d Reading, Senate Bill 975 (2001-2002 Reg. Sess.) as amended August 30, 2001, p. 4; Senate Rules Committee, Office of Senate Floor Analyses, Unfinished Business of Senate Bill 975 (2001-2002 Reg. Sess.) August 30, 2001, p. 5.)

Thus, Mobile Modular cannot argue that “construction” and “installation” are distinct concepts based on the SB 975 statutory amendment to support the argument that the activities at issue cannot fall within the definition of “demolition” under section 1720(a)(1).

B. The Dismantling and Removal of Modular Units is Performed in the Execution of the Public Works Contract.

Section 1772 provides that: “Workers employed by contractors or subcontractors in the execution of any contract for public works are deemed to be employed upon public work.”

Mobile Modular first argues that the Determination appears to consider the Lease Agreements to be public works contracts, stating that the entirety of the Lease Agreements is not a public works contract. In fact, the Determination acknowledges that the work activities listed in section 1720, subdivision (a)(1) do not encompass leasing but that lease agreements can form the basis of a public works contract citing *Hensel Phelps Construction v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020.

The Determination found that the dismantling of the modular units is work that is being performed in execution of a contract for public work. The statutory term ‘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. (*Williams v. Snsands Corporation* (2007) 156 Cal.App.4th 742 (*Williams*)). The Determination discussed *Williams* and *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434 (*Sansone*), to the extent they set forth the general framework, in identifying specific factors,² for considering whether certain functions are integral to the performance of a public works contract. The Determination also acknowledged that because *Sansone* and *Williams* arose in the context of hauling materials, they are limited in the analysis of dismantling and removal of modular units. In its Appeal, Mobile Modular agrees that the definitive question here is whether, in the dismantling and removal activities, Mobile Modular was conducting an operation truly independent of the performance of the general contract for public works, as opposed to conducting work that was integral to the performance of that general contract. (*Williams, supra*, at p. 752).

² Whether the prime contractor obtained the materials from the standard commercial supplier and whether hauled materials were immediately distributed onto the jobsite (*Sansone*); 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 the work was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract (*Williams*). (*Local 104, supra*, 162 Cal.App.4th at p. 206)

Here, the dismantling and removal work is required to be performed by Mobile Modular at the end of the Lease Agreement, as stated in the contract. The Lease Agreement specifies that Mobile Modular is responsible for preparing the modular units for removal, removing the ramp and skirting and lifting the modular units off the District's sites. This work includes detaching of the wooden supports and de-installation of the ramp and skirting. The Lease Agreement further provides specific charges for this contemplated and specified work. Thus, the dismantling and removal activities were contemplated when the parties entered the Lease Agreement and are necessary to the carrying out and completion of all provisions of the contract.

Mobile Modular nonetheless argues that the dismantling and removal work is not "integral" to the public work installation activities because there is not a definite date that the removal activities will be conducted as the lease can be extended. This circumstance does not negate the fact that eventually this work will occur as provided by the temporary leasing contract. The Lease Agreements specifically outline the eventual removal activities and require an exact payment for the work.

Mobile Modular adds that the Lease Agreements are akin to a sales and installation contract, with the ability to repossess the property if timely payments are not made. The Lease Agreements do not provide an option to purchase the classrooms, and no facts have been presented to suggest that the removal activities may or may not occur.

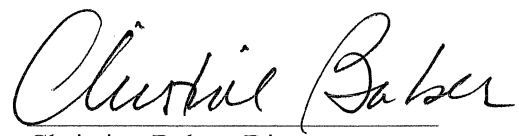
Thus, under *Williams*, the dismantling and removal of the modular units is a necessary part of the carrying out and completion of all provisions of the contract and is subject to prevailing wage requirements under sections 1772.

IV. CONCLUSION

In summary, for the reasons set forth in the Determination and in this Decision on Administrative Appeal, the Appeal is denied and the Determination affirmed. This decision constitutes the final administrative action in this matter.

Dated:

8/21/2015



Christine Baker, Director