STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2016-017

HIGHWAY 99 REALIGNMENT PROJECT

CALIFORNIA DEPARTMENT OF TRANSPORTATION

I. INTRODUCTION

On March 24, 2017, the Director of the Department of Industrial Relations (Department) issued a public works coverage determination (Determination) in the above-referenced matter finding that the off-hauling of asphalt grindings and clean soil from the Highway 99 Realignment Project to outside locations is a public work subject to California prevailing wage requirements.

On April 24, 2017, Granite Construction Company (Granite) timely filed a notice of appeal of the Determination pursuant to Labor Code section 1773.5, subdivision (c)[1] and California Code of Regulations, title 8, section 16002.5, subdivision (b) (Appeal). All interested parties were thereafter given an opportunity to provide legal argument and any additional supporting evidence. The Western States Trucking Association (Western States), United Contractors, the Associated General Contractors of California, the Southern California Contractors Association, and the Engineering Contractors' Association filed submissions in support of the Appeal, and the California Teamsters Public Affairs Council (Teamsters) filed an opposition.

All of the submissions have been reviewed in detail and given careful consideration. For the reasons set forth in the Determination, which is incorporated into this Decision on Administrative Appeal (Decision), and for the additional reasons set forth and discussed in detail below, the Appeal is denied and the Determination is affirmed.

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[1] All further statutory references are to the Labor Code unless otherwise specified.

II. RELEVANT FACTS AND CONTENTIONS

The facts as described in the Determination are undisputed and, to that extent, they are incorporated by reference into this Decision. The project entails realignment of Highway 99 through the City of Fresno from 0.2 miles north of Ashlan Avenue to 0.2 miles north of Olive Avenue (Realignment Project) in accordance with an agreement between the California High Speed Rail Authority and California Department of Transportation (Caltrans). Caltrans, pursuant to Public Contract Code section 6700, engaged in a construction manager/general contractor project delivery method, and awarded the project to Granite.

Granite and Caltrans both agree that the Realignment Project is a public work as defined in section 1720. The sole question presented was whether the off-hauling of asphalt grindings and clean soil from the Realignment Project to, respectively, an outside recycling facility or outside storage location where the soil would be stockpiled for later reuse, is covered public work within the meaning of section 1720.3.

On appeal, Granite contends: (1) asphalt grindings and clean soil are not "refuse" because they are being recycled or reused and therefore have substantial value or worth; and (2) the Determination failed to account for section 1720.3, subdivision (a) before it considered section 1720.3, subdivision (b). The Department considers each of these arguments in turn.

III. DISCUSSION

Section 1771 generally requires the payment of prevailing wages to workers employed on public works. Until the enactment of Assembly Bill No. 514 (2011-2012 Reg. Sess.), section 1720.3 defined "public works" to include "the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California, or any political subdivision of the state."

A.B. 514 amended section 1720.3 effective January 1, 2012, to add subdivision (b), which provides:

> For purposes of this section, the "hauling of refuse" includes, but is not limited to, hauling soil, sand, gravel, rocks, concrete, asphalt, excavation materials, and construction debris. The "hauling of refuse" shall not include the hauling of recyclable metals such as copper, steel, and aluminum that

> have been separated from other materials at the jobsite prior to transportation and that are to be sold at fair market value to a bona fide purchaser.

This subdivision specifically lists the materials included and excluded from the definition of "refuse."

Granite's first argument on appeal is that asphalt grindings and clean soil are not "refuse" because they are being recycled or reused and therefore have substantial value or worth. In making its case, Granite points to definitions of "refuse" from several dictionaries, as well as previous coverage determinations that relied on the American Heritage Dictionary of English Language's definition of "refuse" as "anything discarded as useless or worthless; trash; rubbish." (New College Ed. 1979, p. 1095.) Granite's reliance on these definitions is misplaced. The statute itself defines what constitutes "refuse" without any qualifications for value, worth, or reusability of the listed materials. To the extent Granite posits that section 1720.3, subdivision (b) cannot be considered without first independently analyzing whether the subject materials are "refuse" pursuant to section 1720.3, subdivision (a), Granite is also mistaken. Subdivision (b) defines "hauling of refuse" as that phrase is used in subdivision (a). Where the Legislature has provided an express definition of a term, that definition is ordinarily binding. (*State ex rel. Dept. of California Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1011; see also *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543, 559.)

Likewise, as a statutory mandate, A.B. 514 superseded the Department's interpretations of "refuse" as used in prior administrative decisions. Irrespective of the Department's prior determinations with regard to what constitutes "refuse" under section 1720.3, the Legislature's amendment of section 1720.3 established that asphalt and soil are "refuse" insofar as off-hauling from a public works site to an outside location is concerned. Section 1720.3, subdivision (b)'s express exclusion from the definition of "refuse" is for recyclable *metals* followed by illustrative examples of the same. To qualify for that exclusion, the *metal* must be both separated from other materials at the jobsite, i.e., prior to being off-hauled, and sold at market value to a third party, bona fide purchaser. As asphalt and soil are explicitly enumerated in the definition of "refuse," they are necessarily excluded from the subsequent definition of what is not "refuse" absent a circumstance in

which they could qualify as recyclable metals. Yet, by any measure, asphalt and soil are not metals, as Granite concedes in its Appeal, and certainly not "recyclable metals" as that term is narrowly defined in section 1720.3. Furthermore, to the extent the Department's prior determinations cited the requirement of a disposal fee and/or the nature of the refuse, e.g. hazardous or contaminated, as relevant to the overall inquiry of what constitutes "refuse" under the statute, they have been superseded by A.B. 514.[2]

On this point, Granite argues that A.B. 514 did not alter the Department's historic interpretation of "refuse" under section 1720.3 and invokes the need to study the bill's legislative intent. The Determination found otherwise and explained that the plain language of section 1720.3, subdivision (b) reflects the Legislature's intent to include asphalt and soil within the definition of "refuse," regardless of whether the materials will later be repurposed. Because the statutory language is clear and unambiguous, there is no need to resort to construction or examination of legislative intent. (See *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992.)

Nevertheless, the legislative history supports the Determination's finding that only recyclable metals separated at the jobsite prior to transportation, and sold for fair market value, are specifically excepted from the definition of "refuse." Granite is correct that the Senate Committee on Labor and Industrial Relations report stated A.B. 514 was intended to clarify that "refuse" will be characterized as such unless the material is legitimately worth something and sold for fair market value. (Sen. Com. on Labor and Industrial Relations, Analysis of Assem. Bill No. 514 (2011-2012 Reg. Sess.) as amended Apr. 27,

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[2] As explained in the Department's "Correction of the Important Notice to Awarding Bodies and Interested Parties Regarding the Department's Decision to Discontinue the Use of Precedent Determinations," published on the Department's website on September 6, 2007, "[p]osted public works coverage determination letters provide an ongoing advisory service only. The letters present the Director of DIR's interpretation of statutes, regulations and court decisions on public works and prevailing wage coverage issues and provide advice current only as of the date each letter is issued...Where there is an inconsistency between a statute, regulation or court decision and a public works coverage determination letter, statutory, regulatory or case law is controlling." Because there exists an inconsistency between the Department's prior coverage determinations relating to what defines refuse for purposes of off-hauling, the statute controls, rendering asphalt and clean soil as "refuse" in the context of off-hauling from a public works site.

2011, p. 3.) Granite omitted the author's rationale for the bill, set forth in the preceding paragraphs:

> According to the author, although statute [sic] exists that guarantees prevailing wages for transporting refuse from public worksites to offsite locations, many workers do not receive the wages that they are due as a result of loopholes that circumvent the mandate. This bill is needed to clarify that "hauling of refuse" includes the hauling of materials other than bona fide commodities sold at fair market value; and defines a "bona fide commodity" as one for which there exists a publicly-traded commodity market, such as copper, steel or aluminum.
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> According to the author and proponents, current law requires that workers employed at public works sites be subject to prevailing wage for transporting refuse from the worksite to an offsite location. Unfortunately, proponents contend, some unscrupulous employers have rendered this provision meaningless by selling refuse hauled from public works sites for a nominal fee, a whole load for $1 for instance, and then refusing to pay the prevailing wage. According to proponents, the rationale behind this practice is that since the material hauled away had "some value", it was no longer refuse.

(*Id.* at pp. 2-3; see also Assem. Com. on Appropriations, Analysis of Assem. Bill No. 514 (2011-2012 Reg. Sess.) as amended Apr. 27, 2011.) This commentary suggests that the bill was intended to close the very loopholes in the statute that Granite now wishes to revive.

A.B. 514's history also confirms this to be the case. As the public works bill was initially drafted, A.B. 514 defined "hauling of refuse" to include, but not be limited to, "hauling materials that are neither bona fide commodities nor sold for market value from a public works site." (Assem. Amend. to Assem. Bill No. 514 (2011-2012 Reg Sess.) Mar. 31, 2011.) This version would have been amenable to the interpretation Granite currently offers, in that both bona fide commodities *and* materials sold for market value are excluded from the definition of "refuse." Subsequent to this amendment, however, the Assembly and Senate contracted the definition of "refuse" by limiting it to "hauling materials other than bona fide commodities sold at fair market value from a public works site." (Assem. Amend. to Assem. Bill No. 514 (2011-2012 Reg. Sess.) Apr. 27, 2011.) A "bona fide commodity" was defined as "a commodity for which a publicly traded commodity market exists, such as for copper, steel, or aluminum." (*Id.*) A.B. 514 was amended a final time in the Senate on August 23, 2011, resulting in the current version of the statute's text. The

amendments to the bill reflect that the Legislature contemplated recyclable metals such as copper, steel, and aluminum to be excepted from the definition of "refuse." (See also Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 514 (2011-2012 Reg. Sess.) as amended Aug. 23, 2011, p. 2 ["[T]his bill would ensure that only recyclable metals sold at fair market value would be deemed not to constitute refuse."].)

In contrast, Granite's suggested interpretation of the statute would undermine the purpose of A.B. 514 by allowing a reversion to the Legislature's expressly denounced practice of defining "refuse" by the nebulous, subjective standard of "value" or "worth." The amended statute makes no allowance for asphalt or soil that have worth. Because value and worth are not absolute terms, this interpretation would sow confusion and uncertainty for off-haulers. This ambiguity—and, by extension, loophole—is precisely what the Legislature sought to counter by creating a binary, objective rule for what does and does not constitute refuse. Granite is effectively arguing that the amended statute did not change the law. Moreover, it makes no difference here that the asphalt grindings in question are valued at approximately $1,000,000, based upon the credit Granite offered to Caltrans, because all the statutorily-enumerated categories of materials, regardless of value or worth, constitute "refuse" for purposes of off-hauling unless they also happen to be recyclable metals meeting the requirements in section 1720.3, subdivision (b).

Granite's second argument on appeal is that the Determination failed to account for section 1720.3, subdivision (a)'s express language defining a public work to include the "hauling of refuse from a public works site to an outside disposal location" before it considered section 1720.3, subdivision (b). Specifically, Granite takes issue with the "outside disposal location" requirement and argues that since the asphalt grindings and soil are not being hauled to an outside disposal location such as a landfill, they do not qualify as "refuse." As stated in the Determination, it is not necessary to reach the question of whether an outside recycling or storage facility may be considered an "outside disposal location" pursuant to section 1720.3 because asphalt and soil have already been deemed "refuse" under subdivision (b) and therefore worthless. The destination of the off-hauled asphalt grindings and soil accordingly *cannot* transform the character of these materials into anything other than refuse, as Granite suggests in its Appeal. Taking Granite's

argument to the extreme, even a landfill would not qualify as an outside disposal location if the off-hauler can claim that the off-hauled materials will be recycled or reused.

However, even if the Department were to squarely face the question, it is clear that the "outside disposal location" referenced in section 1720.3, subdivision (a) encompasses many types of offsite destinations, not only landfills. Again, A.B. 514's legislative history confirms this interpretation. Both the Assembly and Senate regarded the term "outside disposal location" as the equivalent of an "offsite location," not per se a landfill or dump.[3] Were the Department to employ Granite's narrow interpretation of the term, contractors could sidestep the law by simply forcing drivers to haul refuse to private storage facilities. Moreover, there is no guarantee that materials off-hauled to alleged recycling facilities would even be recycled or reused.

Several parties have submitted statements in support of Granite's Appeal and proffered similar arguments, including Western States, United Contractors, Associated General Contractors of California, Southern California Contractors Association, and Engineering Contractors' Association. All argue in some form that the Determination ignores the unambiguous statutory language of section 1720.3. As explained above, the Determination is in accord with the clear statutory mandate of section 1720.3, which dictates that recyclable metals separated at the jobsite prior to transportation *and* sold at fair market value to a bona fide purchaser are specifically excepted from the definition of "refuse." Soil, sand, gravel, rocks, concrete, asphalt, excavation materials, and construction debris, on the other hand, are "refuse," irrespective of claimed value or worth, where off-hauling from a public works site is concerned.

In addition, Western States and United Contractors argue that A.B. 514 was never intended to expand prevailing wage law. Their basis for this argument is the same excerpt from the same Senate Committee on Labor and Industrial Relations report relied upon by

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[3] See Assem. Com. on Labor and Employment, Analysis of Assem. Bill. No. 514 (2011-2012 Reg. Sess.) as amended Apr. 27, 2011, p. 2; Assem. Com. On Labor and Employment, 3d reading analysis of Assem. Bill No. 514 (2011-2012 Reg. Sess.) as amended Apr. 27, 2011, p. 2; Sen. Com. on Labor and Industrial Relations, Analysis of Assem. Bill No. 514 (2011-2012 Reg. Sess.) as amended Apr. 27, 2011, p. 3; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 514 (2011-2012 Reg. Sess.) as amended Aug. 23, 2011, p. 3; Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 514 (2011-2012 Reg. Sess.) as amended Aug. 23, 2011, p. 2.

Granite. (See Sen. Com. on Labor and Industrial Relations, Analysis of Assem. Bill No. 514 (2011-2012 Reg. Sess.) as amended Apr. 27, 2011, p. 3.) Like Granite, they extract one portion of the analysis in isolation, and ignore the rest. This characterization of the legislative history also casts a blind eye to all the other Assembly and Senate analyses reflecting those opposed to the bill were concerned it would expand prevailing wage coverage of refuse hauling. For instance, the Senate Rules Committee's third reading analysis stated:

> Opponents contend this bill expands the prevailing wage requirement for public contracts to the hauling of municipal solid waste. They argue that this bill could substantially increase the cost of services provided to schools and other public facilities that have not been factored into contractual agreements and would increase the costs of services to public agencies. Opponents also argue that this bill unnecessarily expands prevailing wage coverage of refuse hauling to the hauling of waste from a job site that is going to be sold as a recyclable commodity rather than trashed. According to opponents, efforts should be focused on encouraging the recycling of construction debris rather than endorsing legislation to restrict recycling of these materials.

(Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 514 (2011-2012 Reg. Sess.) as amended Aug. 23, 2011, p. 3.)[4] Finally, like Granite, Western States argues that section 1720.3, subdivision (b) cannot be applied without first ascertaining whether the items being off-hauled qualify as "refuse" under subdivision (a). Western States' argument is incorrect for the same reasons described above.

The Teamsters in turn submitted a response in opposition to the Appeal. They argue that Granite ignores the plain language of the statute and A.B. 514's intended effect. They refer to A.B. 514's opponents, who argued that the bill would expand prevailing wage coverage of refuse hauling, and assert that those opponents correctly understood the impact of the amended statute. Accordingly, the Teamsters urge rejection of Granite's appeal.

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[4] See also Assem. Com. on Labor and Employment, Analysis of Assem. Bill. No. 514 (2011-2012 Reg. Sess.) as amended Apr. 27, 2011, p. 2; Assem. Com. on Labor and Employment, 3d reading analysis of Assem. Bill No. 514 (2011-2012 Reg. Sess.) as amended Apr. 27, 2011, p. 2; Sen. Com. on Labor and Industrial Relations, Analysis of Assem. Bill No. 514 (2011-2012 Reg. Sess.) as amended Apr. 27, 2011, p. 3; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 514 (2011-2012 Reg. Sess.) as amended Aug. 23, 2011, p. 3; Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 514 (2011-2012 Reg. Sess.) as amended Aug. 23, 2011, p. 2.)

Upon considering the varying arguments, the Department finds that the off-hauling of asphalt grindings and clean soil from the Realignment Project to outside locations is public work within the meaning of section 1720.3 and subject to prevailing wage requirements.

IV. CONCLUSION

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

Dated: 12/29/2017

Christine Baker, Director