

DEPARTMENT OF INDUSTRIAL RELATIONS

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April 5, 2022

Stephen C. Tedesco
Littler Mendelson, PC
333 Bush Street, 34th Floor
San Francisco, CA 94104

RE: Public Works Case No. 2020-012
Housing Development Project
NASA Ames Research Center

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 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 Housing Development Project (Project) at NASA Ames Research Center is not subject to California's prevailing wage requirements.

Facts

The National Aeronautics and Space Administration (NASA) is a federal agency which operates ten field centers located across the country. One such center is the Ames Research Center located at Moffett Federal Airfield (Moffett Field) in an unincorporated part of Santa Clara County, California. On or about August 2017, NASA announced plans to build a new housing campus that would provide at least 1,900 new homes in Moffett Field. After a competitive bidding process, NASA selected Mountain View Housing Ventures, LLC (MVHV) as its private development partner on the Project.

On December 12, 2018, NASA entered into a 72-year Enhanced Use Lease (Lease) agreement with MVHV for MVHV to design, develop, finance, construct, lease, and manage a housing project funded by private capital on 46.52 acres of land at Moffett Field. Under the Lease, MVHV is entitled to construct residential apartment housing and associated retail and commercial space. More specifically, the Project will include the construction of up to 2,078 housing units, 250,000 square feet of ancillary structures to

¹ Unless otherwise indicated, all further statutory references are to the California Labor Code.

serve residents such as recreational facilities and community rooms, and 100,000 square feet of retail space.

MVHV represents that the lease terms were negotiated over a seven-month period to deliver a fair market value to both parties. During the transition and initial development term ending on December 31, 2025, MVHV is not required to pay any rent. Thereafter, MVHV is required to pay annual rent based on a formula that looks at the site value and gross income earned on the project.² NASA may also charge “additional rent” for landlord services it provides such as architectural and engineering services, telecommunications services, etc. According to MVHV, the annual rent payments will be in the range of \$1.9 million to more than \$35 million. Over the course of the lease, MVHV estimates that it will pay between \$400 million to \$1 billion in rent. MVHV did not seek an independent appraisal of the land but asserts that NASA determined that the lease provided fair market value citing to federal law requiring NASA to enter into a fair market value lease.³ On April 6, 2021, the U.S. Department of Labor determined that the Davis-Bacon Act did not apply to the lease of the land to MVHV at Ames Research Center, reasoning that “[b]ased on the information made available, there is no reason to believe that NASA is paying for the construction indirectly through a below-market value lease of land.”

The entire Project is estimated to cost more than \$1 billion and will be fully funded through private financing by MVHV. The lease document itself does not require the payment of California prevailing wages or federal Davis-Bacon rates for any construction on Moffett Field. In fact, California’s prevailing wage law was not contemplated during negotiations. The Lease does however include the requirement that to the extent applicable, MVHV shall comply with the Davis-Bacon Act for off-site improvements.

At the end of the lease term, the ownership of the entire Project will be transferred to a successor tenant who will manage the housing development. Neither NASA nor the federal government will have any ownership in the Project, operate the Project, occupy space in the Project, or offer any government services out of the Project’s facilities.

Discussion

All workers employed on public works projects must be paid at least the prevailing wage rates applicable to their work. (§ 1771.) Section 1720, subdivision (a)(1), defines

² Base rent is calculated as the greater of \$100,000 or the lesser of two values: (i) base rent percentage multiplied by the value of the site as specified in the lease or (ii) the product of 7.5 percent multiplied by the effective gross income from the premises earned during the preceding lease year.

³ Under federal law, NASA is obligated to determine that the Lease provides fair market value. (See 51 U.S.C. § 20145(b)(1) [“A person or entity entering into a lease under this section shall provide consideration for the lease at fair market value as determined by the Administrator.”]; see also 14 C.F.R. § 1204.504(e) [“no leasehold, permit, or license shall be granted under the authority . . . of this section unless . . . [f]air value in money is received by NASA on behalf of the Government as consideration.”])

“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.

In its position statement, MVHV offers three main reasons for why it believes the Project is not subject to California’s prevailing wage requirements. First, MVHV argues that the Project is on federal land and subject to the federal enclave doctrine and thus, California’s prevailing wage law would not apply. Second, MVHV argues that the contract is not with a public entity and not paid for in any part out of public funds and thus, the Project is not a “public work.” Third, MVHV argues that even if there were unknown or unexpected payments of state funds in the Project, it would be *de minimis* in the context of the overall cost of the Project and therefore exempt from California’s prevailing wage requirements. No other interested party submitted a position statement.

A. Federal Enclave Doctrine.

The Enclave Clause of the United States Constitution grants Congress exclusive jurisdiction over any parcel of land ceded by a state to the federal government. Article I, section 8, clause 17 of the United States Constitution reads:

Congress shall have Power . . . to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

Accordingly, “[a]n enclave is created when the federal government purchases land within a state with the state’s consent, which may be conditioned on the retention of state jurisdiction consistent with the federal use. [Citation.] Unlike those situations where the United States has a mere proprietary interest in a piece of land, the voluntary cession of land by a state to the federal government is an actual transfer of sovereignty. [Citations.]” (*Taylor v. Lockheed Martin Corp.* (2000) 78 Cal.App.4th 472, 478 (*Taylor*)).

Since the federal government exercises exclusive legislation in a federal enclave, the United States Supreme Court has interpreted the Enclave Clause to limit the application of certain state laws within an enclave – areas of land ceded by a state to the federal government. For example, state laws in effect at the time of cession that *do not* conflict with federal law become federal law within the enclave unless abrogated by Congress. But state laws in effect at the time of cession that *do* conflict with federal law do not apply in the enclave. (*Stiefel v. Bechtel Corp.* (S.D. Cal. 2007) 497 F.Supp.2d 1138, 1147 (*Stiefel*) citing *Pacific Coast Dairy v. Dept. of Agriculture of Cal.* (1943) 318 U.S. 285, 294 (*Pacific Coast Dairy*) and *James Stewart & Co. v. Sadrakula* (1940) 309 U.S. 94, 99-100 (*Sadrakula*)). Moreover, state laws in effect after the creation of a federal enclave do not apply within the enclave unless the state specifically retained jurisdiction over the subject matter at issue or Congress explicitly authorizes such regulation. (*Paul v. U.S.* (1963) 371 U.S. 245, 268 (*Paul*)) [“Since a State may not legislate with respect to a federal enclave unless it reserved the right to do so when it gave its consent to the

purchase by the United States, only state law existing at the time of the acquisition remains enforceable, not subsequent laws.”]) Congressional authorization of such state laws must be “clear and unambiguous.” (*Goodyear Atomic Corp. v. Miller* (1988) 486 U.S. 174 (*Goodyear*) citing *Hancock v. Train* (1976) 426 U.S. 167.)

B. NASA Ames Research Center at Moffett Field is a Federal Enclave.

To determine whether the federal enclave doctrine is applicable, the first issue to address is whether NASA Ames Research Center at Moffett Field is in fact a “federal enclave.” Moffett Field was acquired by the United States on February 12, 1931 and there is no question that when California ceded Moffett Field to the federal government, exclusive jurisdiction was conferred.⁴ (See *Pacific Coast Dairy, supra*, 318 U.S. 285, fn. 7-8.) When the federal government acquired Moffett Field in 1931, it resulted in automatic cession pursuant to state law. A question that remains is whether Moffett Field continues to be a federal enclave with the federal government exercising exclusive jurisdiction, because a federal enclave may potentially lose its status in a number of ways, such as by retrocession to a state.

There is no evidence that California reacquired jurisdiction of Moffett Field from the federal government. California’s retrocession statute is found in Government Code section 113, which lays out five express conditions that must be satisfied for the California Legislature to consent to retrocession of jurisdiction. The first condition is that the United States must request acceptance of retrocession in writing. Here, not even this first requirement is satisfied. NASA continues to maintain an active research center on the site and there is no indication that the federal government is seeking retrocession.

In addition, NASA Ames Research Center at Moffett Field continues to be a federal enclave despite the fact that it is no longer being used exclusively for military purposes. In 2005, the issue of whether Moffett Field continues to be a federal enclave was addressed by a federal district court in *Powell v. Tessada & Associates, Inc.* (N.D. Cal. 2005) 2005 WL 578103 [unrep. opn.] (*Powell*). In *Powell*, plaintiffs who provided janitorial services at the NASA Ames Research Center at Moffett Field filed an employment discrimination action alleging damages under the California Fair Employment and Housing Act (FEHA), the Displaced Janitor Opportunity Act (DJOA), and the federal Age Discrimination in Employment Act. The defendants moved to dismiss the state law claims on the basis that Moffett Field is a federal enclave and thus, California’s FEHA and DJOA have no force in the enclave. The plaintiffs attempted to distinguish *Pacific Coast Dairy* and argued that “Moffett Field has undergone significant changes such that its status as a federal enclave is no longer certain.” (*Powell, supra*, 2005 WL 578103 at p. 2.) In granting the defendants’ motion to dismiss, the court reasoned that although Moffett Field was closed as a military base in 1994 and taken over by NASA Ames, “this change of

⁴ The Act of February 12, 1931, c. 122, 46 Stat. 1092 provides that “the Secretary of the Navy is hereby authorized to accept on behalf of the United States, free from encumbrances and without cost to the United States, a title in fee simple to such lands as he may deem necessary or desirable near Sunnyvale, in the County of Santa Clara, State of California . . . to wit: One thousand acres as a site for a naval air station . . .”

operation does not alter the status of Moffett Field as a federal enclave because there has been no transfer of ownership of the property.” (*Id.*)

Similarly in *Swords to Plowshares v. Kemp* (N.D. Cal. 2005) 423 F. Supp. 2d 1031 (*Swords to Plowshares*), the court looked at whether the Presidio, which was ceded to the federal government in 1897, continued to be a federal enclave despite the fact that the land was no longer used for military purposes. The plaintiffs conceded that the Presidio was once a federal enclave but argued that it lost such status after the army evacuated the base and when the land was conveyed to a trust in 1996. The plaintiffs pointed to the state statute conferring jurisdiction which read in part, “The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the government of the United States *for military purposes or defense . . .*” (Cal. Stat. 1897, p. 51, italics added.) The court disagreed with the plaintiffs and found that the language, “for military purposes” was not a condition subsequent to the cession of jurisdiction. (*Swords to Plowshares, supra*, 423 F. Supp. 2d at p. 1036.) Further, the court reasoned that there was nothing in the cession statute restricting jurisdiction “*only* until the land ceased to be used for military purposes.” (*Id.*, original italics.)

Accordingly, the NASA Ames Research Center at Moffett Field is a federal enclave acquired by the United States in 1931 and the United States never retroceded jurisdiction. That Moffett Field may no longer be used for military purposes does not alter its status as a federal enclave.

C. California’s Prevailing Wage Law Does Not Apply in a Federal Enclave.

The next issue to address is whether California’s prevailing wage law applies to projects at NASA Ames Research Center at Moffett Field. To answer this question, it is important to understand the history of California’s prevailing wage law and when the law went into effect, which is critical in evaluating the law’s applicability to an enclave. (See *Sadrakula, supra*, 309 U.S. at p. 100 [“Since only the law in effect at the time of the transfer of jurisdiction continues in force, future statutes of the state are not a part of the body of laws in the ceded area.”])

California’s first prevailing wage law dates back to the Public Wage Rate Act of 1931. (See *State Bldg. & Construction Trades Council of Cal. v. City of Vista* (2012) 54 Cal.4th 547, 554.) The law was approved by the Governor on May 23, 1931, and went into effect on August 14, 1931. (Stats. 1931, ch. 397, § 1, p. 910.) Although close in time, California’s prevailing wage law did not go into effect until six months after Moffett Field was ceded to the federal government on February 12, 1931. Thus, under the federal enclave doctrine, California’s prevailing wage law would not apply within the enclave unless California specifically retained jurisdiction over the subject matter at issue or Congress specifically authorized such regulation. (*Paul, supra*, 371 U.S. at p. 268.)

There is no evidence indicating California reserved the right to legislate prevailing wage law within Moffett Field at the time of cession. Accordingly, California’s prevailing wage law could only apply if Congress provided clear and unambiguous authorization for such regulation. The Supreme Court has found this “clear and unambiguous” standard

satisfied in a situation where a federal statute specifically authorized state workers' compensation laws to apply to federally owned facilities. (See *Goodyear, supra*, 486 U.S. 174.)⁵ Since *Goodyear*, several federal courts have looked at whether state statutes are applicable on federal enclaves, but have reached different conclusions.

In *Bouthner v. Cleveland Construction, Inc.* (D. Md. 2011) 2011 WL 2976868 [unrep. opn.] (*Bouthner*), the district court analyzed whether Congress provided clear and unambiguous language in the federal Davis-Bacon Act that authorizes state wage and benefit laws to apply to federal enclaves. In holding that Congress did not, the court reasoned:

[T]he language in the Davis-Bacon Act does not explicitly authorize state wage and benefit laws to apply to contractors working on public works projects. . . . Congress has shown that it is capable of including language in statutes expressly stating that states have the power to apply the statute to land ceded to the United States. Thus, the fact that Congress did not include such explicit language in the Davis-Bacon Act makes it difficult to accept Plaintiff's argument that . . . state and local benefits laws apply to federal enclaves. (*Id.* at p. 5.)

The plaintiffs in *Bouthner* relied on *Lebron Diaz v. General Security Services Corp.* (D.P.R. 2000) 93 F.Supp.2d 129 (*Lebron Diaz*), which concluded that although the federal Service Contract Act (SCA) did not specifically state that local laws shall apply within federal enclaves, "[t]he application of local law providing separate and independent employment benefits . . . was unambiguously assumed." (*Id.* at p. 142.) The *Bouthner* court rejected that statement in *Lebron Diaz* as dicta and instead relied on *Goodyear* and other cases that distinguished the statute in *Goodyear* from the SCA in *Lebron Diaz* in concluding that "one clearly applies state law to federal land, while the other does not." (*Bouthner, supra*, 2011 WL 2976868 at p.5. citing *Manning v. Gold Belt Falcon* (D.N.J. 2010) 681 F.Supp.2d 574, 577 (*Manning*).)

Recently in *Compton v. Oasis Systems, LLC* (S.D. Cal. Mar. 30, 2021) 2021 WL 5513996 (*Oasis Systems*), the court similarly rejected plaintiff's argument that the SCA provides express congressional authorization of local wage and hour laws in federal enclaves. In *Oasis Systems*, the court reasoned that California wage and rest break claims were precluded under the federal enclave doctrine unless Congress provides "clear and unambiguous" authorization for such regulation. Because there was no indication that Congress provided clear and unambiguous authorization, the court dismissed plaintiff's state law claims for failure to provide accurate itemized wage statements, failure to provide rest and meal periods, and failure to pay overtime.

⁵ In *Goodyear*, the federal statute explicitly read, "States shall have the power and authority to apply [their worker's compensation] laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise . . . in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be." (*Goodyear, supra*, 486 U.S. at p. 182.)

Here, California's prevailing wage law went into effect after the creation of Moffett Field as a federal enclave. California did not specifically retain jurisdiction over the subject matter of prevailing wages in this federal enclave nor did Congress specifically provide "clear and unambiguous" authorization for California's regulation. For these reasons, California's prevailing wage law does not apply to projects at NASA Ames Research Center at Moffett Field for which the United States has exclusive jurisdiction.

D. MVHV's Other Arguments Need Not be Addressed.

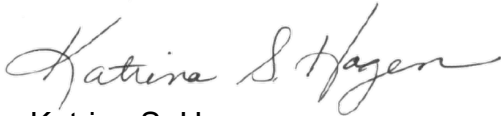
Given the conclusion reached in this determination, it is unnecessary to address MVHV's remaining arguments.

Conclusion

For the foregoing reasons, the Housing Development Project at NASA Ames Research Center is not subject to California's prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Katrina S. Hagen
Director of Industrial Relations