STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

To All Interested Parties:

Re: Public Works Case No. 2006-003
Pier G, Pad 14 – City of Long Beach

The Decision on Administrative Appeal, dated July 3, 2008, in PW 2006-003, *Pier G, Pad 14 – City of Long Beach*, was affirmed in a published Second District Court of Appeal opinion dated March 24, 2011. See *Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538.

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2006-003

PIER G, PAD 14, CITY OF LONG BEACH

I. INTRODUCTION

On October 12, 2007, the Director of the Department of Industrial Relations ("Department") issued a public works coverage determination ("Determination") finding that the construction of replacement conveyor and enclosure improvements for the petroleum coke storage and handling facility at Pier G, Pad 14 ("Project") in the City of Long Beach ("City") is a public work subject to prevailing wage requirements. The Determination found that the Project entails construction done under contract and paid for in part out of public funds in the form of $2.258 million from City within the meaning of Labor Code section[1] 1720(a)(1)'s definition of "public works."

On November 9, 2007, Oxbow Carbon & Minerals LLC ("Oxbow") and City (collectively, "Appellants") filed administrative appeals of the Determination. Iron Workers Union Local No. 433 ("Local 433") filed a response in opposition to the appeals on November 29, 2007. Oxbow filed a reply to that response on December 12, 2007, and a supplement to its reply on March 20, 2008.

All of the submissions have been considered carefully. For the reasons set forth in the Determination, and for the additional reasons stated herein, the appeals are denied and the Determination is affirmed and incorporated herein by reference.

II. CONTENTIONS ON APPEAL

In their appeals, Appellants rely on the fact that the work entailed by the Project was performed under two contracts, one with Bragg Investment Co., Inc. ("Conveyor Contract")

---

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

and the other with W.B. Allen Construction ("Enclosure Contract"). Appellants concede that the work performed under the Conveyor Contract is subject to prevailing wages, but argue that the Enclosure Contract is private work. Appellants make two main arguments.[2] Appellants argue that the plain meaning of the term "construction" in section 1720(a)(1) requires that the two construction contracts be viewed separately to determine whether the public funds element is met for each one. Appellants assert that even though "construction of one part of the system" is paid for in part out of public funds, "private money wholly paid for construction of another part" of the system. (Appeal letter of Robert W. Tollen on behalf of Oxbow, November 9, 2007 ("Appeal"), p. 2.) Appellants also argue that the Department's use of the term "project" in referring to work done under both contracts is incorrect because the term has no statutory basis. Appellants rely on *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942 (*"City of Long Beach"*) and *Greystone Homes, Inc. v. Cake* (2005) 135 Cal.App.4th 1 (*"Greystone"*) in support of their arguments.

Local 433 opposes the appeals, arguing that payment in part out of public funds for the construction of the conveyors triggers coverage of the entire Project. To hold otherwise, according to Local 433, would require the Department to "divide a project into portions of a building and then analyze whether each portion is to be built with public funds," something for which there is no legal authority. (Response letter of Roberta D. Perkins on behalf of Local 433, November 29, 1997, pp. 3-4.)

III. DISCUSSION

A. The Plain Meaning Of Section 1720(a)(1) Does Not Support Appellants' Position.

Section 1720(a)(1) defines "public works" as "construction ... done under contract and paid for in whole or in part out of public funds." The Determination found that the three elements of the statute were met in that performance of the work entails construction, the work is done under contract, and City's reimbursement to Oxbow of $2.258 million constitutes a payment in part out of public funds. Also, the Determination found that the scope of construction, paid for in part out of public funds within the meaning of section 1720(a)(1), includes work performed under both the Enclosure and Conveyor Contracts.

---

[2] Separately, City contends that under section 1722 and associated regulations, it is neither an interested party nor an awarding body. As stated in the Determination, public works status does not turn on whether City awarded the contract. It also does not turn on whether the City considers itself an interested party. It turns on whether construction is done under contract and paid for in whole or in part out of public funds.

In *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, the Court instructed: "'To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning. [Citations.]' [Citation]." (*Id.* at p. 1588.) Section 1720(a)(1) requires only that construction be paid for "in part" out of public funds. The "in part" wording contemplates that there are works of construction paid for with a combination of public and private funds, as here. Appellants' view is that such works of construction can be divided into public and private parts by contractual agreement of the parties.[3] Their view has no basis in statute. It also would violate the rules of statutory construction by rendering surplusage the "in part" wording in section 1720(a)(1).[4] Last, it would violate the mandate of section 1771, which provides that "[e]xcept for public works projects of one thousand dollars ($1000) or less ... the general prevailing rate *shall be paid to all* workers employed on public works." (§ 1771, italics added.)

Appellants argue the plain meaning of the term "construction" as used in section 1720(a)(1) precludes the Department from considering the relationship of the parts being constructed. While the term "construction" is not defined by the statute, Webster's Third New International Dictionary (2002), at page 489, defines "construction" as "[t]he act of putting parts together to form a complete integrated object."[5] Under this definition of

---

[3] Appellants also argue that when the Legislature intends to apply the prevailing wage law to construction that was not paid for our of public funds, it knows how to do so, as exemplified by section 1720.2. For all the reasons cited in this Decision, Appellants' characterization of the construction work in this matter as being paid for solely out of private funds is inaccurate. To the extent Appellants are arguing that the only coverage section that applies to construction under contracts between private parties is section 1720.2, Appellants' argument is unfounded. Section 1720.2, which includes as "public works" those improvements relating to a public entity lease of building space, by its terms was meant to supplement, not restrict, the definition of "public works."

[4] "In construing the words of a statute or constitutional provision to discern its purpose, the provisions should be read together; an interpretation which would render terms surplusage should be avoided, and every word should be given some significance, leaving no part useless or devoid of meaning." (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54.)

[5] This definition appears in *TRB Investments, Inc. v. Fireman's Fund Ins.* (2006) 40 Cal.4th 19, 28 ("*TRB Investments*"), which in turn was cited in *Plumbers and Steamfitters Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083, 1089. For purposes of interpretation of an insurance policy, *TRG Investments* noted additional definitions of "construction": "'[t]he creation of something new, as distinguished from the repair or improvement of something already existing' (Black's Law Dict. (6th ed.1990) p. 312); '[t]he act of building by combining or arranging parts or elements' (Black's Law Dict. (7th ed.1990) p. 308) [*sic*]; and '[t]he action of framing, devising, or forming, by the putting together of parts; erection, building' (3 Oxford English Dict. (2d ed.1989) p. 794).'" (*TRB Investments, supra,* 40 Cal.4th at p. 28.) None of these definitions support Appellants' view that a work of construction is defined by the scope of a particular construction contract rather than the scope of the project.

"construction," the conveyor improvements and the enclosure improvements do in fact constitute parts that are put together to form "a complete integrated object," a petroleum coke handling and storage facility. (See, too, *Priest v. Housing Authority of the City of Oxnard* (1969) 275 Cal.App.2d 751, 756 ["[a]s one thinks of 'construction' one ordinarily considers the entire process, including construction of basements, foundations, utility connections and the like, all of which may be required in order to erect an above-ground structure"].)

Appellants argue that their contractual arrangement should be accepted at "face-value." The California Supreme Court in *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976 ("*Lusardi*") held, however, that the statutory obligation of a contractor to pay prevailing wages cannot be contracted away. As the Court stated:

> To construe the prevailing wage law as applicable only when the contractor and the public entity have included in the contract language requiring compliance with the prevailing wage law would encourage awarding bodies and contractors to legally circumvent the law, resulting in payment of less than the prevailing wage to workers on construction projects that would otherwise be deemed public work.

(*Id.* at pp. 987-988.) Consistent with *Lusardi*, the prevailing wage law would be undermined if parties could avoid their statutory obligations by dividing up construction so that some elements -- for example, electrical, plumbing, or roofing -- were contractually designated as being paid for solely with private funds and other elements designated as being paid for with public funds. Similar to Appellants here, the parties in *Lusardi* argued their contract controlled the statutory analysis of whether prevailing wages were required under then section 1720(a). *Lusardi* rejected that argument. That argument is rejected here, as well.

Factually, Appellants' argument that there are two separate works of construction is not supported by the record. Producing a usable facility that complies with the new air quality control rule is the objective of the parties' agreements.[6] That the City expects to receive a functioning facility for its investment finds expression in a memorandum from the Director of Properties, Kathryn McDermott, to the Board of Harbor Commissioners dated December 15, 2004 ("McDermott Memorandum"). The McDermott Memorandum states that the lease

---

[6] Schedule 1 of the appendices to both the Enclosure and the Conveyor Contracts describes the common purpose of constructing a facility that complies with the air quality control rule. Also, the recitals in both contracts identify the same objective, "to make certain improvements ... pursuant to the requirements of Rule 1158 ... ."

amendment "acknowledges the partnership between Oxbow and the Port for the improvements that are *required* for the continued use of Pad 14 for coke storage" and "Oxbow *will construct the roof* and the conveyors." (Italics added.) The McDermott Memorandum also states: "The goal of the Port and Oxbow is to maximize the use of the Pier G bulk loading facility to achieve a return on the costs invested in compliance [with the air quality control rule]. In order to accomplish this, a roof and receiving conveyors will have to be constructed, which will move the product from the adjacent truck dump into the barn." Without performance under both contracts, construction would be incomplete and not viable.

Definitional terms are common to both contracts. The two contracts define "Facility" in the same terms: "an existing terminal facility located at 1029 Pier G Avenue... ." Section 1.1 of each contract states: "The Project will be constructed on the site leased by Oxbow and situated at 1029 Pier G Avenue, Long Beach, California (the 'Project Site')." Other portions of the two contracts denote the interdependence, not the separateness, of the construction work. The conveyors physically connect to the enclosure roof, requiring coordination between work forces.[7] Section 1.7 of the Enclosure Contract discloses a temporal connection between work under both contracts whereby "[t]he Enclosure Contractor specifically acknowledges that the New Conveyors Enclosure Contractor Work is dependent upon the timely and accurate completion of the Framing Completion milestone described in Section 6.2." Further, work under both contracts proceeds under the same Harbor Development Permit and the same regional air quality management district permit.

As stated in the Determination, the facts relating to function, use, oversight, location, permitting, designs, and physical connections of the conveyors and enclosure improvements provide a reasoned basis on which to conclude that there are not two separate works of construction. While the parties contractually allocate City's $2.258 million reimbursement as

---

[7] Section 1.7 of the Enclosure Contract states: "The Enclosure Contractor acknowledges that Oxbow has employed other contractors to perform construction and repair services on the Project Site during the expected term of this Agreement and those services are interfacing to the Work or are in close proximity to the Work; the Enclosure Contractor undertakes to perform the Work in close coordination with those other contractors ... ." Under section 3.7 of the Enclosure Contract, "Oxbow shall, to the extent reasonably required to maintain the Project Schedule, assist the Enclosure Contractor in coordinating its work with the work to be performed by the Conveyors Contractor and others on or with respect to the Project (to the extent the same may be affected by the Enclosure Contractor." Also, Schedule 1 of the Enclosure Contract reads "The Petroleum Coke Enclosure shall include the cupola structure and cladding for the entry of the C13 conveyor tube into the Petroleum Coke Enclosure. (The seal assembly of the tube into the Petroleum Coke Enclosure shall be provided and installed by the Conveyors Contractor ... .) The Enclosure Contractor shall fit the cladding to the seal assembly after the conveyor tube erection is complete."

payment for the conveyor portion of the improvements, the relationship between the parts compels the conclusion that the "construction" to which public works status attaches under section 1720(a)(1) includes work performed under both the Conveyor and Enclosure Contracts.

B. *City of Long Beach* And *Greystone* Do Not Support Appellants' Argument That Under The Facts Of This Case Construction Is Severable Into Public And Private Parts.

Appellants argue the courts in *City of Long Beach, supra*, 34 Cal.4th 942 and *Greystone, supra,* 135 Cal.App.4th 1 rejected a "project" approach to public works coverage determinations. These cases addressed the meaning of "construction" under a prior version of section 1720(a) that predates the adoption of Senate Bill 975 (Stats. 2001, ch. 938 ("SB 975"), § 2, effective January 1, 2002). In *City of Long Beach*, the Court held that public funds paid for preconstruction, not construction. In *Greystone*, the Court held that public funds paid for land acquisition, not construction. Here, it is undisputed that public funds paid for construction.

In *City of Long Beach*, the Court stated:

> [U]nder the law in effect when the contract at issue was executed, a project that *private* developers build solely with *private* funds on land leased from a public agency remains private. It does not become a *public* work subject to the [prevailing wage law] merely because the City had earlier contributed funds to the owner/lessee to assist in defraying such 'preconstruction' costs or expenses as legal fees, insurance premiums, architectural design costs, and project management and surveying fees.

(*City of Long Beach, supra,* 34 Cal.4th at pp. 946-947, italics in original.) In contrast, the current matter does not involve a project built solely with private funds. The wording of the conclusion in *City of Long Beach* clarifies the stark difference between this case and *City of Long Beach*: "The [prevailing wage law] does not apply in this case *because* no publicly funded construction was involved." (*Id.* at p. 954, italics added.) Publicly funded construction *is* involved here. Hence, Appellants' reliance on *City of Long Beach* is misplaced.

Greystone likewise does not change the analysis here. There, the court found that, under the pre-SB 975 version of section 1720(a), public funds must be used to pay for costs of actual construction for a project to be a public work. The public agency's payment of a

traffic mitigation fee, reimbursement for land acquisition costs, and gift of public land were deemed not expenditures for construction. Thus, the issue in *Greystone* was whether public funds were used for "actual construction." (*Greystone*, *supra*, 135 Cal.App.4th at p. 11.) In the current matter, public funds *are* being used for actual construction.

Also, Appellants wrongly assert that *Greystone* held "that the issue is not one of identifying the scope of a 'project.'" (Appeal, p. 3.) In *Greystone*, the scope of the construction project was not in question. The Court rejected neither the Department's determination of the scope of construction nor the utility of the term "project." *Greystone* revealingly states: "Since public funds were used to pay for land acquisition rather than construction costs, the Agency reimbursement did not make this Project a public work under former section 1720(a)." (*Greystone*, *supra*, 135 Cal.App.4th at p. 11.) Implicit in that statement is that, even under former section 1720(a), where public funds are used for actual construction, as they are in this case, there is a public work.

C. Senate Bill 975 Validates A "Project" Based Analysis.

Appellants object to the use of the term "project" in the Determination. The term, however, has long appeared in California's statutory scheme. As stated above, section 1771, which was last amended in 1981, refers to "public works projects." (See also Cal.Code Regs., tit. 8, § 16001(b) – (e) [governing "Federally Funded or Assisted Projects," "Field Surveying Projects," "Residential Projects" and "Commercial Projects"].) The term routinely has been used over the years in coverage determinations. (See, e.g., PW 93-023, *Redevelopment Agency of the City of Torrance* (October 4, 1993) ["the construction of the parking, the improvements, and the housing units is a public works project because public funds are expended in part and all aspects of the project are integrally related"].) Courts have consistently analyzed coverage in terms of "construction projects," as illustrated by *Lusardi*, *supra.*

In 2001, the Legislature specifically used the term "project" in the SB 975 amendments to then section 1720(a). Among other things, SB 975 amended subdivision (a), and created new subdivisions (b), (c) and (d). While the term "project" appears in subdivisions (b), (c) and (d), Appellants rely on the fact that it does not appear in subdivision (a). In the first published opinion interpreting the SB 975 amendments, the First District Court of Appeal rejected such a piecemeal approach, holding that resort to other sections of

the statutory scheme is a necessary tool for analyzing coverage. (*State Building and Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 310 ["That construction is not to be reached by examining bits and pieces of the statute, but after a consideration of all parts of section 1720 in order that we may effectuate the Legislature's intent"].)

Subdivision (b) defines the phrase "payment in whole or in part out of public funds" that appears in subdivision (a). Included within that definition is "[p]erformance of construction work by the state or political subdivision in execution of the project." (§ 1720(b)(2).) Subdivision (b)(2) illustrates that coverage under subdivision (a) necessarily contemplates a "project."

That "project" is inherent to section 1720(a)(1) is further confirmed by subdivision (c), which enumerates the types of "projects" that can be exempt from coverage. Section 1720(c)(2), for example, provides:

> If [a public entity] requires a private developer to perform construction ... work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the [public entity] contributes no more money, or the equivalent of money, to the *overall project* than is required to perform this public improvement work, and the [public entity] maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

(§ 1720(c)(2), italics added.) This subdivision would exempt from coverage all but the public improvement work of "an otherwise private development project." Subdivision (c)(2) illustrates, again, that the focus of the coverage analysis is on the "overall project." Also, implicit in subdivision (c)(2) is the notion that privately funded construction within a project in which there is a public funds payment as defined by section 1720(b) is a "public work" and is not exempt from prevailing wage requirements where the requirements for the exemption have not been met.

Appellants may criticize the Determination for employing a "project" approach, yet it is an approach endorsed by the Legislature. To the extent that Appellants seek a determination that limits public works status to only part of the construction at Pier G, they argue, in essence, for a new exemption from the prevailing wage law. It is for the Legislature, not the Department or the parties, to create such exemptions, as it did in SB 975.

In a related argument, Appellants attack the Department's consideration of the "integrated" nature of the parts being constructed. "Integration" of construction, however, is neither a new concept nor an invention of the determination in PW 2000-016, *Vineyard Creek Hotel and Conference Center, Redevelopment Agency, City of Santa Rosa* (October 16, 2000), as Appellants contend. Evaluating the integrated nature of the parts to determine whether there is a single public works project is consistent with prior coverage determinations, both before and after *Vineyard Creek.*[8] It is an approach used in at least one other state.[9] Factors of integration have been used to analyze projects under other statutory schemes as well.[10] While the precedential determination system no longer exists, as explained in the Determination, *Vineyard Creek* isolated salient factual considerations in the project analysis.

D. Due Process Claim Is Not Cognizable Here.

As for Appellants' assertion that it was denied due process, such a claim is not cognizable in the context of a public works coverage determination. (*Lusardi, supra*, 1 Cal.4th at p. 990 ["The Court of Appeal erred in assuming that the Director's determination that the project was a public work is an 'adjudication' resulting in a deprivation requiring procedural due process"].)[11] Further, in contrast to the concern raised by the dissent of

---

[8] See, e.g., PW 93-023, *Redevelopment Agency of the City of Torrance, supra*, and PW 2004-048, *Simi Valley Town Center, First California Bank, City of Simi Valley* (October 15, 2007) (bank construction not an "integrated part of the Parcel A or Parcel B development" but is, instead, "a separate project").

[9] The Alaska Supreme Court decision found timber clearing work was part of a dam construction project under Alaska's prevailing wage law in *City and Borough of Sitka v. Construction and General Laborers Local 942* (1982) 644 P.2d 227, 232 ("... the focus of inquiry in determining whether the ALP-Sitka contract concerned 'public construction' subject to the [Alaska prevailing wage law] is the extent to which the work relates to the construction of the dam. ... The superior court, properly employing this analytic approach, concluded that 'the predominant characteristic (*sic*) is that the work to be done is an integral part of the dam construction and is therefore "public construction".' We agree.").

[10] See, e.g., *Tuolumne County Citizens for Responsible Growth, Inc. v. Ciyt of Sonora.* (2007) 155 Cal.App.4th 1214, 1226-1227, 1229 (under California Environmental Quality Act, courts consider factors of physical location, timing of development, and identification of the entities undertaking the action as part of the analysis whether two development activities are integral to one another or separate and independent undertakings for purposes of deciding the proper scope of an environmental impact report); and *National Engineering & Contracting Co. v. United States Occupational Safety and Health Review Comn.* (6th Cir. 1987) 838 F.2d 815, 817 (under Occupational Safety and Health Act, work of rehabilitating existing pump house "was necessary and integral" to construction of new pump house at the site, and thus constituted "construction work" subject to safety standard).

[11] It should be noted that Appellants had notice of the coverage request at the outset of the administrative proceedings and participated throughout.

Justice Panelli in *Lusardi*,[12] the parties here were well aware of the prospect that the work performed under the Enclosure Contract could be subject to prevailing wages. (See, Enclosure Contract, section 13.2.1: "In the event that the Work pursuant to this Agreement is deemed to be a public work subject to the payment of prevailing wages ... , the Enclosure Contractor may request a Change Order to compensate it for any increased costs resulting from such determination.")

IV. CONCLUSION

For the reasons stated above, Appellants' appeals are denied and the Determination finding that the Project is a public work is affirmed. This Decision constitutes the final administrative action in this matter.

Dated: 7/3/08

John C. Duncan, Director

[12] *Lusardi, supra,* 1 Cal.4th at p. 1002 ("Under the majority's interpretation, a contractor may be held liable for extra wages although the contractor had no notice that the prevailing wage requirements would be applicable ... [I]f a contractor enters into a contract in a good faith belief that it is for a private work, *as the stipulated facts state that Lusardi did,* and the project is later determined to be a public work, the contractor would effectively have been forced against its will into accepting a public works contract" (italics in original)).