STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
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September 23, 2024

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Drew Bohan
Executive Director
California Energy Commission
715 P Street
Sacramento, CA 95814

Re: Public Works Case No. 2024-016
High-Efficiency Electric Home Rebate Act Program
California Energy Commission

Dear Mr. Duvall and Mr. Bohan:

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 Labor Code section 1773.5[1] and California Code of Regulations, title 8, section 16001, subdivision (a). Based on my review of the facts of this case and an analysis of applicable law, it is my determination that the installation of certain energy efficient appliances and non-appliance upgrades in single-family homes funded by the High-Efficiency Electric Home Rebate Act Program is not subject to prevailing wage requirements.

Facts

A. The High-Efficiency Electric Home Rebate Act.

In 2022, Congress passed the Inflation Reduction Act (Pub.L. No. 117-169 (Aug. 16, 2022) 136 Stat. 1818.) (IRA). As a part of the IRA, Congress established a High-Efficiency Electric Home Rebate Act (HEEHRA) program (Section 50122 of the IRA) to provide grants to states to carry out a rebate program "under which rebates shall be provided to eligible entities for qualified electrification projects." (42 U.S.C. § 18795a(c)(1).) Eligible entities are defined in the legislation as, "(A) a low- or moderate-

[1] Unless otherwise indicated, all further statutory references are to the California Labor Code.

income household," "(B) an individual or entity that owns a multifamily building not less than 50 percent of the residents of which are low- or moderate-income households," or (C) an entity carrying out a qualified electrification project on behalf of an entity described in (A) or (B). (42 U.S.C. § 18795a(d)(1).) "Qualified electrification project" means a project that "includes the purchase and installation of" a number of enumerated energy efficient appliances (an electric heat pump water heater; an electric heat pump for space heating and cooling; an electric stove, cooktop, range, or oven; an electric heat pump clothes dryer; an electric load service center) and non-appliance upgrades (an electric load service center; insulation; air sealing and materials to improve ventilation; or electric wiring.) (42 U.S.C. § 18795a(d)(6)(A).) Any upgrades that are not Energy Star certified do not qualify. (42 U.S.C. § 18795a(d)(6)(B).) An eligible entity may receive up to $14,000 in rebates. (42 U.S.C. § 18795a(c)(3)(C).)

B. The HEEHRA Rebate Program.

The California Energy Commission (CEC) opened a new docket for the acceptance of public comments on January 27, 2023 to support the implementation of the HEEHRA program. On August 29, 2023, the CEC executed an Assistance Agreement with Department of Energy (DOE) and its Office of State and Community Energy Programs (SCEP) to "obligate IRA SCEP funds and to authorize activities under Section 50122." On January 12, 2024, the CEC submitted an application for the HEEHRA program to receive funding and continue the process of setting up California's rebate program. On June 12, 2024, the CEC executed a modification to the Assistance Agreement that makes $290 million in funding available for the HEEHRA program.[2]

On July 29, 2024, the CEC entered into a contract with Cohen Ventures, Inc. dba Energy Solutions (Energy Solutions) to act as administrator of the HEEHRA program by performing tasks such as implementing HEEHRA rebate program policies and procedures, conducting outreach regarding the program, reviewing and approving rebate applications, and processing payment to installers.

According to Energy Solutions, which submitted this coverage determination request, the process for the HEEHRA rebate program works in this fashion:

> An installer will sign a Participation Agreement for the rebate program. A household will engage the installer to install energy-efficient equipment (e.g., a heat pump system for space cooling and heating) at their home. The installer will perform a home assessment to verify that the system has compliant ventilation conditions. Any projects where a combustion appliance is present in the home will require combustion safety testing and the homeowner must remediate unsafe conditions at the home before receiving any rebates. Finally, the energy-efficient equipment will be installed.

[2] The HEEHRA program authorized under Section 50122 of the IRA (codified at 42 U.S.C. § 18795a) is now often referred to as the Home Electrification and Appliance Rebates Program in the CEC's and DOE's literature. In this determination, the Department will continue to use "HEEHRA program" to refer to this program.

> Once the installation is complete, the installer will complete an application through Energy Solutions' online portal. Energy Solutions will review the application and send a check to the installer in the amount of the rebate. In turn, the installer will deduct the rebate from the amount it charges the homeowner. Energy Solutions will not contract directly for the installation with the contractor and will not pay for the installation itself.

The CEC, which submitted a letter in support of the coverage determination request by Energy Solutions, also provided records in response to a request from the Department. The CEC's documents describe a process that differs slightly. After installation and approval of the application, the check the installer receives can be turned over to the household to reimburse them for the payment they made to the installer. The description by Energy Solutions, on the other hand, suggests that the installer keeps the rebate check and deducts the rebate from the amount it charges the household.

Discussion

All workers employed on public works projects must be paid at least the applicable prevailing wage rates. (§ 1771.) The standard and most common definition of "public works" is construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds. (§ 1720, subd. (a)(1) (hereafter section 1720(a)(1)).) "There are three basic elements to a 'public work' under section 1720(a)(1): (1) 'construction, alteration, demolition, installation, or repair work'; (2) that is done under contract; and (3) is paid for in whole or in part out of public funds." (*Busker v. Wabtec Corporation* (2021) 11 Cal.5th 1147, 1157.)

A. Installation of Energy Efficient Upgrades Funded by HEEHRA is Public Work Under Section 1720(a)(1).

Energy Solutions explains that HEEHRA funds will pay for a contractor's construction or installation of energy efficient upgrades done under contract with an eligible single-family household. The HEEHRA funding comes from the DOE through the CEC to Energy Solutions and then to the contractor as reimbursement for work performed for the eligible single-family household. Energy Solutions appears to concede that all three elements to a public work under section 1720(a)(1) are met. Indeed, Energy Solutions does not address section 1720(a)(1) at all and instead focuses its analysis on the exception for assistance provided to a household for the rehabilitation of a single-family home in subdivision (c)(5)(C) of section 1720 (hereafter section 1720(c)(5)(C)).

Despite Energy Solutions' apparent concession, the CEC urges that its contract with Energy Solutions does not constitute a public works contract because its contract does not pay for the construction or installation out of public funds. Instead, the CEC is paying for "(1) rebate program development, and (2) rebate issuance, which are subsidies paid after eligible installation work is completed in the private marketplace, and after installers seek such rebates." Essentially, the CEC argues that the arrangement does not fall within the public works definition of section 1720 because the CEC is funding rebates for installation after the work is complete, and only if rebates are sought. If the work is

done and no rebate request is submitted, no HEEHRA funds will flow to the contractor. The CEC refers to these installations and potential rebates as occurring in the "private market" and that Energy Solutions is "not responsible for the design and success of these installations."[3] And although the installation has to occur before the rebate is paid, "it is not true California is paying for that installation within the meaning of section 1720(a)."

The CEC's reading of the statute is too narrow. As the California Supreme Court has repeatedly emphasized, the "overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985 (*Lusardi*).) "It protects those who work under contract for covered districts from substandard wages, benefits the public through the superior efficiency of well compensated workers, and results in higher wages to make up for lack of job security and benefits that normally attach to public employment." (*Kaanaana v. Barrett Business Services, Inc.* (2021) 11 Cal.5th 158, 172.) The prevailing wage law is construed liberally to fulfill the law's various purposes. (*Id.* at p. 166.)

Regardless of how the HEEHRA program is characterized, the basic process is that the CEC is providing funds to Energy Solutions, which will use those funds to provide rebates or reimbursement for installation work performed by private contractors on single-family homes. While the CEC seems to focus on its agreement with Energy Solutions not expressly requiring any rebate or payment of funds for the installation, the Court of Appeal has stated that the "done under contract" element in section 1720(a)(1) means that the installation work is "not by the public entity's own employees." (*Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 20.) And that is consistent with the purposes of the prevailing wage law, one of which is "to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees." (*Lusardi*, *supra,* 1 Cal.4th at p. 987.)

The CEC also appears to take issue with the fact that funding for the installation is through a rebate that may happen in the future or not at all. To quote the CEC: "To subject a rebate program that cannot control or dictate installation timing and quality to prevailing wage rules would be counter-intuitive to the purpose for the rebate relief in the first instance, which was intended to subsidize the impact of inflation on those private transactions." Although the CEC makes compelling policy arguments on the purpose of HEEHRA and the IRA, to generally carve out public funding that comes in the form of a rebate or reimbursement under the prevailing wage law would "incentivize gamesmanship." (*Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 216 (*Cinema West*).) In *Cinema West*, a theater developer was entitled to payments from public funds after it completed construction and satisfied certain eligibility conditions – essentially a rebate or reimbursement for construction already completed. The developer argued that it

[3] Based on these and other statements in its submission, the CEC appears to be attempting to disavow itself as the "awarding body" of the public works contract (§ 1722), and relieve itself from any potential consequences from that designation. Coverage determinations, however, only 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 public works under the Labor Code." (Cal. Code Regs., tit. 8, § 16001.)

may not be able to satisfy the conditions, and that it did not yet receive any public funds, even though the payments were essentially promised. The *Cinema West* court rejected the argument that the developer could disclaim promised public benefits post-construction under those circumstances and avoid payment of prevailing wages. (*Ibid.*)

In another case, a hotel developer argued that construction cannot be paid for out of public funds unless one is able to "connect the dots" to show that public funds went to pay for the actual construction. (*Hensel Phelps Construction Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, 1033.) Implicit in the developer's argument was that if payment occurs after construction has been completed, there is no way a rebate or reimbursement could ever pay for actual construction within the meaning of the prevailing wage law. The Court of Appeal rejected that argument as a matter of statutory interpretation because there were several categories of public subsidies that cannot be provided to a developer until well after construction is complete and "as a practical matter, cannot be used to pay the actual construction costs, but that can serve to reduce a developer's project costs." (*Id.* at p. 1034.)

The Department has previously applied these precedents to find that transient occupancy tax rebates, which are promised but do not materialize until after construction is complete, are a form of public subsidy for the purposes of the prevailing wage law. (See PW 2018-034, *Great Wolf Lodge – City of Manteca* (Oct. 10, 2019).)

Here, if the contractor were to fail to apply for the rebate or disclaim the rebate because the value of the rebate is outweighed by the cost of prevailing wage law compliance, the workers who already performed the installation, through no fault of their own, would not see the benefits of the prevailing wage law to which they were entitled. In fact, if the rule were that prevailing wages only applied when the rebate actually reached the contractor's hands, then workers performing the installation work would not become entitled to prevailing wages for months or even years after they performed their labor. That "cannot have been the Legislature's intent." (*Cinema West, supra,* 13 Cal.App.5th at p. 216.) In this case, nonpublic employees performing installation work for private contractors will be paid with public funds. All the elements of section 1720(a)(1) are met.

B. Installation of Energy Efficient Upgrades at Single Family Homes Constitutes Rehabilitation Under Section 1720(c)(5)(C).

As noted, Energy Solutions appears to concede that the installation of energy efficient upgrades constitutes public work under section 1720(a)(1), but argues that an exception to prevailing wage requirements applies because the HEEHRA funds are being provided to low or moderate income households to rehabilitate their privately-owned, single-family homes. Section 1720(c)(5)(C) provides:

> (c) Notwithstanding subdivision (b):
>
> . . .
>
> Unless otherwise required by a public funding program, the construction or rehabilitation of privately owned residential projects is not subject to the

> requirements of this chapter if one or more of the following conditions are met:
>
> . . .
>
> (C) Assistance is provided to a household as either mortgage assistance, downpayment assistance, or for the rehabilitation of a single-family home.

In this case, prevailing wage requirements are not "otherwise required by a public funding program." (§ 1720, subd. (c)(5)(C).) The CEC is not otherwise requiring prevailing wages as a condition of the rebates, since it actively supports the argument that section 1720(c)(5)(C)'s exception to prevailing wage requirements applies. DOE also does not appear to require prevailing wages for HEEHRA funding, as a DOE SCEP website's frequently asked questions section states that federal prevailing wage laws do not apply to HEEHRA-funded rebate programs.[4] Assistance in the form of HEEHRA funds is being provided to households for the installation of energy efficient upgrades in single-family homes. The sole remaining issue then is whether installation of energy efficient upgrades qualifies as "rehabilitation" for the purposes of section 1720(c)(5)(C).

As explained extensively in prior coverage determinations, "rehabilitation" is not defined in the prevailing wage law or its regulations. But prior determinations from the Department, which have analyzed state and federal law, provide guidance on this issue. The determinations noted that both state and federal laws define "rehabilitation" broadly.

For instance, in PW 2011-004, *American Recovery and Reinvestment Act Funded Contract for Installation of Residential Energy Efficient Retrofits on Single-Family Homes – California Energy Commission* (Mar. 10, 2011) (*ARRA-CEC*), the CEC provided American Recovery and Reinvestment Act funds to rural low-to-moderate income California homeowners for comprehensive energy efficient retrofits. The program in *ARRA-CEC* is remarkably similar to the HEEHRA program here, which is also providing federal funds to low and moderate income households for energy efficient upgrades. *ARRA-CEC* relied on Section 203(k) of the National Housing Act and its implementing federal regulations to conclude that "rehabilitation of a single family home" included "rehabilitation of existing structures to improve the thermal efficiency of the homes and installation of photovoltaic systems." (*Id.* at p. 3.) Section 203(k) defines "rehabilitation" as "the improvement (including improvements designed to meet *cost-effective energy conservation standards* prescribed by the Secretary) or repair of a structure, or facilities in connection with a structure . . . ." (National Housing Act, § 203(k)(2)(B), 12 U.S.C. § 1709(k)(2)(B); 24 C.F.R. § 203.50, italics added.)

The HEEHRA program promotes *high-efficiency electric* upgrades, and DOE states that the program is designed to "provide home energy savings across a variety of

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[4] See Office of State and Community Energy Programs, Home Energy Rebates Frequently Asked Questions <https://www.energy.gov/scep/home-energy-rebates-frequently-asked-questions> [as of Sept. 20, 2024] ["18. Do the Davis-Bacon Act and the BABA [Build America, Buy America] Act apply to Home Energy Rebates? No, they do not apply to the Home Energy Rebates programs."]

households and income levels, and specifically enable energy improvements within underserved and underrepresented communities." (See SCEP, Inflation Reduction Act Home Energy Rebates Program Requirements and Application Instructions at p. 4 (June 13, 2024) <https://www.energy.gov/sites/default/files/2024-06/program-requirements-and-application-instructions_061324.pdf> [as of Sept. 20, 2024].) In addition, all HEEHRA-eligible upgrades must be Energy Star-certified. (42 U.S.C. § 18795a(d)(6)(B).) The Energy Star program was established to "promote energy-efficient products and buildings in order to reduce energy consumption, improve energy security, and reduce pollution," including those products that "meet the highest energy conservation standards." (42 U.S.C. § 6294a(a).) Energy Star certified products are "designed to meet *cost-effective energy conservation standards*," and under Section 203(k), their installation in a single-family home would fall within the broad definition of "rehabilitation."

In PW 2019-012, *Installation of Solar Photovoltaic Systems, Solar Watts Program – Housing Authority of the City of Los Angeles* (Oct. 24, 2019) (*Solar Watts*), the Department concluded that installation of solar photovoltaic systems constituted rehabilitation. In addition to reviewing federal laws, *Solar Watts* also looked to the definitions in the enabling statutes for a number of California's residential rehabilitation programs. The determination reasoned that these laws defined rehabilitation "broadly" and that "[c]entral to each of these definitions . . . is that rehabilitation is work done to a substandard residence with obsolete features to bring it up to current building or housing standards." (*Id.* at p. 5.)

Most recently, in PW 2022-008, *Lead Hazard Remediation Program – City of Los Angeles Housing Department* (Mar. 21, 2023), the Department expanded on *Solar Watts* and *ARRA-CEC* to conclude that removal of lead-based paints from single family homes also constituted rehabilitation under section 1720(c)(5)(C), reasoning that homes with lead-based paints are substandard, and removing them brings the home up to current building or housing standards.

In this case, the Energy Star-certified energy efficient upgrades not only replace obsolete features in single-family homes, they meet the highest energy conservation standards to "reduce energy consumption, improve energy security, and reduce pollution." (42 U.S.C. § 6294a(a).) The CEC states that rising temperatures and greater frequency of heat events are causing Californians to increase their use of air conditioning, resulting in higher energy bills, which disproportionately impacts "those who can least afford to pay more." The CEC also states that it has determined that "the installation of high-efficiency heat pumps funded through the HEEHRA program is one of the best means available to control bill increases while simultaneously delivering the benefits of cooling to California's disadvantaged communities and low- and moderate-income residents." The upgrades go towards meeting current building energy efficiency standards. (See Cal. Code Regs., tit. 24, §§ 150.0, 150.1.) Updating homes to current energy efficiency standards will increase property values in underserved and underrepresented communities, the main beneficiaries of the HEEHRA program. The increase in value and decrease in energy costs will have beneficial ripple effects throughout these underserved communities, further confirming that this installation work constitutes "rehabilitation."

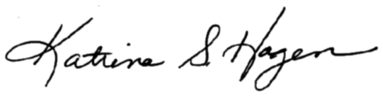
In short, the installation work in single-family homes funded by HEEHRA funds is not subject to prevailing wage requirements, pursuant to the exception set forth in section 1720(c)(5)(C). This determination is based on the facts presented. "If the assumed facts concerning this project change, a different result may obtain." (PW 2003-014, *Phase II Residential Development Victoria Gardens – City of Rancho Cucamonga* (July 20, 2005).)

Conclusion

For the foregoing reasons, the installation of certain energy efficient appliances and non-appliance upgrades in single-family homes funded by the High-Efficiency Electric Home Rebate Act Program is not subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Katrina S. Hagen
Director of Industrial Relations