

DEPARTMENT OF INDUSTRIAL RELATIONS

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October 11, 2020

Edward Kunnes, Hearing Officer
Office of the Director, Legal Unit
Department of Industrial Relations
1515 Clay Street, Suite 701
Oakland, California 94612

Re: Public Works Case No. 2018-037
Alturas Fire Department Parking Structure Feasibility
City of Alturas

Dear Mr. Kunnes:

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 on-site soil sampling work to investigate the feasibility of constructing the Alturas Fire Department Parking Structure in the City of Alturas is public work and therefore subject to prevailing wage requirements.

Facts

In 2016, the City of Alturas (City), a general law city, sought to construct a new parking structure. City staff performed excavation work using the City's own equipment. The City then hired Anderson Engineering & Surveying, Inc. (Anderson) to perform a geotechnical study that included on-site soil sampling and testing. Anderson invoiced the City \$3,000 for the work, which was paid in full by the City Fire Department. According to the City, the study's purpose was to conduct a preliminary investigation into the feasibility of constructing a proposed public work, namely a new parking structure. Anderson describes the work as a soil feasibility study but states that what the structure would ultimately be, how it would be funded, and whether the construction would qualify as a "public work" were all unknown to Anderson at the time of its study.

On August 16, 2016, Anderson submitted a geotechnical report to the City. After analyzing the results and evaluating the costs associated with necessary site work, the

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.

City Council decided not to go forward and no further action was taken with respect to the proposed construction.

Discussion

The California Prevailing Wage Law (CPWL) requires that all workers on “public works projects,” except for projects of one thousand dollars (\$1,000) or less, must be paid at least the general prevailing rate of wages. (§ 1771.) Section 1720, subdivision (a) defines “public work” as, *inter alia*, “[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds.”

During the pendency of this request, the Legislature passed Assembly Bill No. 1768 (A.B. 1768), which amended section 1720, subdivision (a)(1). Prior to the amendment, section 1720, subdivision (a)(1) stated, in relevant part, that “construction” included “work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work.” (See former § 1720, subd. (a)(1), as amended by Stats. 2018, ch. 92, § 160 (S.B. 1289), eff. Jan. 1, 2019.) As of January 1, 2020, section 1720, subdivision (a)(1) now further clarifies that “construction” includes “work performed during the design, *site assessment, feasibility study, and other preconstruction phases of construction*, including, but not limited to, inspection and land surveying work, *regardless of whether any further construction work is conducted.*” (§ 1720, subd. (a)(1), as amended by Stats. 2019, ch. 719, § 1 (A.B. 1768), eff. Jan. 1, 2020, italics added.)

There is no dispute that Anderson’s work in question was done under contract and paid for entirely with public funds. Thus, the sole issue here is whether the on-site soil sampling work performed by Anderson, which was done prior to A.B. 1768 and the amendment of section 1720, subdivision (a)(1), qualifies as “construction” within the meaning of the former language of the statute. The A.B. 1768 amendments operate prospectively and do not apply retroactively to this Project. (See *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840 [“Generally, statutes operate prospectively only.”])

A. The Positions of the Parties.

Anderson argues that its on-site soil sampling work is not covered “public work” because the City was only looking at the possibility of constructing a new building. Actual construction never began because the City abandoned its plans at some point after Anderson’s geotechnical report. Anderson also argues that at the time it performed the sampling work, it was unknown whether the building of the proposed structure would qualify as a “public work.”

The Division of Labor Standards Enforcement (DLSE)² argues that there is no need to inquire into whether the project was completed, cancelled, or abandoned, and

² As authorized under section 1741, DLSE conducted an investigation and issued a civil wage and penalty assessment against Anderson. Anderson filed a request for review of the assessment under section 1742. After Anderson disputed coverage of the

that Anderson's on-site soil sampling work falls within the statutory language of section 1720, subdivision (a)(1) – preconstruction work, done under contract, and paid for with public funds. DLSE adds that Anderson tested soil in the context of constructing a new facility and that preconstruction soil testing is a routine aspect of any new construction project, pointing to the Scopes of Work accompanying the prevailing wage determinations that are based on the Operating Engineers Union's collective bargaining agreements. (See *Henson v. C. Overaa & Co.* (2015) 238 Cal.App.4th 184, 189 [The Department's prevailing wage determinations "generally list the scope of work and craft classifications to which the rates apply."])

The City did not expressly comment on the applicability of section 1720, subdivision (a)(1), but stated that Anderson's work involved soil testing in advance of what would have been a public work that was then not engaged.

Operating Engineers Local Union No. 3 (Local 3), which submitted a letter of opinion with respect to the request, argues that Anderson's on-site soil sampling in question is "work performed during the design and preconstruction phases of construction" under section 1720, subdivision (a)(1). Local 3 wholly rejects Anderson's argument that work is exempt from coverage because the project was not ultimately completed or because the project's status as a "public work" was unknown.

International Union of Operating Engineers Local 12 (Local 12), which also submitted an opinion letter, argues that Anderson's on-site soil sampling work fits squarely under section 1720, subdivision (a)(1) as "[s]oils testing and surveying in these 'preliminary' stages, 'feasibility' studies or 'geotechnical' work are all forms of preconstruction, which is included under the definition of construction work subject to prevailing wages." According to Local 12, the City's ultimate decision not to go forward with the project or Anderson's actual knowledge about the City's construction plan are irrelevant in determining whether the specific work in question is covered "public work."

B. On-Site Soil Sampling Work is Covered Work Performed During the Preconstruction Phase.

Former section 1720, subdivision (a)(1), explicitly includes "work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying." This sentence was added by the Legislature in 2000 via Senate Bill No. 1999 (S.B. 1999) and leaves no doubt that the definition of "construction" includes design and preconstruction activities. (Stats. 2000, ch. 881, § 1.)³ The California

on-site soil sampling work under the CPWL, the matter was referred for a coverage determination.

³ This is evinced by the legislative history of S.B. 1999, which is replete with references to the Legislature's intent that workers entitled to prevailing wages during the construction phase of a public works project should also receive prevailing wages for performing the same type of work during the design and pre-construction phases of a project. (See Assem. Com. on Labor & Employment, Analysis of Sen. Bill No. 1999 (1999-2000 Reg. Sess.) as amended Aug. 18, 2000, Aug. 18, 2000 ["[This bill] ... insures

Supreme Court described S.B. 1999 as “more than a simple restatement of existing law” and noted that the Legislative Counsel’s digest to the bill explained that it would “‘revise the definition of public works by providing that ‘construction’ includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.’ [citation.]” (*City of Long Beach v. Department of Indus. Relations* (2004) 34 Cal.4th 942, 953 (*City of Long Beach*), original italics.)

In fact, the work at issue here – on-site soil sampling – is a classic example of a preconstruction activity covered by the CPWL. Even prior to the enactment of S.B. 1999, the Department historically considered soil sampling to be subject to prevailing wage requirements. (See PW 2018-033, *Del Rio Trail Environmental Assessment – City of Sacramento* (Jan. 2, 2020) citing PW 2000-03, *Soils Testing, California Street Water Pipeline Project – Yucaipa Valley Water District* (Sept. 13, 2000) [finding soil testing covered where the “tests involved taking samples of the soil with hand tools and occasionally inserting a steel rod to detect the density of the soil.”]) Further, it has been the Department’s longstanding practice to issue prevailing wage determinations for “Building/Construction Inspectors and Field Soils and Material Testers.” Had Anderson’s on-site soil sampling been performed during the building phase of a construction project, it would unquestionably be covered. No persuasive rationale has been presented that the on-site soil sampling in this case should not be subject to prevailing wage requirements.

C. Under the Prevailing Wage Law, there is No Requirement that Actual Construction Must Begin nor a Requirement that a Contractor Must Be Aware that the Construction Project Constitutes “Public Work.”

Despite the plain language of the statute, Anderson puts forth two primary arguments for why its on-site soil sampling work is not covered “public work.” First, Anderson argues that the CPWL does not apply in this situation because the actual building or construction work never began on the proposed parking structure. Second, at the time Anderson performed the on-site soil sampling, it was unknown whether the building of the proposed parking structure would qualify as a public work. Therefore, Anderson reasons, the soil sampling work does not constitute “public work” under (former) section 1720, subdivision (a)(1), because *preconstruction* must be tied to a public work of *construction*.

that workers earning the prevailing wage in the construction phase of a project will also be entitled to that wage for the same type of work done during the design and pre-construction phases of a project, even if that work is done pursuant to a services contract or otherwise.”]; Sen. Rules. Com., Off. Of Sen. Floor Analyses, 3d reading analysis of Sen. Bill. No. 1999 (1999-2000 Reg. Sess.) as amended Aug. 23, 2000, Aug. 29, 2000 [same]; Assem. Com. on Appropriations, Analysis of Sen. Bill No. 1999 (1999-2000 Reg. Sess.) as amended Aug. 18, 2000, Aug. 23, 2000 “[This bill] ... insur[es] that workers entitled to prevailing wage during the construction phase of a public works project will get prevailing wage on the design and pre-construction phases of a project.”]; Assem., 3d reading analysis of Sen. Bill No. 1999 (1999-2000 Reg. Sess.) as amended Aug. 23, 2000, Aug. 25, 2000 [same].)

These arguments are unavailing. To adopt Anderson's position – that soil sampling in the preconstruction phase constitutes public work only if the project proceeds – would mean that contractors, public entities and other interested parties would be unable to determine at the time workers are performing preconstruction work whether they are owed prevailing wages. During the preconstruction phase, it is theoretically always unknowable whether, for any number of reasons, actual "building" work on a proposed project will begin or ultimately proceed to conclusion. It cannot have been the Legislature's intent that workers performing publicly-funded preconstruction work that is otherwise covered under the CPWL would become entitled to prevailing wages only when actual building or construction work starts on the proposed project. This would mean that workers performing preconstruction work would not become entitled to prevailing wages for months or even years after their labors had been completed.

Similarly, it may often be unknowable during the preconstruction phase whether the remaining phases of construction on the proposed project will be a public work. The CPWL's statutory exemptions, as well as the complexities of the funding and public subsidies that may ultimately occur, all contribute to this uncertainty. Again, it could not have been the Legislature's intent that workers performing publicly-funded preconstruction work would be excluded from the CPWL's protections until some later time when it becomes "known" that the project qualifies as a public work. Such a result would be contrary to the intent and purposes of the CPWL, a statute that is to be liberally construed to further its purpose of protecting and benefiting workers and the public. (*City of Long Beach, supra*, 34 Cal.4th at pp. 949-950; *see also Herbert Hawkins Realtors, Inc. v. Milheiser* (1983) 140 Cal.App.3d 334, 338 ["[S]tatutes must be construed in a reasonable and common sense manner consistent with their apparent purposes and the legislative intent underlying them."]).

Furthermore, this conclusion comports with the Department's prior coverage determination which found publicly funded preconstruction work that would otherwise require prevailing wages during the building or construction phase of a project to be covered even if the building phase for that preconstruction work was not yet fully known or completed. (See PW 2002-002, *Survey Work – Construction of Veritas Elementary School – Manteca Unified School District* (July 19, 2002) [rejecting contractor's argument that work performed during the preconstruction phase did not constitute construction because no specific construction plans existed at the time the work was completed.]

Here, the City paid Anderson to perform on-site soil sampling, and despite the actual construction of the parking structure never coming into fruition, the work clearly constitutes *preconstruction* work in the sense that it was performed for a "construction-related" purpose. In Anderson's own words, the work contracted to perform was to determine whether the soils would support "some sort of possible fire department building." Anderson's geotechnical report confirms this, and concludes: "[B]ased on our observations and review of the soils, we recommend a footing bearing of 2,500 pounds per square foot (PSF) bearing on native undisturbed soil." Stated differently, even though the proposed structure was never built, Anderson's preconstruction work was performed for the construction-related purpose of determining what type of building foundation would be necessary on the proposed site, clearly work necessary for, and preliminary to, actual

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construction, which was performed during the “preconstruction phases of construction.”
(Former § 1720, subd. (a)(1).)

Conclusion

For the foregoing reasons, Anderson’s on-site sampling work to investigate the feasibility of constructing the Alturas Fire Department Parking Structure for the City of Alturas 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