

DEPARTMENT OF INDUSTRIAL RELATIONS

Christine Baker, Director

Office of the Director

1515 Clay Street, 17th Floor

Oakland, CA 94612

Tel: (510) 622-3959 Fax: (510) 622-3265



November 5, 2014

James O'Reilly
Los Angeles Community College District
770 Wilshire Boulevard
Los Angeles, California 90017

RE: Public Works Case No. 2013-027
Los Angeles Community College District Furniture Contracts
Los Angeles Community College District

Dear Mr. O'Reilly:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to California Code of Regulations, title 8, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the assembly and disassembly of freestanding and affixed modular office systems and affixed furniture or office items under requests for proposals dated on or after January 1, 2013 are public works for which prevailing wages must be paid. Similarly, the assembly and disassembly of affixed modular office systems and affixed furniture or office items under requests for proposals pre-dating January 1, 2013 are a public work. On the other hand, the assembly and disassembly of freestanding individual pieces of furniture and office items that are not part of a modular office system, however, are not a public work either before or after January 1, 2013. Under the specific facts of this case, the requirement to pay prevailing wages for assembly and disassembly of freestanding modular office systems does not apply under requests for proposals pre-dating January 1, 2013.

Facts

Like other school districts, the Los Angeles Community College District (District) has significant needs for furniture and office or classroom items such as shelving, storage systems, and display boards. To satisfy those needs, the District procures furniture and other items through two primary methods. The District may purchase furniture as a "Participating Agency" under Foundation for California Community Colleges (FCCC)¹ master agreements, or it may do so under its own master agreements that it directly enters into with vendors. Master agreements are entered into after acceptance of a vendor's bid responding to a request for proposal (RFP). Bidders must offer prices

¹ The Foundation for California Community Colleges is the sole and official auxiliary organization of the California Community Colleges Chancellor's Office and Board of Governors. FCCC was established under Education Code section 72670.5(a) to provide "supportive services and specialized programs for the general benefit of the mission of the California Community Colleges."

for all items listed in the RFP, discounted pricing for high quantity purchases, and, in at least one instance, a differential pricing in event that prevailing wage rates are required by a funding source. Whether proceeding under its own or FCCC's master agreement, the District orders furniture and office items according to its needs by issuing a purchase order to vendors who entered into the master agreements. A purchase order is a document the District uses to request that the vendor deliver and set up the items in return for payment, with specifications and quantities required. The master agreements, in turn, govern the general terms on which the vendors sell the items to the District, such as price, payment, types of furniture, and warranties, among other aspects. Regardless of when the purchase orders are placed, the prices are frozen according to the master agreements.

At issue in this determination are: (1) an FCCC RFP (RFP #13-002) to replace an expired master agreement FCCC had with Krueger International, Inc.; (2) a master agreement between FCCC and Haworth, Inc. (Haworth Agreement); and (3) a master agreement between the District and Unisource Solutions, Inc. (Unisource Agreement).

Whereas the Unisource Agreement covers only powered conference and meeting room tables, RFP #13-002 and the Haworth Agreement cover a hodgepodge of different office furniture items. In particular, the FCCC agreements also cover cubicles, which may or may not be freestanding.

A. FCCC Request for Proposals #13-002

In June 2013, FCCC released RFP #13-002, soliciting proposals from vendors for a master agreement for "Furniture and Fixtures Applications." The RFP included 18 furniture classifications. Subject to specified limits, multiple master agreements may be awarded to different vendors for each classification. The vendors to whom the contracts are ultimately awarded assemble and install the furniture. Vendors may also use contractors to affix furniture to the realty.

Under RFP #13-002, bidders will submit prices for items within classifications that run the gamut of office furniture and other office items, mostly freestanding but also affixed to the realty. Within each classification are "applications" consisting of different and more specific product items with a variety of optional characteristics. In general, the classifications of freestanding furniture include chairs, student and faculty desks and seating, faculty podiums, computer lab tables, study carrel units, student area benches, lounge seating, student lab stools, meeting room tables, cubicles, and child development center furniture. Certain other furniture such as overhead cabinets, wall systems, storage systems, and tack boards are items that may be fastened or attached to cubicles, floors or walls in some manner. Depending on height considerations and the particular building involved, the Division of the State Architect may require otherwise freestanding file cabinets and bookshelves to be bolted to a wall for seismic safety purposes. The classifications also call for other furniture that must be affixed to the realty, such as fixed seating in lecture halls and raised access flooring, an element installed above an existing sub-flooring which allows network and electrical cables to run underneath. Cubicles and conference tables may have power capabilities with hardwire connections to the building power supply or standard outlets for power.

B. Haworth Agreement

Similar to RFP #13-002, FCCC previously issued a request for proposal for "Office Areas, Child Development Centers, and Other Specialty Applications Furniture" (RFP 09-002). In 2009, FCCC awarded a master contract on RFP 09-002 to Haworth, Inc. The Haworth Agreement expires on October 1, 2014. It encompasses eight broad furniture classifications including office area items; lounge seating; meeting and conference rooms; tack, white and display boards; technology tools; and child development centers. Under the Haworth Agreement, Haworth assembles and installs the furniture at District-designated locations.

Much of the furniture described in the Haworth Agreement appears to be freestanding and part of a modular office system, including desks, bookcases, lounge seating (chairs, sofas, benches, and settees), overhead cabinets, conference room tables and chairs, cubicles, monitor arms, keyboard trays, tack boards and white boards, as well as activity tables, seating, and bookshelves for children. Though rare, some of the cubicles and conference room tables may be affixed to the realty and either be powered through a standard fifteen amp plug or otherwise have hardwire connections to the building power supply. Cabinets and boards may be attached to a cubicle's panels.

C. Unisource Agreement

Unlike the scope of furniture available under RFP 13-002 and the Haworth Agreement as described above, the Unisource Agreement, while a master agreement, is a direct contract between the District and Unisource. The Unisource Agreement became effective December 8, 2011 and expires December 7, 2014. It provides that in exchange for Unisource's promise to supply powered conference tables, the District agrees to purchase at least \$8,753.92, and no more than \$2,000,000, of tables from Unisource. Since these tables are powered, they must somehow connect to the building power supply. Unisource delivers, assembles, and installs the tables. The District's own employees, or its contractors, do the electrical wiring leading to the tables and connect electrical cords to the outlet on the tables. Like the other master agreements, the District procures powered conference tables by issuing a purchase order specifying the desired products.

Discussion

Labor Code section 1771² generally requires the payment of prevailing wages to workers employed on public works, unless the work is carried out by a public agency's own forces. Section 1720, subdivision (a)(1) defines "public works" generally under a three pronged definition: "[c]onstruction, alteration, demolition, installation, or repair work done under contract, and paid for in whole or in part out of public funds" Assembly Bill No. 1598 (stats. 2012, ch. 810, § 1) (AB 1598) amended section 1720, effective January 1, 2013, by expanding the definition of "installation" to include "the assembly or disassembly of freestanding or affixed modular office systems."

² All statutory citations are to the California Labor Code and all subdivision references are to the subdivisions of section 1720 unless otherwise specified.

It is undisputed that the work performed under RFP #13-002, the Haworth Agreement and the Unisource Agreement is “paid for in whole or in part out of public funds” and that the work is “done under contract.” In its request for coverage determination, the District concedes that any furniture item that must be affixed to the realty is work subject to the prevailing wage laws, a position consistent with previous coverage determinations. (See PW 2008-035, *Open Item Contract WA00023961 - Modular Furniture - County of Sacramento* (November 24, 2009) (*County of Sacramento*.) The issue is whether assembly and disassembly of the furniture described in the Haworth and Unisource Agreements and RFP #13-002 fall within the definition of “installation” in section 1720. A related question is the effect of AB 1598 as to the pre-2013 master agreements and the purchase orders issued under them.

A. Assembly/Disassembly of Modular Office Systems Purchased Under RFP #13-002 Constitutes “Installation” Within the Meaning of Section 1720.

While AB 1598 defined “installation” in section 1720 to include the assembly and disassembly of modular office systems, the statute offers no guidance as to what the phrase “modular office systems” means. In the absence of a statutory definition, the words of the statute are given their usual and ordinary meaning. (*In re Lucas* (2012) 53 Cal.4th 839, 849.) Dictionary definitions can aid in determining the usual and ordinary meaning of a statutory term. (*McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1588.)

According to Webster’s Third New International Dictionary, the adjective “modular” is defined as “planned or constructed on the basis of a standard pattern or standard dimensions: capable of being easily joined to or arranged with other parts or units <~ furniture> <a ~ wall unit>.” (Webster’s 3d. New Internat. Dict. (2002), p. 1452, italics added.) Further, the word “system” is defined as “a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose . . . a group of devices or artificial objects forming a network or used for a common purpose <a nationwide dial telephone ~> <an express highway ~> <a ~ of public parks> <a hot air heating ~>.” (*Id.*, at p. 2322.) Under these definitions, a “system” is a group and a “modular office system” within the meaning of section 1720 is a group of furniture items capable of being joined or arranged together and serving the common purpose of enabling an administrator, faculty member, office worker or student to perform his or her work. These dictionary definitions show that “installation” under AB 1598 does not include assembly of individual pieces of furniture that are not part of a modular office system. Carpenters 46 Northern California Counties Conference Board (Carpenters Board) anticipates this result where it states that purchases of free standing desks delivered to a classroom with no required installation of a modular system is not covered “installation” under subdivision (a)(1). AB 1598 did not make the assembly and disassembly of freestanding individual pieces of furniture a public work.

Based on the dictionary definitions, a purchase order for a grouping consisting of seating, tables, desks, study carrels, cubicles, walls, panels, and partitions that are to be physically joined or arranged together to comprise a work, classroom, or study space (including tack boards, shelves, overhead storage units, and any other pieces of furniture that are affixed to the cubicle or study carrel) are to be considered part of a “modular office system” within the meaning of section 1720, subdivision (a)(1). The assembly or disassembly of such a grouping under RFP #13-002 (regardless of whether they are freestanding or affixed to the realty), to the extent they form a modular office workspace, fall under the definition of “installation” under AB 1598. As such, that work is public work subject to prevailing wage requirements.

B. Freestanding Furniture Not a Part of a Modular Office System Is Not “Installation” But Assembly or Disassembly of Furniture Affixed to the Realty Constitutes Installation Both Before and After AB 1598.

The assembly or disassembly of individual pieces of furniture that are *not* a part of modular office system involves different considerations. AB 1598 added “the assembly or disassembly of freestanding or affixed modular office systems” to the definition of “installation” under section 1720. AB 1598 was a legislative response to previous coverage determinations, adding to section 1720 language to eliminate the distinction the determinations had made between freestanding and affixed modular furniture. (See Sen. Rules Co., Off. of Sen. Floor Analyses, 3d reading analysis of AB 1598 (2011-2012 Reg. Sess.) as amended Apr. 26, 2012.) Under the previous determinations, assembly and/or disassembly of freestanding modular furniture was not “installation” under former section 1720 because the furniture was not bolted down, secured or mounted to the realty. Instead, freestanding modular furniture was said to more closely resemble personal office furniture such as desks and chairs that did not become part of the building structure. (See PW 2005-017, *Western Contract Services, Assembly and Disassembly of Free-Standing Modular Furniture* (December 16, 2005) (*Western Contract Services*); and *County of Sacramento, supra*, PW 2008-035.) While AB 1598 was a response to the Department’s approach to installation, it did not purport to make the assembly or disassembly of individual pieces of furniture part of the definition of “installation.” To the extent such furniture must be assembled on-site, the determination of whether that work is covered as “installation” under AB 1598 should continue to adhere to what was the Department’s pre-AB 1598 freestanding/affixed approach as to modular furniture: assembly or disassembly of individual pieces of furniture that are affixed to the realty is covered, while assembly or disassembly of freestanding pieces is not.

Put differently, if a piece of furniture must be affixed to the realty, work assembling the furniture on-site and then affixing it to the realty is subject to the prevailing wage laws. For example, the assembly and affixing of bookshelves, cabinets, and other such furniture that must be bolted onto the walls for seismic safety purposes would be covered work. The assembling and affixing of stationary seating, erecting affixed wall systems, and installing cable access flooring systems would also constitute public work. On the other hand, freestanding furniture such as individual chairs, sofas, children’s activity tables, student desks, and file cabinets are examples of furniture that may not be part of modular office systems. In that instance, the assembly of such furniture is not covered work under section 1720 as it existed before and after AB 1598.

Carpenters Board argues that “setting a couch or chair that does not itself require assembly into an integrated system of office modular furniture, [is] work [that] would not only be part of the modular system, but would also be done „in execution of the contract”” under section 1772. That argument is misplaced. Section 1772 provides that workers “employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.” In analyzing whether transporting materials from a job site was in the “execution” of the contract, the court in *Williams v. SnSands Corp.* relied on *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434 to hold that the determinative factor “is the role the transport of the materials plays in the performance or „execution” of the public works contract.” (*Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742, 752.) Delivery of cement materials to a highway project was deemed part of a public work because the materials were immediately laid

upon the highway as an “*integrated* aspect of the „flow“ process of construction.” (*O.G. Sansone Co. supra*, at p. 444, italics added.) Applying that concept in the context of this case, setting in place a chair, couch, or any other freestanding individual piece of furniture with no requirement to assemble it into an *integrated* modular office system is not an “*integrated* aspect of the „flow“ process of [installation]” of “freestanding and affixed modular office systems.”

In sum, to the extent RFP 13-002 calls for the assembly of freestanding or affixed modular office systems or the assembly and affixing of individual pieces of furniture to the realty, as described in this determination, it is covered work. To the extent it calls for the assembly or disassembly of freestanding individual pieces of furniture that are not a part of a modular office system, it is not covered work.

C. AB 1598’s Addition to the Definition of Installation Does Not Apply to Purchase Orders under the Haworth and Unisource Agreements Because the Related RFPs Predate the Effective Date of AB 1598.

As stated above, under former section 1720, when determining whether such installation constituted public works, the Department’s previous coverage determinations maintained a careful distinction between assembly of freestanding and affixed modular furniture. (See *County of Sacramento, supra*, PW 2008-035; *Western Contract Services supra*, PW 2005-017; and PW 2000-052, *Installation of Modular Furniture, Department of General Services* (August 18, 2000).) Because the Haworth and Unisource Agreements were both signed before January 1, 2013, the District asks whether AB 1598 applies to those two agreements and purchase orders issued thereunder.

An amendment to a statute may apply to acts that occurred before its enactment, if the amendment simply restates existing law. (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 471.) “[A] statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment . . . because the true meaning of the statute remains the same.” (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243, original italics.) In other words, when an amendment does not change the law, then the law has *always* applied to acts predating the amendment. AB 1598 is devoid of any legislative declaration that the amendment merely clarifies existing law. The fact that the amendment was enacted in response to the Department’s coverage determinations suggests that the Legislature meant to change the law. (See *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 953.)

When there is an actual change in the law, “a statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application.” (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840.) Absent from AB 1598’s legislative history is any intent to apply the amendment retroactively. Since the Legislature changed the law in AB 1598 and did not expressly apply the amendment retroactively, the new definition of “installation” cannot apply to pre-January 1, 2013 purchase order transactions placed under the Haworth or Unisource Agreements.

Although AB 1598 does not apply retroactively to pre-January 1, 2013 purchase orders, the question remains if it applies to post-January 1, 2013 purchase orders issued under the Haworth

and Unisource Agreements. To determine if AB 1598 applies to such post-January 1, 2013 purchase orders, it is necessary to identify the "benchmark date" that is used for purposes of determining which version of the prevailing wage law applies in a given case.

The Haworth and Unisource Agreements are the products of RFPs issued before the January 1, 2013 effective date of AB 1598. The benchmark date for purposes of ascertaining the applicable version of section 1720 is the bid advertisement date for each of those master agreements. Responding to the RFPs before AB 1598 became effective, the vendors that entered the Haworth and Unisource Agreements committed to prices assuming the law as it previously existed. Purchase orders under those agreements, whether placed before or after January 1, 2013, cannot deviate from the listed prices. Therefore, the purchase orders placed under the Haworth and Unisource Agreements must be evaluated under section 1720 as it existed before AB 1598, when the Department's previous coverage determinations maintained a careful distinction between assembly of freestanding and affixed modular furniture.³

For the foregoing reasons, the assembly and disassembly of freestanding and affixed modular office systems and affixed furniture and office items under RFP #13-002 are a public work within the meaning of section 1720. The assembly and disassembly of affixed modular office systems and affixed furniture and office items under the Haworth and Unisource Agreements are a public work. The assembly and disassembly of freestanding modular office systems under the Haworth and Unisource Agreements are not a public work. The assembly and disassembly of freestanding individual pieces of furniture and office items that are not part of a modular office system are not a public work either before or after January 1, 2013.

I hope this letter satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in blue ink that reads "Christine Baker". The signature is written in a cursive, flowing style.

Christine Baker
Director

³ This view comports with a previous determination, where the bid advertisement date was deemed the benchmark date in the context of a contract to move, assemble, and disassemble modular furniture. (See *Western Contract Services, supra*, PW 2005-017.)