

DEPARTMENT OF INDUSTRIAL RELATIONS

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Howard Wien, Hearing Officer
Department of Industrial Relations
Office of the Director – Legal Unit
355 South Grand Avenue, Suite 1400
Los Angeles, California 90071

RE: Public Works Case No. 2016-013
San Diego River Multi-Use Pathway Project
City of San Diego

Dear Mr. Wien:

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 San Diego River Multi-Use Pathway Project (Project) is public work subject to prevailing wage requirements. The charter city status of the City of San Diego (City) does not exempt the Project from the requirement to pay prevailing wages.

Facts

A. The Project

In 2013, the City awarded a contract to Tri-Group Construction & Development, Inc. to construct a quarter-mile long bicycle and pedestrian path in the Mission Valley neighborhood of San Diego from Hazard Center Drive to Fashion Valley Mall. The path connects two existing bike paths on either side of state highway SR-163 that are connected to a wider array of paths throughout the county and the larger metropolitan area. As described in the bid invitation, the Project includes "construction of a concrete and pervious pathway, access ramp, retaining walls, gravity walls, peeler log fence, kiosk, street lights, luminaire lights, electrical system, striping and signage." The Project, completed in 2014, is entirely within City limits. TransNet funds paid for all \$608,447 in Project costs. Based upon its belief that the Project was a strictly municipal affair, the City expressly stated in its bid invitation that "[p]revailing wages are not applicable to this contract."

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

B. TransNet

The San Diego County Regional Transportation Commission (Commission) was created “so that local decisions can be implemented in a timely manner to provide improvements to the transportation system.” (Pub. Util. Code, § 132001, subd. (b).) The Board of Directors of the San Diego Association of Governments (SANDAG) serves as the Commission. (*Id.*, § 132051.) The Commission² is empowered to impose a “retail transactions and use tax ordinance applicable in the incorporated and unincorporated territory of the county” if approved by two-thirds of voters in a special election. (*Id.*, § 132301.)

The San Diego Transportation Improvement Program Ordinance and Expenditure Plan, or TransNet, is the voter-approved county one-half cent sales tax that funds a variety of countywide transportation facility and service improvements for highways, rail transit services, new bus rapid transit services, local bus services, senior and disabled transportation services, local streets and roads, bicycle and pedestrian facilities, transportation-related community infrastructure to support smart growth development, and related environmental mitigation and enhancement projects. (TransNet Ordinance and Expenditure Plan (TransNet Ordinance), § 2.) The Commission is charged with implementing TransNet. TransNet revenues are deposited in a special fund and used solely for the improvements identified in the TransNet Ordinance and Expenditure Plan. (*Ibid.*) Expenditures of these funds are not only governed by the TransNet Ordinance, but must conform to both the long-range Regional Transportation Plan (RTP) and the short-range, five-year Regional Transportation Improvement Program (RTIP). (See Pub. Util. Code, § 132302; TransNet Ordinance, §§ 4, 5(B), 6.) SANDAG, as the designated regional transportation planning agency pursuant to Government Code section 65080, is charged with preparing the RTP and RTIP. (TransNet Ordinance, §§ 21(H), 21(I).)

In 2004, San Diego County voters extended TransNet, which began in 1988 and was slated to expire in 2008, for another forty (40) years to 2048. (TransNet Ordinance, § 1.) This extension is expected to generate approximately \$14 billion to be distributed among highway, transit, and local road projects and other new programs to reduce traffic congestion in San Diego County.

The Project was funded entirely by two TransNet programs: the Local Street and Road Program and the Bicycle, Pedestrian and Neighborhood Safety Program.

1. Local Street and Road Projects

TransNet’s expenditures are allocated to two overarching programs: the Congestion Relief Program and the Bicycle, Pedestrian, and Neighborhood Safety Program. (TransNet Ordinance, p. 18.) Within the Congestion Relief Program are three major improvement projects: Major Transportation Corridor Improvements, Transit System Improvements, and Local System Improvements. The Local System Improvements project in turn consists of smaller projects, with the largest share of funding dedicated to the Local Street and Road Program. (See TransNet Ordinance § 2(C).) Approximately 29 percent, or an estimated \$3,950 million (after deducting for administrative and oversight

² Unless the context requires further specificity, SANDAG and the Commission are collectively referred to as the Commission.

committee expenses and funding for the Bicycle, Pedestrian, and Neighborhood Safety Program) of the TransNet annual revenues are allocated to the Local Street and Road Program, to be disbursed to each local agency within the County based on the distribution formula set forth in the TransNet Extension ordinance.³ (*Id.* at §§ 2(C)(1), 4(D)(1).)

The Commission retains broad oversight over how TransNet funds are used by local agencies. Each local agency must biennially develop for the Commission's review a five-year list of projects to be funded with Local System Improvements revenue, in accordance TransNet criteria: priority should be conferred to improvements to regional arterials, grade separation projects, and related facilities contributing to congestion relief, and a minimum of 70% of revenues must be devoted to new construction, with no more than 30% of revenues expended on maintenance. (*Id.*, §§ 2(C)(1), 5(A), 5(B).) The Commission then biennially reviews and approves the five-year project lists and a biennial program of projects to be funded during the succeeding two fiscal years. (*Id.*, § 6.) The Commission is required to "review each local agency's biennial project list submittal and make a finding of consistency" with the TransNet Ordinance, expenditure plan, and the RTP prior to approving the local agency's project list for funding. (*Id.*, § 2(C)(1).) Finally, because TransNet funds are intended to augment, not supplant, existing local revenues being used for local system improvements, the Commission is empowered to withhold revenues to any eligible local agency in any fiscal year until that local agency has certified to the Commission that it will include in its budget for that fiscal year an amount of local discretionary funding for streets and roads purposes at least equal to the minimum requirement. (*Id.*, § 8.) The Commission is to ensure local agencies are meeting their minimum requirements by conducting annual independent audits. (*Ibid.*)

2. Bicycle, Pedestrian and Neighborhood Safety Program

Two percent (an estimated \$280 million) of the TransNet annual revenues are allocated to the Bicycle, Pedestrian and Neighborhood Safety Program (BPNSP). (TransNet Ordinance, § 2(E).) This program funds bikeway facilities and connectivity improvements, pedestrian and walkable community projects, bicycle and pedestrian safety projects and programs, and traffic calming projects. (*Ibid.*) These funds "shall" be allocated on a regional competitive grant basis. (*Ibid.*) Further, it is "intended that these funds be used to match federal, state, local, and private funding to maximize the number of improvements to be implemented." (*Ibid.*) The Commission establishes the specific project eligibility criteria. (*Ibid.*) Together the BPNSP⁴ and Transportation Development Act, Article 3 funding are referred to as the "SANDAG Active Transportation Grant Program (ATGP)."

³ The formula consists of an annual base sum of \$50,000 and then a proportional share that is weighted two-thirds by population and one-third by street and road mileage. (*Id.* at § 4(D)(1).)

⁴ Article 3 of the Transportation Development Act (Pub. Util. Code, § 99200, et seq.) provides funding for Bicycle and Pedestrian Facilities and Programs.

C. The City is a Charter City

The City is a charter city, and its charter contains a provision stating that the City “shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs”. (San Diego Charter, art. I, § 2.) In 2003, the City adopted Resolution R-298185, which provides that the City’s public works projects will not require payment of prevailing wages unless the project is of statewide concern or payment of prevailing wages is a condition of federal or state grants.⁵

Discussion

“Public works” is generally defined as construction, alteration, demolition, installation, or repair work that is done under contract and paid for in whole or in part out of public funds. (§ 1720, subd. (a).) Workers employed on public works must be paid the prevailing wage. (§ 1771.)

It is undisputed that the Project is public works, as it involves construction work that is done under contract by Tri-Group Construction and paid for entirely out of TransNet funds. The City, however, argues that its charter exempts the Project from the state’s prevailing wage laws because the Project is a purely municipal affair, as the Project is entirely within the City’s limits, serves primarily the City’s residents, and is subject to minimal control by the Commission. DLSE, on the other hand, contends that the Project is not a purely a municipal affair, based on its own application of the factors the Department has historically employed to determine whether a project is a municipal affair. For the reasons set forth below, DLSE has the more persuasive argument.

A. California’s Home Rule Doctrine

The “home rule doctrine” refers to a charter city’s plenary powers over its own municipal affairs. Charter cities are “specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs.” (*State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 555 (*Vista*); Cal. Const., art. XI, § 5, subd. (a).) “City charters adopted pursuant to this Constitution shall...with respect to municipal affairs...supersede all laws inconsistent herewith.” (*Id.*, art. XI, § 5, subd. (b).) However, this autonomy is not unlimited. Charter cities remain subject to and controlled by general state laws regardless of the conflicting provisions of their charters where the matters are of statewide concern. (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61-62; *Pacific Tel. & Tel. Co. v. City & Cty. of San Francisco* (1959) 51 Cal.2d 766, 769 [citations omitted].) Whether the charter city exemption applies in this case, therefore, depends on whether the Project is a subject of statewide concern or a “purely” municipal affair.

⁵ The Resolution also states that the City’s water and sewer fund public works projects that are estimated to be in excess of \$10 million shall comply with state prevailing wage laws. In 2013, the City adopted San Diego Ordinance O-20299 which rescinded Resolution R-298185 and added a new section 22.3019 to the municipal code, which requires compliance with state prevailing wage law for all new public works projects as of January 1, 2014.

“Statewide” refers to “all matters of more than local concern and thus includes matters the impact of which is primarily regional rather than truly statewide.” (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 505.) Where the scope of the project “intrudes upon or transcends the boundary of one or several municipalities . . . such contemplated improvement ceases to be a municipal affair and comes within the proper domain and regulation of the general laws of the state.” (*Wilson v. City of San Bernardino* (1960) 186 Cal.App.2d 603, 611.)

Courts have construed the concept of “municipal affair” narrowly when determining the applicability of the charter city exemption by asking whether the activity in question is “*merely* a municipal affair” (*City of Pasadena v. Chamberlain* (1928) 204 Cal. 653, 660, italics added, *Southern California Roads Co. v. McGuire*, 2 Cal.2d 115, 123, italics added); “*strictly* municipal affair[s]” (*Committee of Seven Thousand, supra*, 45 Cal.3d at p. 505, italics added); “*purely* municipal affairs” (*Baggett v. Gates* (1982) 32 Cal.3d 128, 136 [citation omitted]); or “*exclusively* municipal affairs.” (*Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 291, italics added). Further, the California Supreme Court has recognized that matters which once may have been a municipal affair may later become a subject of statewide concern. (See *Pacific Tel. & Tel. Co., supra*, 51 Cal.2d at p. 77 [The concept of “municipal affair” is neither “fixed” nor “static” and “changes with the changing conditions upon which it is to operate.”].)

The Department’s analysis for determining whether a Project is a municipal affair of a charter city has historically considered three factors: (1) the extent of the non-municipal control over the project; (2) the source and control of the funds used for the project; and (3) the nature and purpose of the project. (See *McGuire, supra*, 2 Cal.2d at pp. 120-123.) Related to the nature and purpose of the project are its geographical scope (*Young v. Superior Court of Kern County* (1932) 216 Cal. 512, 516-517) and its extra-territorial effects (*Pacific Tel. & Tel. Co., supra*, 51 Cal.2d at pp. 771-774.)

B. The Project is Not a Municipal Affair

1. Extent of Non-Municipal Control Over the Project

The City planned the Project, determined the scope of work, advertised for bids, and awarded the contract. The City also oversaw construction activities, including reviewing plans and specifications. The Commission, however, determined whether the City met the eligibility requirements for TransNet funding under the Local Street and Road Program, identified the permissible purposes of the TransNet funds, allocated the TransNet revenue to the City for the sole specified purposes, and awarded competitive grant funds to the City under the BPNP. In addition, the Commission set a deadline to use the TransNet funds, imposed various other restrictions on the expenditures, and retained approval and audit oversight over the Project. In the City’s attempt to characterize the Commission’s role in the Project as merely administrative, it concedes the great extent to which the Commission is involved in the Project:

The Commission reviews the project lists of the local agencies for consistency with the goals and purposes of the TransNet program, its implementing ordinance and expenditure plan, as well as for consistency with the RPT and RTIP. The Commission’s role is essentially to verify local agencies have complied with their

minimal procedural requirements (e.g. adhere to TransNet's prioritization of new construction and improvement of road over maintenance (70% versus 30%), hold a public hearing to obtain community input on project lists, and evidence the agency's official approval of its project list through adoption of a resolution) and to ensure there are no disqualifying inconsistencies between the local agencies' proposed projects and the goals of the TransNet program." (Brief of City of San Diego in Support of Motion to Dismiss, at pp. 4-5.)

The Commission's involvement in the Project is clearly extensive. Although the City argues that it was not required to submit its project plans to the Commission and that it could have theoretically made changes to the Project without Commission approval, the extent of this discretion is misleading. The City was required to submit a five-year list of projects consistent with TransNet funding guidelines to the Commission, enforceable by periodic audits. Moreover, though the City could have unilaterally made changes to the Project without consulting the Commission, if those changes were incongruent with the TransNet Ordinance, the City stood to have its funding reduced in the following year. (See, e.g., TransNet Ordinance, § 8.) Thus, the extent of extra-municipal control over the Project is more than nominal. Finally, the fact that the bike path was not an asset of the Commission is unavailing, as ownership alone has not been considered a determinative factor in the control analysis.

Where, as here, all Project costs are funded by a County sales tax, the conditions imposed during the TransNet funding approval process represent shared control over the Project between City and the Commission. Under these facts, analysis of the first factor does not support the City's assertion that there is no extra-municipal control over the Project.

2. The Source and Control of the Funds Used for the Project

The Project was funded entirely by the County's taxpayers. The manner in which the County's tax dollars are spent is of obvious concern to more than just those living within the City's boundaries. Thus, a non-municipally funded project is routinely excluded from the ambit of a "municipal affair". (See, e.g., *Young, supra*, 216 Cal. at p. 516 [a charter city construction project "cannot be deemed a matter of purely municipal concern" in part because it was to be financed from federal, state, and county funds].) Moreover, as explained above, in addition to the non-municipal funding of the Project, the Commission retains a high degree of control over how the City uses its TransNet funds through a preapproval process for project programming, use of annual audits, and potential claw-back of funding. Because the Project was entirely funded by the County and the Commission controls how the TransNet funds are to be used by the City, analysis of the second factor does not support City's assertion that the Project is merely, strictly, or purely a municipal affair.

3. The Nature and Purpose of the Project

Although located within the City limits, the Project was expressly intended to, and does benefit, the County's neighborhoods and communities adjacent to the City.

The County's voters approved the creation of TransNet to address major regional transportation needs. TransNet's sole purpose is to implement the San Diego Transportation Improvement Program, which would result in "countywide transportation facility and service improvements" to reduce congestion, increase regional access to transit, and "support smart growth development, and related environmental mitigation and enhancement projects." (TransNet Ordinance, § 2.) To that end, the RTP envisions "a multimodal regional transportation network that includes a regional bicycle network." (See 2050 RTP at p. 6-53.) The San Diego Regional Bicycle Plan, in turn, supports implementation of the RTP, and "sets forth a vision for a distinctive regional bicycle system composed of interconnected bicycle corridors, support facilities, and programs . . . The Bicycle Plan presents an interconnected network of 40 bicycle corridors that will enable residents to bicycle with greater safety, directness, and convenience within and between major regional destinations." (*Ibid.*) As a component of the Bicycle Plan, the Project is clearly regional in scope.

The Project itself connects two existing bike paths on either side of state highway SR-163 that are connected to a wider array of paths throughout the County and the larger metropolitan area. Thus, the nature and purpose of the bike path was not only to serve City residents, but all of the region's residents and visitors, and the interconnection of the bike path to the larger region was therefore more than a mere local or "incidental extra-municipal benefit"; it was the very purpose of the Project. The Project was intended to be a component of the regional transportation network and to confer significant benefits on the transportation needs of not only the City, but the entire San Diego regional community.

C. This Determination is Consistent with California Case Law

The City is unable to cite to a case where a court has held that a project funded by non-municipal funds falls within the ambit of a municipal affair. Indeed, case law supports the contrary conclusion, that a non-municipally funded project is excluded from the ambit of a "municipal affair." (See, e.g., *Vial v. City of San Diego* (1981) 122 Cal.App.3d 346, 348 [specifically excluding, pursuant to city's resolution, state and federally funded projects from the sphere of "municipal affairs"]; *McGuire, supra*, 2 Cal.2d at pp. 121-22 [finding improvement of Sepulveda Boulevard by the city of Los Angeles "not merely a local or municipal affair of the city, but that it is an affair in which the state has a direct and vital interest" in part due to its non-municipal funding]; *City of Pasadena v. Charleville* (1932) 215 Cal. 384, 389 [improvement was a municipal affair in part because "[t]he money to be expended for the cost of the improvement belongs to the city and the control of its expenditure is a municipal affair".])⁶

⁶ Further, the City's reliance on *Vista* is misplaced because *Vista* involved the expenditure of a "city's tax dollars," subject to the city's sole control. *Vista* held that "wage levels of contractor workers constructing *locally funded* public works are a municipal affair (that is, exempt from state regulation), and that these wage levels are not a statewide concern (that is, subject to state legislative control)." (54 Cal.4th at p. 556, italics added.) In expressly limiting its holding to municipally-funded public works projects, the California Supreme Court observed:

Taxpayers from both inside and outside the City are funding construction of a project that is intended to benefit all of them. Such a project cannot be considered an exclusively municipal affair of the City.

Conclusion

For the foregoing reasons, the Project is a public work and not a municipal affair. Accordingly, the Project is subject to California's prevailing wage requirements.

I hope this letter satisfactorily answers your inquiry.

Sincerely,



Christine Baker
Director

We can think of nothing that is of greater municipal concern than how a city's tax dollars will be spent; nor anything which could be of less interest to taxpayers of other jurisdictions.

(*Id.* at p. 562 [citations omitted].)

By contrast, no tax dollars from the City went into the Project in this case, as the Project was funded entirely by the revenues from a countywide sales tax.