STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

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

July 7, 2011

Stephen C. Tedesco
Littler Mendelson, P.C.
650 California Street
20th Floor
San Francisco, CA 94108

Re: Public Works Case No. 2011-008
Bay Division Pipelines Reliability Upgrade, Bay Tunnel - Off-haul of Excavated Material
San Francisco Public Utilities Commission/City and County of San Francisco

Dear Mr. Tedesco:

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 off-haul and disposal of excavated material by subcontractor S & S Trucking, Inc. ("S & S"), performed in connection with the Bay Division Pipelines Reliability Upgrade – Bay Tunnel ("Project"), is subject to prevailing wage requirements.

Facts

The Project is proceeding under contract number WD-2531 ("Contract"), which was entered into on December 18, 2009, between Michels/Jay Dee/Colúccio Joint Venture, ("Contractor") and the San Francisco Public Utilities Commission. The Project is one part of the San Francisco Public Utilities Commission's Water System Improvement Program, a $4.6 billion upgrade to the City and County of San Francisco's regional and local drinking water system.[1] The Project involves adding a five-mile long, 108-inch internal diameter pipeline to the water system, extending five miles under the San Francisco Bay, from the Newark Valve Lot to the Ravenswood Valve Lot. Contractor entered into a subcontract with S & S, an independent trucking company, to transport and dispose of surplus excavated material. Work on the Project began in early 2010.

Under the off-haul subcontract, S & S is required to off-haul surplus excavated material from the Ravenswood and Newark Valve Lots and dispose of it at any of the following seven sites: Dumbarton, Bair Island, Tri City, Altamont landfill, Vasco Rd. Landfill, Newby Island, and Kirby Canyon. The subcontract runs from August 16, 2010, through May 30, 2015. S & S anticipates

[1] The Water System Improvement Program is funded by Local Measure A, which was approved by San Francisco voters in November of 2002. Local Measure A allows for public financing of improvements to San Francisco's water system using revenue bonds and/or other forms of revenue financing.

off-hauling a total of approximately 225,000 cubic yards of excavated material from the Project over the term of the subcontract. To date S & S has off-hauled 1,655 loads to the Dumbarton Quarry,[2] a private disposal site, at a cost to S & S of roughly $60 per load.

Several provisions of the Contract specifically address the off-haul and disposal work. Subsection 1.02 D of section 02111 of the Contract provides for two disposal options. Either the surplus excavated material can be reused on-site or it can be disposed of at an off-site facility of the Contractor's choosing. The disposal work must meet all Contract requirements, which include the following:

Section 02111, subsection 1.03 C.2.a. requires Contractor to:

> Prepare a Materials Management and Disposal Plan and submit a copy of the plan for the City Representative's acceptance prior to removing, recycling or disposing of any material. The plan shall identify how the Contractor will remove, handle, recycle, transport, and dispose of all material required to be removed under the contract in a safe, appropriate, and lawful manner in compliance with all applicable regulations of local, state, and federal agencies having jurisdiction over the disposal of removed materials.

Also, subsection 1.03 C.2.e. requires Contractor to:

> Submit permission to dispose of material from disposal site owner or facility operator prior to disposing of any material off-site. Include name, address, and telephone number of disposal site and of owner or facility operator. Submit weigh tickets or volume calculations, as appropriate, for all reused, recycled or disposed materials to the City representative. Refer to Document 00816, Construction and Demolition Debris Recovery Plan and Reporting Requirements.

Document 00816, Construction and Demolition Debris Recovery Plan and Reporting Requirements, mandates that Contractor, prior to commencement of work, submit a debris management plan to the City representative, and thereafter submit monthly reports quantifying the debris generated and recycled, reused, or transported to an off-site facility. As a condition of final acceptance of the work, Contractor is to submit a final construction and demolition debris recovery report to the City representative.

---

[2] The Dumbarton Quarry is located at 9600 Quarry Road in the City of Fremont, adjacent to Coyote Hills Regional Park and Highway 84. The Dumbarton Quarry was operated for 40 years as a crushed rock aggregate quarry by Dumbarton Quarry Associates, an affiliate of DeSilva Gates Construction, a general engineering contractor specializing in heavy, highway, and civil engineering construction services. On March 25, 1997, the City of Fremont approved a 10-year extension of quarry operations in exchange for DeSilva Gates Construction's agreement to convert the 91-acre quarry into a park to be transferred upon completion to the East Bay Regional Park District. DeSilva Gates Construction estimates it will need 1.5 million cubic yards of excavated material to partially fill the quarry for the creation of a freshwater lake within the park. Pacific States Environmental Contractors, Inc., another affiliate of DeSilva Gates Construction, is coordinating the disposal activities at the quarry.

Discussion

Labor Code section 1720, subdivision (a)(1)[3] defines "public works" to mean: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds ... ."

Under section 1720.3, "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including...any political subdivision of the state."

Section 1771 provides:

> 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.

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 states that: "The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rate of wages to all workmen employed in the execution of the contract."

The work of adding a pipeline to the water system entails construction, demolition and alteration. It is performed under the Contract and is paid for in whole out of public funds in the form of Local Measure A funds. Accordingly, the Project meets the definition of "public works" set forth in section 1720, subdivision (a)(1). The sole matter to be addressed is whether the off-haul and disposal of excavated material from the Project site, by independent trucking subcontractor S & S, is subject to prevailing wage requirements within the meaning of section 1772.[4]

Work falls under the scope of sections 1771, 1772, and 1774 when it is "functionally related to the process of construction" and "an integrated aspect of the 'flow' process of construction." (See *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 444, quoting *Green v. Jones* (1964) 23 Wis.2d 551, 128 N.W.2d 1, 7.)

The term "execution" in section 1772 was interpreted by the First District Court of Appeal in *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, 749-750 ("*Williams*"):

---

[3] All further statutory references are to the California Labor Code unless otherwise indicated.

[4] As noted in the Facts, the Contract itself requires that prevailing wages be paid to all workers employed by the Contractor and subcontractors on the Project. The Contract also requires adherence to the prevailing wage requirements of the San Francisco Administrative Code and the San Francisco Charter. The question here, however, is whether the off-haul and disposal work performed by S & S for the Project is subject to prevailing wage requirements as a statutory matter under the California Labor Code.

> 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.'" (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388, 20 Cal.Rptr.2d 523, 853 P.2d 978, quoting *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230, 100 Cal.Rptr. 144, 514 P.2d 1224.) 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, supra*, 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.)

The relevant factors discussed by the court in *Williams* for determining whether an independent trucking company is a subcontractor performing off-haul work in the execution of the contract include: 1) whether the transport was required to carry out a term of the public works contract; 2) whether the work was performed on the project site or another site integrally connected to the project site; and, 3) whether work that was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract. (*Williams v. SnSands Corporation, supra,* 156 Cal.App.4th at p. 752.) In addition, the court in *Williams* affirmed the validity of two prior coverage determinations concerning off-haul and disposal work. In PW 1999-081, *Granite Construction Company* ((March 16, 2000) ("*Granite*"), the public works contract obligated the prime contractor to remove excavated pavement and dirt. The court in *Williams* noted that the off-haul and disposal work was specifically incorporated into the public works project. In PW 2000-078, *Rosewood Avenue* (August 6, 2001) ("*Rosewood*"), the project involved the installation of a sewer pipe. To properly execute the contract, the contractor was required to remove excess dirt displaced by the installation work. Thus, the off-haul and disposal work was found to be functionally related to the construction work.

With regard to the first factor, the off-haul and disposal work is required to carry out express provisions of the Contract that address the disposal of excavated material. Terms applicable to the off-haul and disposal work are set forth in section 02111. Subsection 1.03 C.2.a. of section 02111 mandates preparation by Contractor of a Materials Management and Disposal Plan. This plan must specify how Contractor will remove, handle, recycle, transport, and dispose of all excavated material, in compliance with all applicable regulations of local, state, and federal agencies that have jurisdiction over the disposal of removed materials. Contractor must submit this plan to the City representative for review and approval prior to removing, disposing of, or recycling any material. Under subsection 1.03 C.2.e., Contractor must obtain authorization for disposal from disposal site/facility owners and submit that authorization to the City representative prior to disposal. Submittals are to include the name, address, and telephone number of the disposal site

and of the owner or operator of the facility. Contractor must submit to the City representative weigh tickets or volume calculations, for all reused, recycled or disposed of materials. Additionally, Document 00816 mandates that Contractor, prior to commencement of work, submit a debris management plan to the City representative, and thereafter submit monthly reports quantifying debris generated and recycled, reused, or transported to an off-site facility. As a condition of final acceptance of the work, Contractor is to submit a final construction and demolition debris recovery report to the City representative.

With regard to the second factor, the off-haul and disposal work is performed off-site. S & S is hauling the excavated material from the Project site and disposing of it at the Dumbarton Quarry, a site not integrally connected to the Project.

With regard to the third factor, notwithstanding the off-site nature of the off-haul and disposal work, the work is necessary to accomplish or fulfill the Contract. Construction of the five-mile long pipeline involves removing vast amounts of excavated material for the eventual placement of a 108-inch internal diameter pipe. Over the term of the subcontract, S & S will off-haul an approximate total of 225,000 cubic yards of excavated material. As the court in *Williams* noted, the disposal of excess dirt in *Rosewood* was functionally related to the construction work of installing a sewer pipe. Here too, the disposal of excavated material is an integral aspect of the flow of construction. While the Project is at a much larger scale than the work that was the subject of the *Rosewood* determination, the logic is the same – in order to install new pipe, excess displaced material must be disposed of. As such, the off-haul and disposal work is functionally related to the construction process.

As the court in *Williams* noted in *Granite*, because the public works contract obligated the prime contractor to remove excavated material, the off-haul work was specifically incorporated into the public works contract. Here, as in *Granite*, the Contract requires that Contractor remove and dispose of excavated material, according to contract terms. That the off-haul and disposal work is done by a subcontractor does not change this analysis. On balance, the factors set forth in *Williams* weigh in favor of coverage. Therefore, it is found that the off-haul and disposal of excavated material by S & S is work done in the execution of the Contract under section 1772 under the analysis set forth in *Williams*. This determination is consistent with the analysis and conclusion reached in PW Case No. 2008-027, *On-Haul and Off-Haul to and from the Friendly Inn/Senior Center* (October 31, 2008).

S & S argues that the Contract does not require that a particular disposal site be used, nor govern how the excavated material is to be off-hauled, emphasizing that such matters are at the discretion of Contractor. Subsection 1.02 D of section 02111 of the Contract does allow Contractor two options for disposal of excavated material. Contractor may either reuse the excavated material on-site or dispose of it at an off-site facility of Contractor's choosing. Subsection 1.02 D, however, requires that either choice meet all Contract requirements. Pursuant to the Contract's express terms, Contractor is not at liberty to unilaterally determine the manner of disposal or choose the disposal site because such decisions require approval by the City representative.

S & S adds that the hauling of clean dirt was not subject to prevailing wages in PW 2003-044, *Lindeman Brothers Trucking* (February 2, 2004 original determination, January 3, 2005 administrative appeal) ("*Lindeman*"). In *Lindeman*, the City of Dixon gave clean dirt away for free

to a company, which then came to the project site to off-haul it. The off-haul work was not performed in the execution of the public works contract. S & S also points out that clean dirt used as landfill was not considered refuse under PW 2006-017, *Off-hauling of Contaminated and Clean Soil – Long Beach Unified School District* (June 26, 2007) ("*Long Beach*"). In *Long Beach*, the clean dirt was found not to constitute refuse under section 1720.3. The issue whether off-haul of the clean dirt was subject to prevailing wage requirements under section 1772 was not addressed. S & S also states that the off-haul of road grindings was not subject to prevailing wages in PW 2003-049, *Williams Street Widening Project* (January 6, 2005 original determination, August 23, 2005 administrative appeal) ("*Williams Street*"). In *Williams Street*, the grindings became the property of the contractor and the contract did not contain specific provisions that governed the manner of removal and disposal of the road grindings, as is true here.

For the foregoing reasons, the off-haul and disposal of excavated material by S & S is subject to prevailing wage requirements because it is performed in the execution of the Contract within the meaning of section 1772.[5]

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Christine Baker
Acting Director

[5] Because the off-haul and disposal work performed by S & S is subject to prevailing wages under section 1772 as work performed in the execution of the Contract, there is no need to reach the issue whether the excavated material is refuse within the meaning of section 1720.3, which includes as "public works" the hauling of refuse from a public works site to an outside disposal location.