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

Arnold Schwarzenegger, *Governor*

June 19, 2008

Juan D. Garza
Senior Compliance Officer
Joint Electrical Industry Fund
P.O. Box 6329
San Jose, California 95150-6329

Re: Public Works Case No. 2007-016
Secondary Clarifier No. 2 Replacement
City of Palo Alto, Regional Water Quality Control Plant

Public Works Case No. 2007-017
Recycled Water Pump Station Upgrade
City of Palo Alto, Regional Water Quality Control Plant

Dear Mr. Garza:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced projects under California's prevailing wage laws and is made pursuant to California Code of Regulations, title 8, section 16001(a). Both projects are addressed in a single determination because they involve the same issues and facts pertaining to coverage. Based on my review of the facts in these cases and an analysis of the applicable law, it is my determination that the Secondary Clarifier No. 2 Replacement Project and the Recycled Water Pump Station Upgrade Project (hereinafter collectively "Projects") are public works; and the City of Palo Alto's ("City's") chartered city status does not exempt it from the requirement to pay prevailing wages.

Facts

City is the owner and operator of a regional wastewater treatment facility known as the Palo Alto Regional Water Quality Control Plant ("RWQCP"). The RWQCP is located within City but is part of a "joint sewer" system that has been acquired, constructed, and maintained pursuant to a joint exercise of powers agreement entered into by City with the cities of Mountain View and Los Altos pursuant to Chapter 5 of Division 7 of Title 1 (commencing with section 6500) of the Government Code. In addition to serving the three partners to the joint powers agreement, the RWQCP also serves the Town of Los Altos Hills, the East Palo Alto Sanitation District (located in San Mateo County), and Stanford University. Each entity pays a proportional share of the RWQCP's costs, with all balances and transactions maintained under City's Wastewater Treatment Fund.

The Project in Case No. 2007-016 entails the installation of a replacement clarifier mechanism at the RWQCP. The Project in Case No. 2007-017 involves the construction of upgrades to the recycled water pumping system, including the addition of four new pumps delivering recycled water to customers in Palo Alto and Mountain View. City has or will award the construction contracts.

The Bid Specifications for both Projects included the following assertion:

> There is no requirement of prevailing wages. The Contractor is not required to pay prevailing wages in the performance and implementation of the Project, because the City, pursuant to its authority as a chartered city, has adopted Resolution No. 5981 pertaining to prevailing wages, and invokes the exemption from the state prevailing wage requirement with respect to this Project and declares that the Project is funded one hundred percent (100%) by the City of Palo Alto.

City's claim that the Projects are funded entirely by City is plainly in error. In a letter dated October 24, 2007, addressed to a Department staff member, City's Director of Public Works, Glenn S. Roberts, acknowledged that the Projects would be funded out of City's Wastewater Treatment Fund, to which the partners (City, Mountain View, and Los Altos) and sub-partners (Town of Los Altos Hills, East Palo Alto Sanitation District, and Stanford University) pay a proportional share. According to this letter, Mountain View paid the largest proportional share for fiscal year 2006-2007 at 38.99 percent, followed by City at 35.99 percent.[1]

Notwithstanding City's assertion regarding prevailing wages in the Bid Specifications (quoted above), the successful bidder in Case No. 2007-017 has expressed its intent to pay its workers "per Davis-Bacon Prevailing Wage requirements,"[2] while the successful bidder in Case No. 2007-016 has stated that it "plan[s] on paying prevailing wages" and would "be responsible for paying the difference and any associated penalties" if City or this Department find that prevailing wages are not being paid. City, however, continues to maintain that the prevailing wage law does not apply to either Project due to its chartered city status, citing the case of *Vial v. City of San Diego* (1981) 122 Cal.App.3d 346, which upheld a city resolution declaring prevailing wage requirements appropriate "only when required by Federal or State grants or on other jobs considered to be of State concern... ."

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[1]City asserts that neither Project will receive any state or federal funding. While not disputing this contention, the Joint Electrical Industry Fund ("Fund") notes that the pump station upgrades in Case No. 2007-017 were required in conjunction with the construction of the Mountain View/Moffett Area Reclaimed Water Pipeline Project, which did receive state funding.

[2]The Davis-Bacon Act governs federally funded and controlled public works projects. (*See* 40 U.S.C. § 3141, et seq.; and *Southern California Labor Management Contract Compliance Committee v. Aubry* (1997) 54 Cal.App.4th 573.) In general terms, California's prevailing wage law tends to cover more types of work and provide for higher prevailing wage rates than the Davis-Bacon Act due to differences in how public works is defined and how prevailing wage rates are determined.

Discussion

Labor Code section 1720(a)(1)[3] provides, in pertinent part, that: "'public works' means ... [c]onstruction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds ... ." The Projects entail construction and installation work performed under contract and paid for in whole out of public funds. It is undisputed that both Projects fit within this statutory definition.

City asserts, however, that its chartered city status exempts it from the Labor Code's prevailing wage requirements.[4] Where a public works project is completely within the realm of the chartered city's "municipal affairs," it is exempt from California's prevailing wage laws. (*City of Pasadena v. Charleville* (1932) 215 Cal. 384 [disapproved on other grounds by *Purdy and Fitzpatrick v. State* (1969) 71 Cal.2d 566].) "Municipal affairs are matters which affect the local citizens rather than the people of the State generally." (66 Ops.Cal.Atty.Gen. 266, 271-272.) "'[S]tatewide' 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, City of Irvine* (1988) 45 Cal.3d 491, 505.)

In *City of Santa Clara v. Von Raesfeld* (1970) 3 Cal.3d 239, the California Supreme Court observed as follows:

> Historically the treatment and disposal of city sewage is a municipal affair [citations] ... . As in the case of other municipal projects, however, sewer projects may transcend the boundaries of one or several municipalities. Such projects also may affect matters which are acknowledged to be of statewide concern; e.g., protection of navigable waters [citations], tidelands [citation], and the public health [citation]. In such circumstances the project "ceases to be a municipal affair and comes within the proper domain and regulation of the general laws of the state." [Citation]. As this court stated in *City of Pasadena v. Chamberlain* (1928) 204 Cal. 653, 659-660 ..., "It may be admitted that, generally speaking, the distribution of water within municipalities would be as to each of such municipalities a municipal affair, but it would be entirely too narrow an interpretation of the purposes and scope of the Metropolitan Water District Act to hold that, because the distribution of water for domestic use in each of a number of the municipalities within a designated area is a municipal affair, the formation of a common purpose for the acquisition of water in large quantities from sources outside of such municipalities, and even outside of the area within which they

[3]All statutory references herein are to the Labor Code, unless otherwise specified.

[4]City argues that the coverage determination requests are moot in light of the contractors' commitments to pay prevailing wages. Given the equivocal nature of those commitments and City's continued adherence to its position that the Projects are exempt from prevailing wage requirements, City's mootness argument is rejected.

> exist, and the distribution of such water, when so acquired, among such cities, in accordance with a common plan, and with a view to achieving equitability in the distribution and use of such water, would in any sense be, as to each or any of such combined municipalities, a municipal affair. The impossibility or impracticability of any one or more of such municipalities acting separately and independently in the acquisition and distribution of such water would seem to argue conclusively that in achieving such object by the means provided for in said act the municipalities engaged therein could not be held to be engaged in the conduct of a merely municipal affair."

(*City of Santa Clara v. Von Raesfeld, supra,* 3 Cal.3d at pp. 246-7.)[5]

City of Santa Clara v. Van Raesfeld supports the proposition that general improvements to regional wastewater treatment facilities that transcend municipal boundaries and are funded by several constituent entities are matters of statewide concern, notwithstanding the fact that the entity which manages the enterprise is a chartered city. The RWQCP is a regional wastewater treatment facility that serves and is funded by six different entities transcending not just city boundaries but also a county boundary. Improvements to the RWQCP cannot be viewed independent from the regional character of the facility. As such, City's reliance on *Vial v. City of San Diego, supra,* is misplaced because under the reasoning of *City of Santa Clara v. Van Raesfeld* these Projects are "of State concern" and do not fit within the rubric of being "*purely* municipal affairs." (*Vial v. City of San Diego, supra*, 122 Cal.App.3d at p. 348.)

The Department's three-part analysis for determining whether a Project is a municipal affair of a chartered city under *Southern California Roads Co. v. McGuire* (1934) 2 Cal.2d 115 yields the same result. The three factors considered are: (1) the extent of extra-municipal control over the project; (2) the source and control of funds used to finance the project; and (3) the nature and purpose of the project. *(Ibid.)* 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 Telephone and Telegraph Co. v. City and County of San Francisco, supra,* 51 Cal.2d at pp. 771-774). While City is undertaking the Projects, it does so under a joint powers agreement with two other partnering cities. The Project is financed by City's Wastewater Treatment Fund that includes funding from five other entities. For fiscal year 2006-2007, Mountain View contributed the largest share of all the partner and sub-partner entities. The nature and purpose of the Projects is to make improvements to a treatment facility, and although the facility is located within City it serves a regional area. The installation of a replacement clarifier mechanism at the RWQCP in Case No. 2007-016 will provide a benefit to the entire region, not just City. The same is true of the construction of upgrades to the recycled

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[5]The court cited additional cases at the end of this passage, including *Pacific Telephone and Telegraph Co. v. City and County of San Francisco* (1959) 51 Cal.2d 766, which held that the construction and maintenance of telephone lines in streets or other places within a city was a matter of statewide concern and which further noted that "What may at one time have been a matter of local concern may at a later time become a matter of state concern controlled by the general laws of the state." *(Id.* at p. 771.)

water pumping system in Case No. 2007-017. The work in that case includes the addition of four new pumps that will deliver recycled water to customers in Palo Alto and Mountain View. Consideration of these factors does not support City's contention that the Projects are municipal affairs.[6]

For the foregoing reasons, under the specific facts of these cases, the Projects are public works that do not fall within the chartered city exemption and are therefore subject to California's prevailing wage laws.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

John C. Duncan
Director

[6]This is consistent with PW 97-018/97-019 *Primary Plant Headworks and Cannery Segregation Project, City of Modesto* (March 17, 2000), *aff'd. sub nom. City of Modesto v. Department of Industrial Relations*, CCA5 No. F036603 (June 10, 2002), and PW 2005-012 *Sewer and Storm Lift Station Upgrade Project, City of Visalia/Goshen Community Services District* (October 12, 2007). In these prior coverage determinations, the chartered city exemption was found not to apply notwithstanding the assertion that the wastewater system upgrade projects primarily benefited the respective affected municipalities. Here, City does not even attempt such an argument. Similar to the result reached in the prior cases, the Project's extraterritoriality is well-supported by the factual record showing that this is a matter of regional, not municipal, concern.