

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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December 22, 2008

Dennis Cook, Esq.
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555 Capitol Mall, Suite 425
Sacramento, CA 95814-4503

Re: Public Works Case No. 2008-028
Oil Field Remediation Project - Off-Haul of Groundwater
Port of Long Beach

Dear Mr. Cook:

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 of groundwater from an oil field remediation project site by an independent trucking company is subject to prevailing wage requirements.

Facts

The City of Long Beach ("City") through the Port of Long Beach ("Port")¹ owns a 123-acre site located at Pier A West/Area 2 in the Wilmington District of the City of Los Angeles. The site has been used for oil field operations since the 1930's. It currently is being leased for crude oil production.

Between 1948 and 1970, 19 shallow, clay-lined impoundments or sumps at the site were used to collect liquid waste, drilling mud, tank bottoms, solid debris, solvents, spent catalysts, and paint sludge. In 1970, this practice ceased and the sumps were covered with two to three feet of clean soil. On July 11, 2007, the Los Angeles Regional Water Quality Control Board issued a Cleanup and Abatement Order regarding the impacted soil and groundwater.

In May 2008, the Port released a Project Announcement Notice and a Notice Inviting Bids for the soil and groundwater remediation work required under the Cleanup and Abatement Order as well as for the related demolition and reconstruction of a parking lot for the adjacent marina, the construction of a temporary parking lot with bathroom facilities, the demolition of existing oil field piping and infrastructure, and the construction of new oilfield access roads ("Project"). City awarded the Project to Tutor-Saliba Corporation ("Tutor"). City and Tutor entered into the construction contract ("Contract") on July 9, 2008.

¹Port is a public agency managed and operated by City's Harbor Department.

The work under the Cleanup and Abatement Order involves the excavation and removal of approximately 510,000 tons of impacted soil. This work also includes the concurrent removal of groundwater encountered during sump excavations. Upon completion of the soil and groundwater remediation activities, approximately 1.26 million tons of clean fill will be imported for backfilling and site grading, and drainage measures will be implemented.

With respect to the subject matter of this request - the groundwater removal work - Tutor employees take the groundwater to an on-site portable facility where the water is pre-treated to meet environmental standards by Clear Creek Corporation. Tutor employees then place the treated groundwater in on-site storage tanks. From there, the treated groundwater is disposed of in accordance with a subcontract ("Subcontract") entered into on August 14, 2008, between Tutor and Environmental Recovery Services ("ERS"), an independent trucking company. Pursuant to the Subcontract, ERS must "furnish all transportation, labor, materials, equipment, incidentals ... to dispose of approx. 7,085,000 gal of treated groundwater" The Subcontract requires that ERS trucks be equipped with on-board pumps to allow Tutor employees to pump groundwater from the storage tanks into ERS trucks. ERS employees off-haul the treated groundwater at a rate of up to 300,000 gallons per 24 hours, seven days per week, under the terms of the Subcontract.

Further, the Subcontract provides as follows:

ERS will provide an on-site "truck coordinator" to coordinate w/TSC [Tutor] Supervisor the following:

- Daily Scheduling of all necessary trucking, and dispatch from staging site at Pier S
- Daily reporting of trucks entering/exiting the site ...
- Daily accounting and submission of manifest weight tickets ...
- ...
- Provide preprinted manifests for Treated Water, Cal-Haz/Non-Haz material and obtain necessary signatures for disposal as required by the contract
- Provide a Transportation plan for haul routes, decontamination process and contingencies for spills
- Coordinate deliveries with appropriate disposal facility.

(Subcontract, p. 1-A.)

On August 20, 2008, ERS entered into a contract with Lakeland Processing Co. ("Lakeland"), a disposal facility that accepts and processes non-hazardous liquid waste. Pursuant to the terms of the contract, "ERS, as a subcontractor, will agree to transport and deliver to Lakeland, as the designated disposal facility, certain groundwater removed from Project." Based on the projected revenue from the contract, Lakeland constructed a two million gallon tank and dedicated it to the Project to accommodate the anticipated amount of groundwater that is to be removed. If there is

excess capacity, the tank may be used for other customers. Lakeland also hired two additional employees and made several retrofits to its existing facility to accommodate the anticipated large amount of groundwater from the Project. Because the groundwater has been pre-treated and is non-hazardous, Lakeland is charging ERS a reduced rate of \$.075 per gallon as the disposal fee. From Lakeland, the groundwater is being released into the Los Angeles County Sanitation District sewer system where it flows to the Los Angeles Sanitation District's Joint Water Pollution Control Plant in the City of Carson for final treatment. From there, it is recycled for irrigation, pumped into the water table or pumped into the ocean.

The total Project cost under the Contract between City and Tutor is \$67,360,836.52. The Subcontract between Tutor and ERS is in the amount of \$18,362,400.² Of that amount, \$1.062 million is the cost of off-hauling the groundwater to Lakeland.

Discussion

Labor Code³ section 1720(a)(1) defines "public works" as "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds" 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.

....

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

²In addition to the groundwater off-hauling work described above, ERS is also required under the Subcontract to off-haul hazardous and non-hazardous soil from, and on-haul clean fill to, the Project site. As mentioned above, however, the coverage request is limited solely to the issue of whether the groundwater off-hauling is subject to prevailing wage requirements.

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

“[E]xecution” 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 as follows:

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. [Citations and quotation marks omitted.] 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* [1976] *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 Project meets the elements of a public work under section 1720(a)(1) in that it entails construction, demolition and alteration work done under contract and paid for out of public funds. The sole question presented by the requesting party is whether the off-haul of treated groundwater from the Project site to Lakeland under the Subcontract between ERS and Tutor is subject to prevailing wage requirements.

The relevant factors discussed by the court in *Williams* for determining whether an independent trucking company is a subcontractor performing work in the execution of the contract include: whether the transport was required to carry out a term of the public works contract; whether the work was performed on the project site or another site integrally connected to the project site; and, 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.) The court in *Williams* stated that “what is important in determining the application of the prevailing wage law is not whether the truck driver carries materials *to* or *from* the public works project site.” As the court explained, “[w]hat is determinative is the role the transport of the materials plays in the performance or ‘execution’ of the public works contract.” (*Williams v. SnSands Corporation, supra*, 156 Cal.App.4th at p. 752 (italics in the original).) Further, in finding that the off-haul work at issue in *Williams* was not performed in the execution of the public works contract, the court noted that there was no evidence that the terms of the relevant public works contracts required the off-hauling of generic building materials. (*Williams v. SnSands Corporation, supra*, 156 Cal.App.4th at p. 754.)

Here, the groundwater disposal work is specifically called for in the Project Announcement Notice, the Notice Inviting Bids and the Contract between Tutor and City. As such, the off-haul was required to carry out a specific term of the contract for public work. In addition, Lakeland constructed a two million gallon tank, retrofitted its existing facility and hired two employees to accommodate the large amount of groundwater from the Project. In this respect, the disposal site is integrally connected to the Project site. Further, because the Project involves the excavation, removal, and disposal of hundreds of thousands of tons of impacted soil and over seven million gallons of water, the off-haul was necessary to accomplish or fulfill the Contract. In fact, to ensure a continuous flow between the off-haul work and the on-site remediation activities, ERS is required to provide an on-site truck coordinator to work with the on-site construction contractor's (Tutor) supervisor. Under the particular facts of this case, transport plays an integral role in the performance or "execution" of the public works contract. Accordingly, the off-haul of groundwater from the Project site to an off-site facility for disposal constitutes work performed by a subcontractor in the execution of the public works contract and, therefore, is subject to prevailing wage requirements.⁴

ERS contends that the groundwater off-haul work is not subject to prevailing wage requirements under section 1772 because there are no specifications in the Contract between City and Tutor that the groundwater be off-hauled in a specific manner or to a specific location. *Williams*, the only published California appellate court opinion concerning coverage of off-haul, does not set forth a requirement that the underlying public works contract identify the precise manner in which a term of the contract is to be performed or the identity of the off-site disposal location. Instead, *Williams* discusses several factors, summarized and analyzed above. Under *Williams*, it is sufficient that the off-haul work is an express term of the public works contract, as it is here. ERS also contends that the off-haul of groundwater to Lakeland is similar to the off-haul of unused generic materials to a locale bearing no relation to the public works project site, which was found not subject to prevailing wage requirements in *Williams* because there was no evidence that the off-haul was "an integrated aspect of the 'flow' process" (*Sansone, supra*, 55 Cal.App.3d at p.444, 127 Cal.Rptr. 799) of the project." (*Williams v. SnSands Corporation, supra*, 156 Cal.App.4th at p. 754.) ERS's reliance on *Williams* is misplaced. Here, for the reasons explained above, the transport of groundwater to Lakeland, a locale bearing a direct relationship to the Project site, is an integrated aspect of the flow process of the on-site remediation work performed under the public works contract.

ERS also relies on two of the Department's prior coverage determinations as well as an enforcement decision and a letter from former Acting Director John M. Rea to support its position. Regarding the two coverage determinations, preliminarily it should be noted that on September 4, 2007, the Department issued a notice stating that it would no longer designate public works coverage determinations as "precedential" under Government Code section

⁴The analysis herein is consistent with the recently issued public works coverage determination in PW 2008-027, *On-Haul and Off-Haul to and from the Friendly Inn/Senior Center - Abatement and Demolition Project - City of Morgan Hill* (October 31, 2008).

11420.60.⁵ Moreover, the Decision on Administrative Appeal in PW 2003-044, *Lindeman Brothers Trucking* (January 3, 2005) ("*Lindeman*") was issued prior to, and without the benefit of *Williams* and, to the extent it is inconsistent with this determination, it no longer reflects the Department's interpretation of the statutory scheme, which is guided by the court's analysis in *Williams*. The same is true of Acting Director Rea's letter of January 6, 2005. The other coverage determination relied on by ERS is PW 2005-025, *Canyon Lake Dredging Project, Lake Elsinore and San Jacinto Watersheds Authority* (March 28, 2008) ("*Canyon Lake*"). ERS asserts that a pivotal fact in that case was that a task order specified that the dredged silt was to be off-hauled to a designated locale, the Audie Murphy Ranch. The *Canyon Lake* Decision on Administrative Appeal nowhere stated that the specification of a designated locale is a dispositive factor under *Williams*. Critical to the Decision in *Canyon Lake* was the fact that the off-haul was performed by an employee of the on-site construction contractor. Neither *Canyon Lake* nor the Director's enforcement decision in *Kern Asphalt* [Civil Wage and Penalty Assessment Case No. 04-0117-PWH], which involved on-haul performed by employees of the on-site construction contractor, should be viewed as limiting coverage to the circumstances in those cases. As footnote 15 in *Canyon Lake* stated: "The circumstances under which off-haul work performed by employees of independent trucking companies, rather than employees of the construction contractor, would be covered under *Williams* will be addressed in a different case where those facts are present." Those facts are present here.

Notwithstanding the Department's decision to discontinue the use of precedential coverage determinations, the court in *Williams* did reference two of the Department's prior public works coverage determinations with approval. In PW Case 99-081, *Granite Construction Company Contract No. SM-0011(1) Project No., 612, Hauling of Roadway Excavation Material* (March 16, 2000), the public works contract obligated the prime contractor to remove the excavated pavement and dirt. Thus, the off-haul, which was performed by both the prime contractor and an independent trucking company, was specifically incorporated into the public works project. In PW Case 2000-078, *Rosewood Avenue/Willoughby Avenue Sewer Interceptor, City of Los Angeles* (August 6, 2001), the off-haul by an independent trucking company of dirt displaced by sewer pipe installation work was found to be functionally related to the on-site construction work and necessary to properly execute the contractor's part of the contract. Both determinations support the conclusions reached in this case.

For the foregoing reasons, the off-haul of groundwater by ERS from the Project site to Lakeland is subject to prevailing wage requirements.⁶

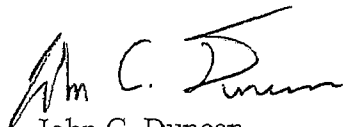
⁵Public notice of the Department's decision to discontinue the use of precedent decisions can be found at [www.dir.ca.gov/DLSF/09-06-2007\(pwcd\).pdf](http://www.dir.ca.gov/DLSF/09-06-2007(pwcd).pdf).

⁶It would appear the groundwater off-haul work may also be covered under section 1720.3, which governs the off-haul of refuse to an outside disposal location, because one indicator of the groundwater's worthlessness as "refuse" is the fact that ERS is being charged \$.075 to dispose of it. ERS argues that the groundwater is not refuse because it could be used for irrigation or discharged into local waterways. Because the off-haul work is subject to prevailing wage requirements under the reasoning in *Williams*, coverage under section 1720.3 need not be determined. It also would appear that the off-haul work may be subject to prevailing wages under the reasoning in *Sansone*, which

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I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Duncan". The signature is written in a cursive style with a large initial "J" and "D".

John C. Duncan
Director

involved hauling between a public works site and a site dedicated to the public works site, because Lakeland's two million gallon storage tank was built specially for the Project and the parties to the Contract are entitled to the tank's full capacity. (See discussion of *Sansone* in PW 2002-010, *Production of Recycled Asphalt Concrete from Reclaimed Asphalt Pavement and Related Off-hauling and On-hauling/Street Resurfacing and Reconstruction Program/City of Los Angeles* (August 8, 2007), p. 6, fn. 8.) Again, because the off-haul work is subject to prevailing wage requirements on other grounds, this issue need not be determined.