

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL
PUBLIC WORKS CASE NO. 2018-008
INSTALLATION OF ENERGY EFFICIENCY IMPROVEMENTS
COTATI-ROHNERT PARK UNIFIED SCHOOL DISTRICT

I. INTRODUCTION

On May 13, 2020, the Director of the Department of Industrial Relations (Department) issued a public works coverage determination (Determination) finding that the installation of energy efficiency improvements at Marguerite Hahn Elementary School in the Cotati-Rohnert Park Unified School District is public work subject to California prevailing wage requirements.

On June 11, 2020, EcoGreen Solutions, Inc. (EcoGreen) timely filed a notice of appeal of the Determination (Appeal) and requested a hearing under Labor Code section 1773.5¹ and California Code of Regulations, title 8, section 16002.5. All interested parties were thereafter given an opportunity to provide legal arguments and any additional supporting evidence. The International Brotherhood of Electrical Workers, Local 551 filed an opposition on August 7, 2020 and EcoGreen filed a reply to the opposition on August 20, 2020.

The Director has sole discretion to decide whether to hold a hearing. (Cal. Code Regs., tit. 8, § 16002.5, subd. (b).) Because the material facts are not in dispute and the issues raised on appeal are solely legal, the request for a hearing is denied.

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.

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.

II. RELEVANT FACTS AND CONTENTIONS ON APPEAL

The facts set forth in the Determination are undisputed, and to that extent, they are incorporated herein by reference.² Cotati-Rohnert Park Unified School District (District) qualified for PG&E's On-Bill Financing Program (OBF program) and obtained a loan to replace existing lighting with LED fixtures.³ There was no dispute that the work involved "installation" of energy efficiency improvements, a type of work covered under subdivision (a)(1). However, the District, PG&E, and EcoGreen disputed that this work was "done under contract" and "paid for in whole or in part out of public funds." The Determination concluded differently and found that the installation work was done under contract and paid for out of public funds, therefore meeting the definition of "public works" under subdivision (a)(1) and requiring the payment of prevailing wages.

On appeal, EcoGreen offers two main arguments for why it believes the Determination was wrongly decided. First, EcoGreen claims that PG&E's loan to the District does not constitute public funds since the District lacked control over the loan proceeds. Second, EcoGreen argues that the Department erred by dismissing the importance of the OBF program and failing to consider the benefits conferred by energy efficiency installations. The Department considers each of these arguments in turn.

² As discussed below, EcoGreen does not dispute the facts but argues that the Determination should have further analyzed certain facts. EcoGreen did not present any new facts or evidence on appeal.

³ PG&E provides interest-free loans to their customers under the OBF program, which are paid back from monthly energy cost savings on the customer's utility bill. The District entered into a loan agreement with PG&E for \$161,392.69.

III. DISCUSSION

A. **Once Loaned by PG&E, the Funds Became District Property and Therefore Constituted Public Funds.**

EcoGreen's main argument on appeal is that the PG&E loan funds somehow never became that of the District since the District lacked control "over the approval for, and disbursement of, the loan funds." (Appeal, p. 2.) According to EcoGreen, the District lacked control because PG&E was required to conduct a post-installation inspection and project verification before making the final decision to approve the loan and ultimately disburse the funds.⁴

This argument misses the mark because once all of the loan requirements were satisfied, the loan proceeds became the property of the District, a public entity, which had an obligation to repay PG&E. Whether or not PG&E had to conduct a post installation inspection prior to disbursing the funds is immaterial since the inspection was merely a prerequisite for the final loan approval. Here, PG&E did approve the loan and the District used the loan proceeds to pay for the installation of the improvements.

Under the Loan Agreement, the District was required to repay the loan balance "irrespective of whether or when the Work is completed, or whether the Work is in any way defective or deficient, and whether or not the Work delivers energy efficiency savings to Customer." (Loan Agreement, section 7.) A failure to repay the loan could result in "shut-off of utility energy service, adverse credit reporting, and collection procedures, including, without limitation, legal action." (*Id.* at section 13.) Although EcoGreen claims that the OBF program required energy savings to cover the costs, PG&E did not guarantee energy savings or project performance.⁵ (PG&E On-Bill

⁴ Although EcoGreen concedes that the Determination addressed PG&E's completion of a post installation inspection before the loan proceeds were disbursed, EcoGreen asserts that "the Decision offers no further analysis as to whether it is up to the District or PG&E to authorize that disbursement."

⁵ On appeal, EcoGreen reiterates the argument that the project was not paid for with public funds since the loan is intended to be "budget neutral," calculated solely based on anticipated energy savings generated by the installation of energy-efficiency equipment. EcoGreen insists that the Determination fails to adequately address PG&E's

Financing Customer and Contractor Handbook, p. 15.) PG&E did not have any liability for the work performed and the parties fully acknowledged that “PG&E is only providing the State with financing.” (Loan Agreement, section 3). Moreover, it was up to the District to decide whether the funds were issued directly to the District or to the designated contractor. (*Id.* at section 6). In total, “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.” (Determination, p. 6.)

To bolster its contention that the District did not have control over the funds, EcoGreen takes issue with the Determination’s citations to *Azusa Land Partners, LLC v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1 (*Azusa*) and PW Case No. 2012-015, *Renovation of Yuba City Office Building, Regional Housing Authority of Sutter & Nevada Counties* (August 28, 2012) (*Yuba City*). However, EcoGreen’s analysis suffers from the same fundamental flaw that permeates its “lack of control” argument. EcoGreen states that both *Azusa* and *Yuba City* are “premised upon the public entity exerting control over the disbursement of the loan proceeds” (Appeal, p. 3) and then proceeds to argue that control over disbursement is lacking because the loan proceeds were not made available to the District until after PG&E’s post-installation inspection and approval. In making that argument, EcoGreen misconstrues the facts and reasoning in *Azusa* and *Yuba City*.

In *Azusa*, the Court of Appeal found that proceeds from the issuance of Mello-Roos tax bonds held by Wells Fargo bank 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 authority to pay absent express authorization from the City. (*Azusa, supra*, 191 Cal.App.4th at p. 26.) EcoGreen attempts to

position that the program is structured to have no impact on the customer. Contrary to EcoGreen’s argument, the Department considered those facts and correctly found that there was a budgetary effect on the District’s coffers. As explained in the Determination, “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.”

distinguish *Azusa* by highlighting that there, the City had to inspect the completed public improvement work before payments were made but here, PG&E, not the public entity, inspected the work post installation. However, this minor factual distinction does not change the fact that the funds from the loan belong to the District. PG&E's inspection was a condition precedent for the final loan approval but once approved, PG&E, like Wells Fargo bank in *Azusa*, was only able to disburse the funds according to the District's direction.

Azusa makes clear that money collected for, or held in coffers of, a public agency constitutes "public funds" under section 1720. (*Id.* at p. 24.) The decision is instructive because it stands for the proposition that funds can constitute public funds even when those funds are held by a third party and do not "pass through" a public agency, as was the situation here. EcoGreen does not dispute this principle and in fact concedes that the loan proceeds did enter the District's coffers when it stated that "PG&E had the ability to approve funding or not, such that PG&E *could have opted not to allow the funds to enter the public coffers*, notwithstanding the installation work that EcoGreen had already completed." (Appeal, p. 3, italics added.) The undisputed facts show that PG&E did approve the loan, the funds did enter the District's coffers, and those funds therefore constitute "public funds." These facts effectively dispose of EcoGreen's "lack of control" argument.

EcoGreen's attempt to distinguish *Yuba City* fails for the same reasons. In *Yuba City*, the Department found that the funds loaned by a lender to the housing authority were public rather than private because the funds were under the control of the housing authority, disbursed upon the housing authority's authorization to pay for the rehabilitation project, and had to be repaid by the housing authority to the lender. EcoGreen makes an unsupported claim that, unlike the housing authority in *Yuba City*, the District lacked control of the funds. This is simply not true. The key analysis in *Yuba City* was that "once loaned, the funds became the property of Regional regardless of where the funds may have been kept [W]hen the loan transaction was consummated, the loan proceeds were under the control of Regional and thereby constitute[d] public funds. If this were not the case, Regional's obligation to repay Lender would not make sense." (*Yuba City, supra*, at p. 3.) The transaction in *Yuba City*

is analogous to the one in this case. EcoGreen's focus on PG&E's post installation inspection of the work prior to approval of the loan and disbursement of the loan proceeds does not change the reality that once PG&E loaned the funds, the money became the property of the District, and the District had an obligation to repay PG&E.

To argue that the District lacked control over the funds because PG&E approved the loan also ignores the many ways the District exercised control over the loan proceeds and the project. The District had to choose a contractor and arrange for the work, the loan balance could not be increased without the District's consent, the District had to designate where the funds would be issued, and the District had to repay the loan in its entirety whether or not the work resulted in actual energy savings. (See Loan Agreement and Application, p. 2.)

Accordingly, the Determination correctly concluded that money loaned to a public entity specifically designated to pay for the installation of improvements constitutes public funds under the prevailing wage law.

B. Energy Conservation and Efficiency are Important Goals but the Purpose Behind the OBF Program is Irrelevant to the Analysis of Whether a Project is “Public Work” Under Section 1720.

EcoGreen asserts in its Appeal that the Determination dismisses the importance of PG&E's OBF program and argues that the Department should consider the benefits such programs offer in determining whether a project is “public work” under section 1720. EcoGreen claims that the Determination, as it stands, would “disrupt the process by which PG&E and other utilities extend incentives to public entities to install energy efficiency equipment, which would, by extension, also disturb the state policy and intent of the California Legislature [to promote energy conservation].” (Appeal, p. 4.) EcoGreen cites to the Department's coverage determination in PW 2019-012, *Installation of Solar Photovoltaic Systems – Solar Watts Program Housing Authority of the City of Los Angeles* (October 24, 2019) (*Solar Watts*) in arguing that the Department is being inconsistent by considering the benefits of energy efficiency in *Solar Watts* while not applying the same principles to this Determination.

EcoGreen's analysis of the *Solar Watts* determination is incomplete and therefore erroneous. There, it was undisputed that the installation of solar energy

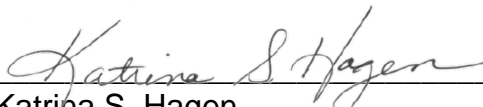
improvements constituted “public work” as it involved installation done under contract and paid for out of public funds. The sole issue was whether an exception to prevailing wage requirements under subdivision (c)(5)(C) applied to exempt the publicly-funded rehabilitation of single-family homes. EcoGreen cherry-picks language from the *Solar Watts* decision to support its misplaced contention that the Department “found the benefits of such energy efficiency installations to be highly relevant to its analysis.” (Appeal, p. 4.) However, such benefits were analyzed exclusively in the context of defining what would qualify as “rehabilitation” under subdivision (c)(5)(C), not whether the project was a public work in the first instance.

While energy conservation and efficiency efforts are undoubtedly important, the purpose behind the PG&E program is irrelevant here. The Project meets the definition of “public work” and EcoGreen does not point to any exception under the statute which would exempt the Project from prevailing wage requirements.

IV. CONCLUSION

In summary, for the reasons set forth in the Determination, as supplemented by 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: March 19, 2021



Katrina S. Hagen
Director of Industrial Relations