

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**ICON Commercial Contractors Inc.,  
dba ICON Builders; and Santa Fe Painting, Inc.,  
A California Corporation dba Leo's Painting**

Case No. 15-0271-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected prime contractor ICON Commercial Contractors Inc. dba ICON Builders (ICON) and its subcontractor, Santa Fe Painting, Inc. dba Leo's Painting (Leo's Painting), jointly submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to work carried out by ICON and its subcontractors on the rehabilitation of the Mission Plaza Family Apartments (Project) in the City of Los Angeles. The Assessment determined that \$57,585.62 in unpaid prevailing wages and statutory penalties was due.<sup>1</sup>

The joint request for review asserted that the workers on the Project were not entitled to the payment of prevailing wages because the Project is not covered by the California prevailing wage law. In compliance with Preliminary Order no. 7, ICON provided legal argument and supporting documentary evidence before the first Prehearing Conference. Pursuant to ICON's request for a coverage determination by the Director, on December 8, 2015, the Hearing Officer ordered these proceedings stayed for the purpose of obtaining such a determination.

The issue for decision is:

Whether the work performed by Leo's Painting as a subcontractor to ICON was subject to the prevailing wage requirements of Labor Code section 1720 et seq.<sup>2</sup>

---

<sup>1</sup> Although the issue is addressed in a rather elliptical manner by ICON and its legal counsel, it appears that the workers employed on the Project were paid at the federal prevailing wage rates prescribed by the Davis-Bacon Act.

<sup>2</sup> All subsequent statutory references are to the California Labor Code, unless otherwise indicated.

The Director finds that the work in question is not subject to the prevailing wage requirements of section 1720 et seq. Accordingly, ICON Commercial Contractors Inc. dba ICON Builders and Santa Fe Painting, Inc. dba Leo's Painting have no liability for the wages and penalties assessed and the Assessment is dismissed.

## FACTS

The Project entailed the renovation of an affordable housing development consisting of 132 residential rental units in a 12-building residential complex on Parkside Avenue in Los Angeles. The work was performed pursuant to a construction contract between ICON and Mission Family Apartments L.P. (Developer)<sup>3</sup> dated December 22, 2011. Before construction commenced, the structures and the site had been sold to Developer by Mission Plaza Tenants Association, a non-profit corporation (Seller).

Contemporaneously with the transfer of the property, the Developer assumed Seller's existing loans on the property, as evidenced by a mortgage held by the federal Department of Housing and Urban Development (HUD) in the amount of \$2,454,000.00; and two mortgages held by the Housing Department of the City of Los Angeles, one for \$1,200,000.00 and one for \$500,000.00<sup>4</sup> Because the property would continue to consist of affordable housing, the Developer entered into regulatory agreements with the City of Los Angeles whereby 130 of the 132 units were designated for either Low Income (no more than 60 percent of the area median income) or Very Low Income (no more than 50 percent of the area median income) families. These affordability restrictions are to remain in force for at least 55 years.

As for the Project itself, the renovation of the property was financed from three sources of funds: a construction loan to the Developer from a private bank, US Bank, for \$21,553,803.00; a loan from the Seller in the amount of \$3,478,950.00; and "equity financing" consisting of State and federal low income housing tax credits (LIHTC). The Developer was allocated federal LIHTC of \$3,521,235.00 and State LIHTC of \$708,565.00, for a total sum of \$4,229,800.00 in LIHTC.

---

<sup>3</sup> Developer is a limited partnership.

<sup>4</sup> The interest rate on these loans is not clear from the documents submitted, although it appears that the HUD loan carries an annual interest rate of only 1 percent.

## DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

The overall purpose of the prevailing wage law ... is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [citations omitted] (*Lusardi*..))

DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a), and *Lusardi, supra*, at p. 985.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a Civil Wage and Penalty Assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that "[t]he contractor or subcontractor shall have the burden of proving that the basis for the Civil Wage and Penalty Assessment is incorrect."

The critical issue for decision is whether the work performed on the Project by Leo's Painting as a painting subcontractor to ICON requires the payment of prevailing wages. For the following reasons, the Project is not a public work subject to prevailing wage requirements because the work was not paid for in whole or in part out of public funds. Alternatively, even if

the Project is deemed to be a public work, it is not subject to prevailing wage requirements by virtue of the exemption set forth at section 1720, subdivision (c)(5)(e).

Section 1771 generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (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 . . .” There is no dispute that the Project involved construction and repair work, and that the work was carried out pursuant to a contract between ICON and the Developer. The key inquiry is whether public funds were used to pay, in part, for the work that was done.

The proceeds of the Developer’s construction loan from US Bank were not public funds, nor were the proceeds of the loan from the Seller to the Developer. Funding in the form of State and federal LIHTC does not come within the statutory definition of “paid for in whole or in part out of public funds” found at section 1720, subdivision (b). (*State Building and Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 310-11). Under the case, the allocation of LIHTC to a project for the rehabilitation of affordable housing was held not to be “the payment of money or the equivalent of money by the state” (§ 1720, subd. (b)(1)), nor was it a “transfer by the state of an asset of value for less than fair market price” (§ 1720, subd. (b)(3)).

It could be argued that Developer’s assumption of the Seller’s federal and City loans as a part of the acquisition of the property triggers coverage under section 1720, subdivision (b)(4). That part of the statute treats loans that are “charged at less than fair market value . . . by the state or political subdivision” as a form of public funding. Given that the loans in question occurred years before the renovation, the renovation cannot be said to have been “paid for in whole or in part out of public funds” within the meaning of section 1720, subdivision (a)(1). Even if the assumption argument had merit, however, the Project would not be covered by the prevailing wage law by virtue of section 1720, subdivision (c)(5)(e). Under this provision, the construction or rehabilitation of privately owned residential projects is exempt when:

The public participation in the project that would otherwise meet the criteria of subdivision (b) is public funding in the form of below-market interest rate loans for a project in which occupancy of at least 40 percent of the units is restricted for at least 20 years, by deed or regulatory agreement, to individuals or families earning no more than 80 percent of the area median income.

Here, the regulatory agreements entered into by the Developer restrict nearly all of the units in the Project to occupancy by families with incomes no greater than 60 percent of the area median income for a period of 55 years. These restrictions exceed the criteria prescribed in

section 1720, subdivision (c)(5)(E), so the exemption would apply even if the Project were to be characterized as public work financed in part by below-market interest rate loans from the City of Los Angeles.

Thus, ICON has produced sufficient documentation to establish that the Project at issue is not a public work because it was not paid for in whole or in part out of public funds.

Alternatively, even if the Project were found to have received public funds, the Project is statutorily exempt from the prevailing wage law. Accordingly, the work carried out by Leo's Painting is not subject to the prevailing wage requirements of section 1720 et seq. In view of this conclusion, all other issues are moot.

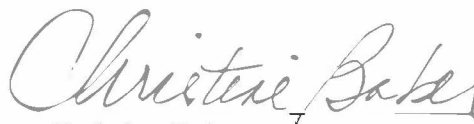
## FINDINGS

1. ICON Commercial Contractors Inc. dba ICON Builders and its subcontractor, Santa Fe Painting, Inc. dba Leo's Painting filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. The work performed by the employees of affected subcontractor Santa Fe Painting dba Leo's Painting was not subject to the prevailing wage requirements of Labor Code section 1720 et seq., and therefore neither Santa Fe Painting, Inc. dba Leo's Painting nor the prime contractor, ICON Commercial Contractors Inc. dba ICON Builders, are liable for the wages and penalties set forth in the Assessment.

## ORDER

Based on these findings, it is ordered that the Assessment is dismissed in its entirety. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the Parties.

Dated: 10/12/2016



Christine Baker  
Director of Industrial Relations