

DEPARTMENT OF INDUSTRIAL RELATIONS

Katrina S. Hagen, Director

Office of the Director

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May 13, 2020

Scott Kronland
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, California 94108

Re: Public Works Case No. 2018-008
Installation of Energy Efficiency Improvements
Cotati-Rohnert Park Unified School District

Dear Mr. Kronland:

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 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 Installation of Energy Efficiency Improvements at Marguerite Hahn Elementary School in the Cotati-Rohnert Park Unified School District is public work and is therefore subject to prevailing wage requirements.

Facts

A. PG&E's On-Bill Financing Program.

Pacific Gas and Electric Company (PG&E) offers an On-Bill Financing Program² to its business and government customers to finance energy efficiency improvements. Through the program, PG&E provides interest-free loans to their customers, which are paid back from monthly energy cost savings on the customer's utility bill. According to PG&E, the program is designed to facilitate the adoption of energy efficiency by removing up-front costs to the customer.

The PG&E On-Bill Financing Customer and Contractor Handbook describes the process. PG&E conducts a payment history screening on the customer, and then notifies the customer of eligibility to participate in the program. To be eligible, the customer must be in good credit standing with PG&E, has maintained an active account for the previous 24 months and had service at the premises to be retrofitted for at least 12 months. For a

¹ Unless otherwise indicated, all further statutory references are to the California Labor Code and all subdivision references are to the subdivisions of section 1720.

² The On-Bill Financing Program was established through various proceedings at the California Public Utilities Commission.

project to qualify for the program, the proposed upgrades must save energy and the estimated energy savings must be sufficient to repay the loan during the maximum allowable payment term of 120 months.

The eligible customer is responsible for obtaining its own contractor to complete the project as PG&E does not recommend or certify any contractors for the program. The customer's contractor submits an itemized project proposal with energy savings calculations to PG&E for review. The savings calculations are used to determine whether the project qualifies for the financing.

PG&E reviews the contractor's proposal and provides the customer with a loan agreement including proposed loan terms. The PG&E loan is interest-free. The amount of the loan is determined by the contractor's proposed project costs. The monthly installment is the estimated monthly energy savings resulting from the project. The loan term is calculated by dividing the loan amount by the estimated monthly energy cost savings. The loan is calculated to be "bill neutral" where the projected monthly energy savings offset the fixed monthly loan installment. Where a project's payback period exceeds the maximum loan term of 120 months, customers may be eligible to buy down the project cost in order to meet the necessary loan terms. This buy-down reflects the amount that will not be covered by On-Bill Financing and is paid directly to the contractor, per an agreement between the contractor and customer.

As part of the loan agreement, the customer decides whether the loan proceeds will be issued to the customer, or sent directly to the customer's contractor, on the customer's behalf. The loan agreement is then executed by the customer and PG&E. At this point, PG&E reserves funding and grants permission to install the project.

After installation, the contractor submits a final itemized invoice to PG&E. PG&E completes a post inspection and verification of the work completed. If there are changes to the project scope, energy savings, or costs, PG&E provides the customer with a Loan Modification Agreement. The reserved loan proceeds are then disbursed as directed by the customer, to either the customer or the customer's contractor.

The customer then repays the loan to PG&E through the fixed monthly installment on its utility bills. After the energy savings, the new monthly loan payment does not cause the customer's monthly bill to fluctuate from its usual charges. After the loan is paid in full, the customer will see a decrease in their monthly charges.

B. The District's Loan Agreement with PG&E for the Project.

As part of this program, the Cotati-Rohnert Park Unified School District (District) entered into a Loan Agreement with PG&E to pay for the installation of certain energy efficiency improvements at Marguerite Hahn Elementary School. An initial loan agreement was signed by the District on July 7, 2017. According to the initial agreement, the District arranged for Contractor EcoGreen Solutions (EcoGreen or Contractor) to complete the improvement work.

The EcoGreen Solutions Audit Report and Quote for Marguerite Hahn Elementary School details the scope of work as LED light fixture replacements of the existing lighting, for a total project cost of \$213,002.09. The District approved of the installation work and gave permission for EcoGreen to proceed with the work at Marguerite Hahn Elementary School, by email from the District to EcoGreen, dated March 2, 2018.

A subsequent Loan Agreement with PG&E was signed on March 16, 2018.³ The terms were included in the Loan Particulars section. The total project cost was \$213,002.50. There was a PG&E business rebate for \$21,658.40, which was assigned by the District to EcoGreen. There was a customer buy-down of \$29,951.41, but EcoGreen stated it would absorb the District's buy-down costs for this Project. The remaining loan balance was \$161,392.69. The monthly payment was \$1,344.94 for 120 months. The estimated monthly energy cost savings was \$1,361.43.⁴

In the Loan Agreement, the District directed PG&E to send its loan proceeds to the Contractor, rather than having the loan proceeds "pass through" the District. The Loan Agreement also provides that the District will repay the loan balance to PG&E irrespective of whether the work is actually completed or whether the work delivers actual energy efficiency savings to the District.⁵

International Brotherhood of Electrical Workers Local 551 requested a coverage determination, arguing that the energy efficiency improvements were public work and the Project is subject to California Prevailing Wage Law.

Discussion

California Prevailing Wage Law generally requires the payment of prevailing wages to workers employed on public works. (§ 1771.) "Public works" is generally defined as construction, alteration, demolition, installation, or repair work that is done under contract and paid for in any part out of public funds. (§ 1720, subd. (a)(1).)

Section 1720, subdivision (b) states in relevant part: "[f]or purposes of this section, paid for in whole or in part out of public funds" means all of the following: (1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer"

³ Besides the Loan Particulars, the terms and conditions remained the same as the initial loan agreement.

⁴ These loan terms were also reported by EcoGreen Solutions to the District's Board of Trustees at a meeting on March 27, 2018.

⁵ (See Loan Agreement, section 7 ["Customer shall repay the Loan Balance to PG&E as provided in this Loan Agreement irrespective of whether or when the Work is completed, or whether the Work is any way defective or deficient, and whether or not the Work delivers energy efficiency savings to Customer."])

There is no dispute that the work involved the “installation” of energy efficiency improvements, the type of work covered under section 1720, subdivision (a)(1) (hereafter section 1720(a)(1)). The District, PG&E and Contractor EcoGreen, however, dispute that this work was “done under contract” and “paid for in whole or in part out of public funds,” and that it does not satisfy the definition of “public works.” Therefore, they argue that there is no requirement to pay prevailing wages to Contractor’s workers.

For the reasons set forth below, the work is installation, done under contract and paid for in full out of public funds, meeting the definition of section 1720(a)(1) and requiring the payment of prevailing wages.

A. The Construction is Done Under Contract.

The District argues that the Project is not subject to prevailing wages because the District did not contract with Contractor, and that the financial arrangement is with PG&E. The District misconstrues the “under contract” language in section 1720(a)(1), which only requires that the work be done under contract, not that the contract be awarded by a public entity or awarding body. (See PW Case No. 2013-015, Decision on Administrative Appeal, *Central Valley Next Generation Broadband Infrastructure Project – Central Valley Infrastructure Network* (Jan. 14, 2015) (*Central Valley*)).

The California Supreme Court analyzed the meaning of “work done under contract” in *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63-64 (*Bishop*). *Bishop* concluded that, by using the “under contract” language, the Legislature intended to exclude the situation where the public agency was using its own employees to carry out the construction. The Legislature later codified the *Bishop* decision by amending section 1771 to expressly exclude “work carried out by a public agency with its own forces.” (Stats.1974, ch. 1202, § 1); (see also *Azusa Land Partners, LLC v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 20 (*Azusa*) [statutory requirement means that work only must be done “under contract (i.e., not by the public entity’s own employees)”) and *O.G. Sansone Co. v. Dept. of Transportation* (1976) 55 Cal.App.3d 434, 459, fn. 5.)

The Department has followed Supreme Court precedent and explained the meaning of “under contract” in several coverage determinations. (See, e.g., *Central Valley*, PW 2005-025, *Canyon Lake Dredging Project, Lake Elsinore and San Jacinto Watersheds Authority*, (June 26, 2007) (*Canyon Lake Dredging*) and PW 98-005, *Goleta Amtrak Station* (November 23, 1998).) As was observed in *Canyon Lake Dredging*, section 1720(a)(1) “only requires that the [work] be done under contract, not that the contract be awarded by any public entity.”

The work at issue is being done under contract. The District’s employees or “own forces” did not complete any work. The On-Bill Financing Customer and Contractor Handbook states that the customer is responsible for obtaining its own contractor for the project. In the Loan Agreement, the District agreed that it would arrange for its contractor

to provide the work.⁶ Section 3 of the Loan Agreement further states that the District independently hired contractors to perform the work on behalf the District. The outside contractor was identified in the Loan Agreement as EcoGreen. EcoGreen was hired to perform the installation work according to the EcoGreen Solutions Audit and Quote for Marguerite Hahn Elementary School, which the District approved. The Loan Agreement, the Audit and Quote, and the District's approval to proceed with the installation work satisfy the "under contract" element of section 1720(a)(1).

B. The Project was Paid for with Public Funds.

Contractor and the District argue that no amount of funding was paid by the District for any portion of the Project, and that the transaction does not fall under section 1720, subdivision (b)(1) since no public funds were involved. This assertion rests on the theory that the source of the Project's funding was from PG&E, because the District's personnel did not actually handle the funds and physically send them to Contractor. The fact that the District used its own loan proceeds to pay for the installation work contradicts this argument.

The Court of Appeal has stated that money collected for, or held in coffers of, a public agency constitutes "public funds" under section 1720. (*Azusa, supra*, 191 Cal.App.4th at p. 24 (citing PW Case No. 93-054, *Tustin Fire Station* (June 28, 1994)).). In *Azusa*, the court rejected the developer's argument that the proceeds from the issuance of Mello-Roos tax bonds never entered the public coffers of the City of Azusa. (*Id.* at pp. 22-29.) The developer argued that, since the proceeds were wired directly from the underwriter to Wells Fargo bank, the fiscal agent for the City, Wells Fargo merely held the funds in trust, with disbursement of the funds to the developer dictated by contract, without the City's discretion. (*Id.* at pp. 25-26.) The court disagreed, finding that the funds held by Wells Fargo were in the public coffers and constituted public funds because the City maintained exclusive control over the funds and all disbursements, and Wells Fargo lacked authorization to pay absent express authorization from the City. (*Id.* at p. 26.)

The Department has also considered similar facts in the case of PW Case No. 2012-015, *Renovation of Yuba City Office Building, Regional Housing Authority of Sutter & Nevada Counties* (August 28, 2012) (*Yuba City*). In that case, the housing authority borrowed money from a lender for the purchase and rehabilitation of an office building. The housing authority asserted that the project was not paid with public funds since the loan proceeds were held by the lender and disbursed by the lender directly to the contractor, without entering the public coffers. The Department rejected this argument citing *Azusa* and finding that the funds were public because they were under the control of the housing authority, disbursed upon the housing authority's authorization to pay for the project, and had to be repaid by the housing authority to the lender.

Both *Azusa* and *Yuba City* are instructive to the present case. Here, the District entered into a Loan Agreement with and borrowed money from PG&E. After the loan was

⁶ (See Loan Agreement, section 1 ["Customer shall arrange for its Contractor, as identified at the end of this Agreement ("Contractor"), to provide the Work as described in the Application".])

made, PG&E simply held the District's funds and disbursed them according to the District's direction, like Wells Fargo did for the City in *Azusa* and the lender did for the housing authority in *Yuba City*, respectively. As was the case with Wells Fargo in *Azusa*, PG&E also lacked authority to pay Contractor, absent authorization from the District.

Contractor's argument is also contradicted by the explicit terms of the Loan Agreement. On Page 1 of the Loan Agreement, PG&E agreed to extend a loan to the District, and the parties agreed that PG&E was only providing the District with financing. Section 5 of the Loan Agreement states that checks could be issued directly to the District or to its designated Contractor, on behalf of the District. The District chose to have the funds be issued to Contractor, on the District's behalf. The terms of the Loan Agreement make clear that the District was entering into a loan transaction with PG&E, and had full control over the loan proceeds while they were being held by PG&E and also upon disbursement.

Additionally, Contractor ignores the fact that once loaned, the funds became the property of the District and the District had an obligation to repay PG&E. The District is the only entity responsible for repayment of the loan balance. Here, in accordance with *Azusa* and *Yuba City*, the loan proceeds entered the District's public coffers and became public funds when the parties entered into the Loan Agreement and the District had full control over the funds, including any disbursements.

PG&E incorrectly asserts that there was no effect on the public coffers, since the District's monthly utility bill remained the same after the installation work was completed. The savings generated by the completed energy efficiency improvements, estimated at \$1,361.43 monthly, helped to pay back the loan. The only reason that the District's monthly utility bill did not decrease immediately after the installation work was completed was because the District was paying its monthly loan installment to PG&E, on top of its actual energy bill. The public coffers were being "affected" every single month the District had to pay back the loan, even though the effect was offset by the energy savings. This scenario is no different from a public entity obtaining a loan from a bank, using the loan to fund energy efficiency improvements, seeing a reduction in their energy rates, and having that reduction be offset by having to pay back the loan every month. The public coffers have been affected because the District borrowed funds, used it on construction, and now must make monthly loan payments.

Contractor alleges that the agreement between PG&E and the District is different from a traditional public works transaction because the loan was extended based solely upon anticipated energy savings generated by the improvements and did not take into account any of Contractor's costs or profits. Any reasons PG&E may have had for choosing to extend the loan and offering a certain loan amount to the District are not relevant in determining whether or not public funds were used for construction. Here, Contractor submitted a quote for energy efficiency improvements based on its labor and material costs and profit. PG&E offered to loan a certain amount of funds to the District to be used for the quoted improvements. The District used the PG&E loan funds to pay for the improvements and the District is responsible for repaying the loan in its entirety regardless of whether the Project produced any energy savings.

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In sum, funds designated for construction were loaned by PG&E to the District, a public entity. Those funds were under the control of the District and disbursed to Contractor upon the District's authorization. The loan must also be repaid by the District. Therefore, the loan proceeds used to pay for the Project were public, rather than private, funds.

Conclusion

For the foregoing reasons, the Installation of the Energy Efficiency Improvements at Cotati-Rohnert Park Unified School District is 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