STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *GOVERNOR*

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STATISTICS & RESEARCH
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102

ADDRESS REPLY TO:
P.O. Box 420603
San Francisco CA 94142-0603

SCOPE OF WORK PROVISIONS

FOR

TEAMSTER:
ALL CLASSIFICATIONS

IMPERIAL, INYO, KERN, LOS ANGELES, MONO, ORANGE, RIVERSIDE, SAN BERNARDINO, SAN LUIS OBISPO, SANTA BARBARA & VENTURA COUNTIES

SOUTHERN CALIFORNIA MASTER LABOR AGREEMENT

Between

SOUTHERN CALIFORNIA GENERAL CONTRACTORS

And

TEAMSTER JOINT COUNCIL NO. 42

And

TEAMSTER LOCAL UNION NO. 87

Affiliated with the

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

This agreement entered into this first day of July 2003, by and between the **Associated General Contractors of California, Inc.**, the **Building Industry Association of Southern California, Inc.**, and the **Southern California Contractors Association, Inc.**, on behalf of their respective eligible members, hereinafter referred to as the **CONTRACTORS**; and **Joint Council of Teamsters NO. 42 and Teamsters Local Union No. 87**, affiliated with the **International Brotherhood of Teamsters**, who are signatory hereto for themselves and the Local Unions which have jurisdiction over the work hereinafter described, hereinafter referred to as the **UNION.**

Purpose

The Contractors are engaged in construction work in Southern California and, in the performance of their present and future operations, are employing and will employ workmen under the terms of this Agreement. The Contractors want to be assured of their ability to procure workmen in the geographic area hereinafter defined in Article I, in sufficient number and with sufficient skill to assure continuity of work in the completion of their construction work. The Union and the Contractors, by this Agreement, intend to establish uniform rates of pay, hours of employment and working conditions for the employees covered by this Agreement. The Union and the Contractors further intend by this Agreement to provide, establish and put into practice an effective method for the settlement of misunderstandings, disputes or grievances, with the thought in mind that the Contractors are assured continuity of operation and the employees of the Contractors are assured continuity of employment and industrial peace is maintained.

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Department of Industrial Relations

JUL 31 2003

Div. of Labor Statistics & Research
Chief's Office

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Department of Industrial Relations

JUL 31 2003

Div. of Labor Statistics & Research
Chief's Office

ARTICLE I

General Provisions

101. Definitions:

101.1. The term "Contractor" or "Employer", as used herein, shall refer to an Employer party to or bound by this Agreement.

101.2. The term "Association," as used herein shall refer to the Associations previously named and signatory to this Agreement.

101.3. The term "Union," as used herein, shall refer to Teamsters Joint Council No. 42 in behalf of its affiliated local unions: Teamsters Local Unions 166, 186, 381, 848, and 986 and Teamsters Local Union No. 87 all affiliated with the International Brotherhood of Teamsters of America, in the Eleven Southern California Counties, which have jurisdiction over the work in the territory covered by this Agreement.

101.4. The term "Workman" or "Workmen," as used herein, shall refer to a person, or persons, in the labor market who are not employed.

101.5. The term "Employee(s)," as used herein, shall refer to the employed person, or persons, covered by this Agreement, and Owner-Operators as defined in Article XXIV of this Agreement.

101.6. All personal nouns and pronouns refer to the male and female gender.

102. COVERAGE

102.1. This Agreement shall apply to and cover all hours of employment of each employee of the Contractors, including Developers, Builders or Construction Managers and to Owner-Builders to the extent permitted by law within the territory as described in this paragraph, employed to perform or performing any construction work within the jurisdiction of the Union, as such employees and construction work are respectively defined hereafter in this Agreement in the area known as Southern California and more particularly described as the Counties of Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, Ventura, Santa Barbara, San Luis Obispo, Kern and in addition: Richardson Rock, Santa Cruz Island, San Miguel Island, Santa Barbara Island, San Clemente Island, Santa Rosa Island, Anacapa Island, including the Channel Islands Monument.

102.2. This Agreement is made for and on behalf of and shall be binding upon all eligible persons, firms or corporations who at the time of execution of this Agreement are, or during the term hereof become eligible members of the Associations.

102.3. Each individual Contractor whether corporate, or other legal entity, or its successor, shall be liable under, subject to and bound by the Agreement. It is agreed that the wages, hours and working conditions of this Agreement are the wages, hours and working conditions in the area covered by this Agreement.

102.4. This Agreement is separate and distinct from and independent of all other Agreements entered into between the Union and other Contractor organizations irrespective of any similarity between this Agreement and any such other Agreements, and no acts or things done by the parties to such Agreements or notices given pursuant to the provisions hereof, shall change or modify this Agreement or in any manner affect the contractual relationships of the parties herein, except as otherwise provided in the Article covering existing and other Agreements.

102.5. This Agreement shall cover and apply to all work falling within the recognized jurisdiction of the Union signatory to this Agreement.

102.5.1. It shall cover work on building, heavy highway, and engineering construction, including the construction of, in whole or in part, or in improvement or modification thereof, including any structure or operations which are incidental thereto, the assembly, operation, maintenance and repair of all equipment, vehicles, and other facilities, including helicopters used in connection with the performance of the aforementioned work and services and including without limitation the following types or classes of work.

102.5.2. Street and highway work, grading and paving, excavation of earth and rock, grade separations, elevated highways, viaducts, bridges, abutments, retaining walls, subways, airport grading, surfacing and drainage, electric transmission line and conduit projects, water supply, water development, reclamation, irrigation, draining and flood control projects, water mains, pipe line, sanitation and sewer projects, dams, aqueducts, canals, reservoirs, intakes, channels, levees, dikes, revetments, quarrying of breakwater or riprap stone, foundations, pile driving, piers, locks, dikes, river and harbor projects, breakwaters, jetties, dredging, tunnels, soil testing and building inspection.

102.5.3. The construction, erection, alteration, repair, modification, demolition, addition or improvement, in whole or in part, of any building structure, including oil or gas refineries and incidental structures, solar energy installations and appurtenances thereto, also including any grading, excavation, or similar operations which are incidental thereto, or the installation, operation, maintenance and repair of equipment, and other facilities used in connection with the performance of such building construction except where such structures are an incidental or supplemental part of highway and engineering construction, as defined in this Article.

102.6. All work performed in the Contractor's warehouses, shops or yards which have been particularly provided or set up to handle work in connection with a job or project covered by the terms of this Agreement and all of the production or fabrication of materials by the Contractor for use on the project shall be subject to the terms and conditions of this Agreement.

103. A vendor, who makes deliveries of materials, supplies or equipment and, who, incidental to or as a part of the furnishing or delivery of material, supplies or equipment, does any work at the jobsite, shall be a party to a current collective bargaining agreement with the International Brotherhood of Teamsters, or one of its affiliates. In the event a vendor is not party to such an agreement, he shall not perform any jobsite work except that deliveries may be made by such vendor to central storage areas, or storage tanks for later distribution by employees covered by an appropriate, current labor agreement with the appropriate union, or subordinate body, affiliated with the Building and Construction Trades Department AFL-CIO, or with the International Brotherhood of Teamsters, or an affiliate thereof. This subparagraph shall apply only to vendors and shall not be applicable to Contractors or their subcontractors or to their employees.

104. Repairs necessitated by defects of material or workmanship or adjustment of newly purchased and/or installed equipment or machinery will not be subject to this Agreement when such repairs and/or adjustments are made pursuant to the terms of a manufacturer's guarantee and the Union will not hamper such manufacturer or his agents or employees on such exempted work.

105. LOADING AND UNLOADING EQUIPMENT

105.1. So far as it is within the control of the Contractor, the loading and unloading of equipment which is operated by employees covered by this Agreement or the transportation of such equipment by means of its own power, shall be performed by employees covered by this Agreement. Nothing herein contained shall be construed to prohibit the normal delivery of freight by common carrier.

105.2. The Contractor and his subcontractors shall have freedom of choice in the purchase of materials, supplies and equipment, except that every reasonable effort shall be made by the Contractor and his subcontractors to refrain from the use of materials, supplies or equipment, which use will tend to cause any discord or disturbance on the project.

106. UNION RECOGNITION

106.1. The Contractor hereby recognizes the Union as the sole and exclusive collective bargaining representative of all employees and persons employed to perform work covered by this Agreement. It is understood that the Union does not at this time, nor will they during the term of this Agreement, claim jurisdiction over the following class of employees: executives, superintendents, assistant superintendents, master mechanics, time keepers, messenger boys, office workers or any employees of the Contractor above the rank of General or Craft Foreman. Employees and persons employed to perform work covered by this Agreement specifically include General and Craft Foreman.

Posted to DLSR website on January 24, 2006.

STATE OF CALIFORNIA Arnold Schwarzenegger, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
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January 23, 2006

Bruce Behrens, Chief Counsel
Department of Transportation
Business, Transportation & Housing Agency
Attn: Legal Division - M.S. 57
1120 N Street
Sacramento, CA 95814-1438

Edgar Patino, Labor Compliance Officer
City of San Diego
600 B Street, Suite 600
San Diego, CA 92101

Re: Public Works Case No. 2004-023
Prevailing Wage Rates
Richmond-San Rafael Bridge/Benicia-Martinez Bridge/
San Francisco-Oakland Bay Bridge
California Department of Transportation

Public Works Case No. 2003-046
Public Works Coverage
West Mission Bay Drive Bridge Retrofit Project
City of San Diego

Dear Messrs. Behrens and Patino:

This constitutes the determination of the Director of Industrial Relations ("DIR" or "Department") regarding the above-referenced projects, which involve the issues of both public works coverage of towboat operator[1] work under California's Prevailing Wage Law ("CPWL") as well as the applicability and rates of prevailing wages for the work. This determination finds that, although certain towboat operator work is deemed to be public work, prevailing wages are not required to be paid on the above-referenced projects both because the March 28, 2002, letter by former Director Chuck Cake was not a public works coverage determination and there were no prevailing wage rates in effect at the time of the bid advertisement dates for any of the projects at issue.

[1] While the interested parties have referred to this work and the vehicles involved in it by various titles, herein we generally use the term "towboat operator."

Factual Background

On January 23, 1998, DIR Director John Duncan issued a public works coverage determination that found that, except for hauling of materials originating from an adjacent source dedicated to the public works site, or where the materials are immediately incorporated into the public work site, towboat operator work performed in relation to a public works outfall project bid by the City of San Diego was not deemed to be public work requiring the payment of prevailing wages. *PW 97-011, Towboat Operators, Point Loma Rebalasting Outfall Project, South Bay Ocean Outfall Contract No. 3, City of San Diego (January 23, 1998)* ("Point Loma Decision"). The project there included the construction of a sewage pipe laid from shore onto the seabed, secured in part with rock. The rock was transported from a dedicated, on-shore, stockpile site created specifically for the project to the construction site up to 22 miles into the ocean. The workers as to whom the public works coverage issue arose transported by towboat the materials from the dedicated site to the construction site. The towboat operators picked up the materials from the dedicated site on pre-loaded barges and hauled the barges to the site, where they were left for later incorporation into the construction site. The Point Loma Decision analyzed the facts of that case under *O.G. Sansone Company v. Dept. of Transportation* (1976) 55 Cal.App.3d 434, 127 Cal.Rptr. 799, the leading California case to address prevailing wage obligations for the on-hauling of materials to a public works site. Until now, the Point Loma Decision was the only determination to have addressed the public works coverage status of material hauling by towboat operators.

On March 13, 1998, Dorothy Vuksich, Chief of the Division of Labor Statistics and Research ("DLSR") sent a copy of the Point Loma Decision to CalTrans in response to its December 10, 1997, request for a rate of pay determination concerning its seismic retrofit of the San Mateo Bridge. Vuksich's letter stated:

> …[I]n your case, there is a question as to whether the marine workers are engaged in construction. According to information provided in your letter, it appears that the workers and their vessels are responsible for transporting personnel, supplies, and equipment for the project. Consistent with a recent Decision on Administrative Appeal, it was determined that "The prevailing wage laws cover construction activity not maritime activity." Therefore, if the work involves only the transport of personnel

> and supplies, it could be construed as a water taxi operation and would be exempt from prevailing wages. However, if the work of the crew involves any work on the public works site, prevailing wages may be required. (Footnote and internal citation omitted.)

Vuksich's letter also advised CalTrans that it could seek a "formal coverage determination" if it thought it necessary.

The Point Loma Decision was designated as precedential in December, 1998, but de-designated approximately six months later by a subsequent Administration.

Between April, 1998, and December, 2001, CalTrans advertised for bid several bridge retrofit projects utilizing towboat operators. The parties to the present CalTrans determination appear to agree that the work included hauling of material, equipment, and construction workers to the job sites and that at least some of this hauling was from dedicated sites. They also appear to agree that the towboat operators hauled barges from the project sites to be reloaded at both commercial and dedicated yards. In its correspondence of June 28, 2005, and July 25, 2005, CalTrans asserts that the primary function of the towboat work was the transportation of equipment, construction materials and personnel, and that the work is identical to the work performed by the towboat operators in the Point Loma Decision, and that no construction activity or loading work was performed by the towboat operators.

The International Organization of Masters, Mates and Pilots ("MMP") claims that the towboat work involved both hauling and on-site work, which consists of moving materials to the bridge site and assisting barges in the performance of their work. MMP also asserts that the towboat operators loaded and unloaded the towboats and, to a lesser extent, the barges themselves, to move equipment and personnel to the job site. According to MMP, when materials were involved, the towboat operators moved the barges onto and around the project sites or brought the barges to be reloaded at a commercial or dedicated yard, depending on the materials involved. It is clear that towboat operators transported wet cement and other materials from dedicated as well as commercial yards.

MMP does not claim the towboat operators operated dredgers or incorporated material into the projects, though they do claim that most of the material transported was immediately incorporated into the bridge projects, at least by other workers. MMP and CalTrans

appear to agree that a contractor towed concrete sections of the bridge from a dedicated source in Stockton to the bridge projects.

On February 1, 2002, Local 3, International Union of Operating Engineers ("Operating Engineers") submitted a letter to DIR Director Chuck Cake requesting a project determination and prevailing wage rates for towboat operators on the CalTrans retrofit projects. In response, on March 28, 2002, Cake issued a rate of pay determination that the Dredge Tender/Deckhand rate of pay was the prevailing wage rate ("Cake Letter".) This rate of pay determination was not sent to any awarding body and was never published as a general prevailing wage determination.

The Cake Letter and another authored by Cake on September 19, 2002, to CalTrans stated that the rate applied to projects already underway as well as to new projects. The September 19, 2002, letter by Cake also stated that neither a public works coverage determination nor a petition of the rate of pay determinations had been submitted:

> To date this Department has not received a request for a coverage decision on this project for work involving "construction work boats." In addition, the rates issued for the above project have not been petitioned. However, the Department of Industrial Relations through the Division of Labor Statistics and Research has issued a Type of Work/Rate of Pay decision for "construction work boats" on this project (see enclosed letter addressed to Donald R. Doser, Operating Engineers Local Union No. 3, dated March 28, 2002).

On September 25, 2002, Cake advised the Operating Engineers that the classifications of Licensed Construction Boat Operator, On-site, and Unlicensed Construction Boat Worker, On-site, would replace the Dredge Tender/Deckhand classification for towboat work bid after September 1, 2002. On August 22, 2002, effective September 1, 2002, the Department published these new classifications in its general prevailing wage determinations as the first rates ever published for towboat work.[2]

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[2] Other maritime construction work involving towboats occurred from time to time in and on the shore of the San Francisco and San Diego bays, and some was undoubtedly performed by towboat operators subject to a collective bargaining agreement. Nevertheless, no agreement had ever been provided to the Department for review for publication in the General Prevailing Wage Determinations. In fact, as of this date, despite requests by the DLSR, no union representing the towboat operators has submitted a collective bargaining agreement for consideration.

On August 15, 2002, the City of San Diego ("San Diego") advertised for bid the retrofit of the West Mission Bay Drive Bridge. On April 1, 2003, San Diego requested from the Department a survey for prevailing wage rates for towboat operators. In its letter, San Diego stated that the towboat work performed on the its project consisted of operating a tugboat to move barges; carrying loads of material; assisting ships to move in and out of the harbors and through dangerous and difficult waterways; maneuvering barges around bridges and in tight spaces with precision; controlling the tugboat to tow and push ships; assisting in docking ships; maintaining and refueling the tug; directing the work of the tug's crew; ensuring the safety of the tug and its crew; optional fighting of fire or oil pollution at sea; placement of buoys to mark hazards at sea; salvage work; and rescue operations.

On May 6, 2003, Director Cake sent to San Diego prevailing wage rates for the Dredge Tender/Deckhand classification, which were the classifications Cake had told Operating Engineers were applicable for work performed prior to September 1, 2002. In a follow-up letter of October 3, 2003, San Diego asserted that, because the towboat work on the West Mission Bay project was "essentially identical" to the work performed in the Point Loma Decision, under that decision and *O. G. Sansone Co., supra*, the San Diego project towboat work would not be public work for which prevailing wages were required.

On May 31, 2004, CalTrans requested the DIR to reconsider or withdraw Cake's March 28, 2002, Dredge Tender/Deckhand rate of pay determination. It argued that the towboat work on its bridge projects should not require the payment of prevailing wages because there was no public works coverage determination finding the work to be covered prior to the Cake March 28, 2002, rate of pay determination.

MMP responded to CalTrans' May 31, 2004, request concerning the CalTrans bridge projects, claiming that the towboat operator work is public work and that the Cake decision is a public works coverage determination effective as to all projects. MMP also argued that CalTrans should be equitably estopped from receiving any reconsideration of the March 28, 2002, Cake rate of pay determination because it was dilatory in waiting more than two years to file its "appeal" of the determination. MMP demanded that CalTrans make payments retroactive to the beginning of each of its bridge retrofit projects.

Westar Marine Service ("Westar"), the employer of the towboat operators on the CalTrans projects, has filed two "appeals" from

the March 28, 2002, Cake rate of pay determination, one on February 4, 2003, and another on July 27, 2004.[3] They are treated herein as a single appeal.

Discussion

I. Public Works Coverage Determinations And General Prevailing Wage Determinations.

While no project or work requires Department pre-clearance of its status as a public work, the Director of DIR has the authority to issue public works coverage determinations "to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which that interested party believes may be subject to or excluded from coverage as a public works under the Labor Code." California Code of Regulations ("CCR"), title 8, section 16001(a). The Director's authority is "plenary." *Lusardi Construction Company v. Aubry* (1992) 1 Cal.4th 976, 4 Cal.Rptr.2d 837.

Under Government Code section 11425.60, the Director may designate as "precedential" public works coverage determinations that the Department expects its advice and enforcement arms to rely on and that serve as notice to the regulated public of their prevailing wage liabilities. The compendium of precedential public works coverage determinations may be found on the DIR website at http://www.dir.ca.gov/DLSR/PrecedentialDate.htm.

A separate and distinct authority of the Director is the issuance of general prevailing wage determinations under Labor Code section 1770.[4] The general prevailing wage determinations are issued by craft, classification or type of work and published on the Department's website at http://www.dir.ca.gov/DLSR/PWD/index.htm. To determine prevailing wages, the Director considers rates established by collective bargaining agreements and rates predetermined for federal public works. Lab. Code § 1773.[5]

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[3] Weststar paid the higher Operating Engineers wage on some of the work related to the Richmond-San Rafael project to avoid a work stoppage. CalTrans claims that it authorized the additional wage payments because it feared a job action would unreasonably delay completion of the project, adversely affecting the traveling public. Letter from Behrens to Holton/O'Mara, June 28, 2005.

[4] All further statutory references are to the Labor Code unless otherwise specified.

[5] See also California Code of Regulations, title 8, section 16200; *Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345, 28 Cal.Rptr.2d 550; *California Slurry Seal Association v. DIR* (2002) 98 Cal.App.4th 651, 121 Cal.Rptr.2d 38.

Because of the statutory definition of prevailing wages as a "modal" rate, the resulting rates are, as here, most frequently derived from union agreements in the area. Lab. Code § 1773.9. The Director's rate of pay in effect at the time of an awarding body's call for bids controls for the life of the project.[6]

Under section 1773.6, "[i]f during any quarterly period the Director of Industrial Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall make such change available to the awarding body and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any contract for which the notice to bidders has been published."

These rules exist so that awarding bodies and competing bidders can estimate labor costs and enjoy pre-bid certainty. *Metropolitan Water District vs. Whitsett* (1932) 215 Cal. 400. Under section 1773.4, parties enumerated therein may timely petition the Director to review a prevailing wage rate determination on the ground that it has not been determined in accordance with section 1773. In the event there is a type of work with no available rate, the awarding body can request with supporting evidence a "special determination." 8 CCR § 16202.

There is a general obligation for "the representatives of any craft … needed to execute contracts … [to] file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements …," (section 1773.1(e)1, earlier codified as 1773.1 (second paragraph)) so as "[t]o enable the Director to ascertain and consider the applicable rates … when making prevailing wage determinations…." 8 CCR § 16200(a)(1)(A).

II. <u>Public Works Coverage Of Towboat Operator Work.</u>

Section 1720(a)(1) states in relevant part: As used in this chapter, "public works" means: (1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds. Section 1772 states: "[w]orkers employed by contractors or subcontractors in the execution of any contract for public works are deemed to be employed upon public work." Sections 1771 and 1774 have similar requirements.

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[6] The prevailing wage rates derived from union collective bargaining agreements, which have a schedule of certain future increases at set dates, will incorporate those predetermined obligations so that the prevailing wage rates are not static on jobs, such as the ones at issue herein, which span many years. See Lab. Code § 1773.9(c).

Clearly, the larger bridge projects undertaken by CalTrans and San Diego are public works in that they are publicly funded construction done under contract. A determination whether the towboat operators working in relation to these projects are deemed to be employed upon public work turns on whether, under sections 1771, 1772, and/or 1774, they are employed by contractors or subcontractors in the execution of any contract for public works.[7] *O.G. Sansone Company, supra,* the leading California case to address prevailing wage obligations for the on-hauling of materials to a public works site, construes the meaning of this concept.

In *Sansone,* two trucking companies hauled sub-base material to a state public works highway construction project from locations adjacent to and established exclusively for the highway project. The material was purchased by the prime contractor from third parties pursuant to private borrow pit agreements. The third parties then subcontracted with trucking firms to haul the sub-base material to the project.

In analyzing whether the truckers employed by the subcontractors were exempt from prevailing wage requirements, the *Sansone* court quoted extensively from the decision in *H.B. Zachary Company v. United States* (1965) 344 F.2d 352, wherein the federal court looked to the United States Secretary of Labor's administrative interpretations of the Davis-Bacon Act's exclusion of material suppliers from statutory coverage. The *Zachary* court set forth three principal criteria for the denomination of a material supplier. First, a material supplier must be in the business of selling supplies to the general public. Second, the plant from which the material is obtained must not be established specially for the particular contract. Third, the plant may not be located at the site of the work. The *Zachary* court went on to apply the material supplier exemption to the truckers in that case, who were employed by a subcontractor hired by the general contractor. The court found that, since the truckers in question delivered material from material suppliers, they performed a function independent of the contract construction activities and therefore were not required to be paid prevailing wages.[8]

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[7] MMP states simply that the towboat operator work at issue is performed within the bridge construction site(s), which presumably is an argument that it constitutes construction under section 1720(a)(1). The parameters of the "public work" sites herein have not been described by either party and, as such, are not specifically addressed herein.

[8] The Court's statement that this proposition is "a logical extension of the congressional intent to exclude employees of materialmen from the coverage of the Davis-Bacon Act" indicates prevailing wages need not be paid to any

The *Sansone* court also relied on *Green v. Jones* (1964) 23 Wis.2d 551, 128 N.W.2d 1, which found that Wisconsin prevailing wage law applies to drivers who haul material to a public works site and immediately incorporate the material into the project, no matter whether the material is brought from a general commercial source or a pit opened solely for the purpose of providing material to the public work project. The court stated:

> In the course of determining whether Jones' employees were covered under the state's prevailing wage law the court made reference to an opinion of the Wisconsin Attorney General (38 Ops.Wis.Atty.Gen. 481, 483) which the court treated as embodying authoritative internal legislative history of the statute. The court stated (128 N.W.2d at p. 6): 'In response to specific questions the opinion elaborated the coverage tests. If certain materials were stockpiled at the site, then coverage depended upon whether the materials were hauled from a commercial pit operating continuously, in which event there would be no coverage, or whether the materials were hauled from a pit opened solely for the purpose of supplying materials, in which event there would be coverage. (Fn. omitted.) However, if the materials hauled were immediately utilized on the improvement, the drivers were covered regardless of the source of the material.' (*Id.* at 803-804.)

The *Sansone* court noted: "Jones' employees were covered because under the facts of that case the materials hauled were dumped or spread directly on the roadbed and were immediately used in the construction of the project. Thus, the court stated (128 N.W.2d at p. 7): 'In the instant case, although the drivers hauled materials from both commercial and 'ad hoc' pits, such materials were immediately distributed over the surface of the roadway. The drivers' tasks were functionally related to the process of construction.'" *Sansone's* adoption from *Jones* of this second basis is also premised upon the view that prevailing wages should be paid to truckers whose delivery of materials becomes "an integrated aspect of the flow process of construction" and who thereby perform work under the [public work] contract.[9]

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truckers delivering materials from general use facilities, whether they are employed by the material suppliers themselves or by the public works contractors.

[9] Neither *Jones* nor *Sansone* found prevailing wages were due to truckers employed by material suppliers. Under the rationale of *Jones*, however, adopted by *Sansone*, truckers who engage in the process of public work construction through their on-site incorporation of the material they deliver must be paid

Sansone, therefore, establishes two different bases for finding that on-haul truckers are deemed to be employed on public work construction. The first basis pertains to the source of the materials hauled. On-haul truckers, by whomever employed, who haul material from material suppliers are not required to be paid prevailing wages because such delivery to a public works site is a function that is performed independently of the contract construction activities. Conversely, truckers on-hauling materials from a source dedicated to the public work site would be deemed employed on a public work and require the payment of prevailing wages.

The second basis concerns whether the material delivered is immediately incorporated by the truckers into the public work site or stockpiled for later re-handling. On-haul truckers who participate in the immediate incorporation into the public work site of the material they haul are deemed to be employed on public work contract and must be paid prevailing wages. Conversely, truckers who haul to the public work site material that is stockpiled for later use are not deemed to be employed on public work and are therefore not required to be paid prevailing wages.

Contrary to the view espoused by MMP, *Sansone* does not lead to the conclusion that all on-haul work performed by employees of a public works contractor or subcontractor is covered under the CPWL. For the reasons discussed above, only that on-hauling work performed by truckers who transport material from a source dedicated to the public works project to the public work site itself, or where the on-haul truckers engage in the immediate incorporation of the material into the public works project are required to be paid prevailing wages.[10]

The above discussion setting forth prevailing wage obligations for trucking under *Sansone* are equally applicable to water-born transportation. Applying these principles to the work at issue in these cases, only towboat operators who haul materials from dedicated sites or who are involved in the immediate incorporation of materials into the bridge projects are deemed to be employed in the execution of a public work and therefore required to be paid prevailing wages.

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prevailing wages. Accordingly, it matters not whether such truckers are employed by material suppliers or public works contractors for prevailing wage obligations to attach under these circumstances.

[10] MMP cites various prior precedential public works coverage determinations in support of this argument. To the extent that any of those determinations are inconsistent with *Sansone* as analyzed herein, they or parts of them cannot be relied upon as a basis for coverage.

III. Prevailing Wage Entitlement For Towboat Operator Work On The Projects At Issue.

A. The March 28, 2002, Letter Of Former Director Chuck Cake Is Not A Public Works Coverage Determination.

Having set forth the conditions under which tow boat operators are deemed to be employed on public work, it must now be addressed whether the tow boat operators on the projects in question are entitled to the payment of prevailing wages.

On projects in which awarding bodies directly enter into contracts for public works projects, the date on which the awarding body advertises for bids determines the controlling law for purposes of public works coverage. The bid advertisement dates for the CalTrans projects span from April, 1998, through December, 2001. The San Diego project was advertised for bid on or about August 15, 2002.

The Point Loma Decision, which addressed the circumstances under which towboat operator work for San Diego would require the payment of prevailing wages, issued on January 23, 1998. The Department sent a copy of the Point Loma Decision to CalTrans on March 13, 1998. It was designated precedential in December, 1998, and then de-designated in approximately June, 1999. The index of precedential determinations required to be kept by the Department would not have contained the Point Loma Decision after June, 1999.

CalTrans argues that it is entitled to rely on the Point Loma Decision from the date of its issuance until March 28, 2002, the date of the Cake Letter. Certainly, for the CalTrans projects advertised for bid between January 23, 1998, (the issuance date of the Point Loma Decision) and June, 1999, (the date the Point Loma Decision was de-designated as precedential), it was reasonable for CalTrans to rely on that decision to determine whether any towboat work required the payment of prevailing wages.

MMP's related arguments are essentially two-fold. First, it argues that the Point Loma Decision was incorrectly decided based on both *Sansone* and subsequent Department precedent interpreting *Sansone* in the context of land-based trucking. We reject this argument for the reasons set forth in the discussion above of *Green* and *Jones*, the two cases on which *Sansone* relies.

Second, MMP argues that the Point Loma Decision is unavailable to CalTrans because the Cake Letter is actually a public works

coverage determination which, by its term, applied to all pending projects. For several reasons, the Cake Letter is not a public works coverage determination.

On February 1, 2002, Operating Engineers wrote to Cake and Maria Robbins of DLSR asking for a "project determination" and a "prevailing wage rate" determination. As the public works coverage determinations on the DIR web site show, the Cake Letter does not in form or in content reflect a public works coverage determination. It does not, as is customary, apply the CPWL to the facts of a particular project or type of work and reach a conclusion regarding public works coverage status. The Cake Letter did not issue pursuant to the law authorizing the Director to issue public works coverage determinations. Nor do Department files show that any of the required procedures set forth in 8 CCR § 16001 (request) or 8 CCR § 16002.5 (appeal) for requesting a coverage determination were followed. In fact, the September 19, 2002, letter from Cake to Glen Streiff, Compliance Officer, CalTrans, referenced above, indicates that Cake himself thought he was issuing only a rate of pay determination, not a public works coverage determination. As a rate of pay determination, the Cake Letter cannot be effective for any project bid prior to its issuance, despite the statement that it applies to all pending projects.

An analysis of CalTrans' argument that it should be able to rely on the Point Loma Decision for projects bid on or after that Decision was de-designated as precedential need not be addressed. CalTrans' reliance on that Decision after June, 1999, obtains the same result as the instant determination because they both find coverage of towboat operation that involves only either hauling from a dedicated site or where the towboat operators are involved in the immediate incorporation of the materials hauled into the public works site

B. There Is No Prevailing Wage Liability For The Projects At Issue Because There Were No Prevailing Wage Rates In Effect In Advance Of The Dates Any Of The Projects Were Advertised For Bid.

It should be noted that the Cake Letter was not made available to either CalTrans or San Diego, the two awarding bodies in question here. It was not until August 22, 2002, that the Department published new rates for the classifications in its General Prevailing Wage Determinations. Such publication fulfilled the Director's responsibility under section 1773.6 to advise awarding bodies of any changes in any prevailing rate of per diem wages in

any locality. These rates were effective September 1, 2002, pursuant to 8 CCR § 16204(a).

None of CalTrans' bid advertisement dates for the bridge projects at issue took place after September 1, 2002. As indicated earlier, they occurred between April, 1998, and December, 2001. San Diego's sole advertisement for bid took place on August 15, 2002.

In order to enforce prevailing wages, there must be prevailing wage rates available in advance of bid advertisement dates. *Whitsett, supra*. As there were no prevailing wage rates available for towboat operator work prior to the bid advertisement dates for any of the projects at issue, retroactive enforcement of prevailing wages is impermissible.[11] The general prevailing wage rates first published effective September 1, 2002, remain in effect for all projects bid after that date unless petitioned pursuant to section 1773.4.

Conclusion

In summary, towboat operators are deemed to be employed on public work when they haul materials to the public work site from a dedicated source or when they immediately incorporate materials into the public works site. Prevailing wages are not required to be paid in connection with any of the public work bridge projects at issue herein both because the Cake Letter was not a public works coverage determination and there were no prevailing wage rates in effect in advance of the bid advertisement dates for any of the projects.

Sincerely,

John M. Rea
Acting Director

[11] It should also be noted that under section 1773.4, an interested party, including a labor organization such as MMP, could have petitioned the Director to establish a prevailing wage rate for the towboat operator work in question before the bid submission deadline. This Department's records show neither the filing nor the granting of any such petition.