

DEPARTMENT OF INDUSTRIAL RELATIONS

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May 9, 2012

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Re: Public Works Case No. 2011-033
Blue Diamond Agricultural Processing Facility
City of Turlock

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 construction of the Blue Diamond Agricultural Products Processing Facility (Project) is not a public work subject to prevailing wage requirements.

FACTS

The Project entails the construction of a 215,548 square foot industrial food processing plant in the City of Turlock (City) by Blue Diamond Growers, a California nonprofit cooperative association (Company). The Project will also involve the construction of truck loading docks, truck parking spaces, and employee and visitor parking spaces as well as public improvements, including drainage work, wet and dry utilities, street widening and landscaping. The current total estimated cost of the Project is \$95,300,000. Approximately \$38,400,000 of this amount will be used to purchase agricultural processing equipment to be installed as fixtures in the facility. Construction of the Project began in April 2012.

Company will receive three types of public financial assistance in connection with the Project: (1) a Turlock Regional Industrial Park fee credit for the cost of offsite improvements completed by the Company; (2) a transfer of reserved sewer capacity; and (3) a County of Stanislaus Public Facilities Fee Discount.

The Project will be located within the Turlock Regional Industrial Park formally known as the "City of Turlock West Side Industrial Plan" or "WISP." WISP requires property developers to pay for the construction of certain pre-planned public infrastructure improvements. These infrastructure improvement costs are apportioned to property owners on a square footage basis as compared to all properties in the WISP. Proposed developers are assessed a fee to pay for the

City's construction of these improvements. Developers are given a choice of paying the fee or constructing the necessary improvements themselves. When a developer constructs the required improvements, it receives a fee credit (WISP Fee Credit) in an amount equal to the lesser of City's estimated construction cost and the developer's actual construction cost. Company intends to construct the required improvements for the entire Project, and the City has estimated a corresponding WISP Fee Credit in the amount of \$437,871, subject to adjustment on completion of construction.

City established a Wastewater Capacity Fee for connecting to its original wastewater treatment plant. In connection with the opening of an improved wastewater treatment plant, City rescinded the pre-existing Wastewater Capacity Fee rate and adopted a new one. City's Municipal Code allows for transfer of reserved capacity attributable to the original wastewater treatment plant from user to user. City allows for transfer of this reserved capacity to new users at the original rate on a first come first served basis. In this case, reserved capacity is available for use by Company in connection with the Project, and City has approved the transfer. The total Wastewater Capacity Fee for the entire Project (Phase I, II and III) based on the original fee is \$1,050,548.33, while the total Wastewater Capacity Fee based on the current rate is \$31,344.00. Accordingly, the amount of the public subsidy is the differential (Wastewater Capacity Fee Differential) which comes to \$1,019,204.

The County of Stanislaus (County) had adopted a Large Industrial Investment Incentive Program to facilitate job creation by promoting development of new industrial facilities in the County. Eligible participants in the program are entitled to a deduction in the amount of Public Facilities Fees otherwise payable to the County in connection with the proposed facility improvement. Based on discussions with the County of Stanislaus, Company should be eligible for a deduction in the approximate amount of \$207,729 in conjunction with the Project. Thus, the total proposed public subsidy to the Project is \$1,664,804.

DISCUSSION

Labor Code section 1771¹ generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1)² defines public works to include: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds" Subdivision (b) provides:

(b) For purposes of this section, "paid for in whole or in part out of public funds" means all of the following:

(1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.

¹Subsequent statutory references are to the Labor Code unless otherwise indicated.

²Subsequent subdivision references are to section 1720.

...

(4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.

Subdivision (c), however, provides:

(c) Notwithstanding subdivision (b):

...

(3) If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

It is undisputed that the Project is a public work under subdivision (a)(1) ["Construction . . . done under contract and paid for in whole or in part out of public funds . . ."].³ The issues are whether the above-described WISP Fee Credit entails a payment of public funds as defined by subdivision (b)(4) and whether the Project is exempt from prevailing wage requirements under the exemption provided in subdivision (c)(3).

The WISP Fee Credit for the entire Project will be \$437,871. On its face, it appears that this credit constitutes a payment of public funds under subdivision (b)(4). Company argues, however, upon closer examination, that the WISP Fee Credit can be distinguished from public funds in that City is only agreeing to provide a credit *if* Company constructs the infrastructure improvements at its own cost. As a result, the Company is effectively paying the WISP fee in the form of the completed infrastructure. According to Company, the WISP Fee Credit is simply an accounting reconciliation to acknowledge that Company has already funded the infrastructure improvements. In that sense, Company argues, it should not be viewed as a waiver of a fee, but rather as a choice for the Company as to how the fee is paid. Similarly, if the Company had chosen to pay the WISP fee, waiver of the requirement to construct the infrastructure improvements also would not be characterized as the payment of public funds. Accordingly, Company requests a determination that the WISP Fee Credit does not constitute a payment of public funds pursuant to subdivision (b)(4). This request must be denied for the following reason.

³ It is undisputed that the Wastewater Capacity Fee Differential of \$1,019,204 and the County's \$207,729 deduction in Public Facilities Fees constitute payments of public funds under subdivision (b).

In *Hensel Phelps Construction Company v. San Diego Unified Port District* (2011) 197 Cal.App.4th 1020 (*Hensel Phelps*), the Fourth District Court of Appeal explained that subdivision (b) does not require that the amount forgiven be an actual tangible net payment by the awarding body to a contractor. As explained in *Hensel Phelps*:

Petitioners also contend that in interpreting the phrase “rents ... that are ... reduced, waived or forgiven” we must incorporate the concept of fair market value. Specifically, Petitioners argue that we may not conclude that the Port District provided a *reduction* in rent within the meaning of section 1720, subdivision (b)(4) unless the total amount of the rent received by the Port District *over the total term of the Lease* is at less than fair market value. We find no support for Petitioners' proposed approach in the text of section 1720, subdivision (b)(4). In fact, the opposite is the case. The statute refers, *in the alternative*, to “rents ... that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.” Therefore, a public agency may pay for construction out of public funds either by reducing rent *or* by charging rent at less than fair market value. There is no requirement that both conditions be present. (*Id.* at 1039.)

The WISP Fee Credit is analogous to the rent reduction in *Hensel Phelps*. It does not matter that Company is performing infrastructure improvements itself or that Company could have elected to simply pay the fee and let the City perform the infrastructure improvement work. Company plans to accept the fee waiver. Therefore, it has received or will receive public funds within the meaning of subdivision (b)(4).

With respect to the exemption from prevailing wages for certain private development projects, subdivision (c)(3) states that if the public entity “provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to” prevailing wages. Here, the Project involves the construction of a new agricultural processing facility, which includes the procurement and installation of agricultural processing equipment as fixtures within the new facility. The estimated cost of the procurement and installation of this processing equipment is \$38,400,000. The installation of this equipment must be deemed part of the overall Project and included in the total project cost for the reasons discussed below.

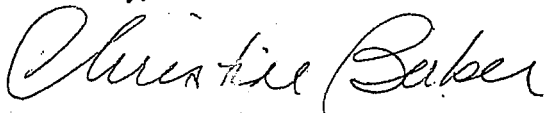
In a recent case, *Oxbow Carbon & Minerals, LLC v. Department of Indus. Relations* (2011) 194 Cal.App.4th 538, the Second District Court of Appeal affirmed an administrative determination by the Director that construction work on a single facility done under two main contracts was a single public works project subject to the California Prevailing Wage Law. The owner, Oxbow, argued that the construction of a privately funded roof enclosure was separate and independent from the construction of a conveyor system that was paid for with public funds. As such, the roof enclosure could not be considered paid for out of public funds. The Court disagreed. It endorsed the application of the dictionary definition of “construction” that led to a view of the “complete integrated object” being constructed and focused on the significance of functionality of the parts being constructed.

Similarly, here, the agricultural processing equipment is part of the entire functional structure and must be included as part of the Project. The equipment will be bolted, secured or otherwise permanently affixed to the new facility.⁴ Accordingly, this work constitutes installation and is included in the total Project cost for the purpose of determining whether the "de minimis" exception in subdivision (c)(3) applies.

The total amount of public assistance to the Project, considering all three types of subsidies constituting "public funds," is \$1,664,804. This amounts to approximately 1.75 percent of the total estimated Project cost of \$95,300,000. The amount of public funds is proportionately small enough in relation to the overall cost of the Project, such that the availability of the subsidy does not significantly affect the economic viability of this Project. As such, under subdivision (c)(3), the public subsidy is considered de minimis in the context of the "otherwise private development project" and the Project is exempt from prevailing wage requirements. This result is consistent with prior coverage determinations addressing the "de minimis" exception.⁵

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Christine Baker
Director

⁴ See, e.g., Public Works Case No. 2005-041, *Pre-rinse Spray Valve Program (Phase II) California Urban Water Conservation Council* (5/11/2006) or Public Works Case No. 2008-035, *Open Item Contract WA00023961 - Modular Furniture - County of Sacramento* (11/24/2009) for a discussion of the definition of installation.

⁵ See PW 2008-037, *The Commons at Elk Grove, City of Elk Grove* (January 2, 2009) (sewer impact fee credit representing 1.1 percent of the total project costs was found to be de minimis); PW 2008-010, *Sewer Line Construction, City of Corona* (August 4, 2008) (public subsidy representing four-tenths of one percent of the total project costs was found to be de minimis); PW 2007-012, *Sand City Design Center, Sand City Redevelopment Agency* (May 15, 2008) (public subsidy representing 1.4 percent of the total project costs was found to be de minimis); PW 2004-024, *New Mitsubishi Auto Dealership, Victorville Redevelopment Agency* (March 18, 2005) (public subsidy representing 1.64 percent of the total project costs was found to be de minimis); Public Works Case No. 2008-038, *Solar Photovoltaic Distributed Generation Facility - Santa Cruz School District* (4/21/2010) (public subsidy representing 0.99 percent of the total project costs was found to be de minimis); and Public Works Case No. 2009-005, *Solar Photovoltaic Distributed Generation Facility - West County Wastewater District* (4/21/2010) (public subsidy representing 1.2 percent of the total project costs was found to be de minimis).