

DEPARTMENT OF INDUSTRIAL RELATIONS

Katrina S. Hagen, Director

Office of the Director

1515 Clay Street, Suite 2208

Oakland, CA 94612

Tel: (510) 286-7087 Fax: (510) 622-3265



February 26, 2025

Jessica Pirrone, Hearing Officer
Office of the Director – Legal Unit
Department of Industrial Relations
355 South Grand Avenue, Suite 1800
Los Angeles, California 90071

Re: Public Works Case No. 2023-008
Breakwater Exterior Paint Project
Catalyst Housing Group / CMFA Finance Agency VII

Dear Ms. Pirrone:

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 1773.5¹ 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 Breakwater Exterior Paint Project (Paint Project) for Catalyst Housing Group on behalf of the CMFA Finance Agency VII is a public work subject to prevailing wage requirements.

Facts

A. The Breakwater Apartments and CMFA Special Finance Agency VII.

According to records from the Orange County Clerk-Recorder, on August 19, 2021, the Breakwater Apartment Homes, LLC, a Delaware limited liability company, transferred the property located at 16761 Viewpoint Lane in Huntington Beach, APN 142-181-05, to CMFA Special Finance Agency VII. That property is known as the Breakwater Apartments, an apartment complex where the Paint Project was performed.

CMFA Special Finance Agency VII (Finance Agency VII) was organized in July 2021 as a joint powers agency between the California Municipal Financing Agency (CMFA) and the City of Huntington Beach (City) under the provisions of the Joint Exercise of Powers Act (Gov. Code, § 6500 et seq.). The California Municipal Financing Agency (CMFA) is itself a joint powers agency formed on January 1, 2004. A joint powers agency

¹ Unless otherwise indicated, all further statutory references are to the California Labor Code and all subdivision references are to the subdivisions of section 1720.

is “a public entity separate from the parties to the agreement.” (Gov. Code, § 6507.) A July 20, 2021 City of Huntington Beach staff report noted that over 325 municipalities have become members of CMFA for the purpose of promoting “economic, cultural and community development, through the financing of economic development and charitable activities throughout California.” (Request for City Council Action Narrative regarding Middle-Income Housing (July 20, 2021) File #: 21- 531 (July 20, 2021 City Staff Report).)

B. Staff Reports Describing the Need to Form CMFA Special Finance Agency VII for Middle Income Housing.

The aforementioned July 20, 2021 City Staff Report recommended formation of Finance Agency VII to carry out the City’s “Middle Income Housing Program” to make affordable housing available to those earning 80 percent and up to 120 percent of area median income (AMI). The staff report explained that the program operates through a combination of issuing tax-exempt bonds and forgoing property tax revenue, which is achieved through the formation of Finance Agency VII:

As a public agency, the JPA is a tax-exempt entity that is not required to pay property taxes. This property tax abatement, coupled with the tax exempt financing, provides a significant advantage in terms of cash flow, which allows the JPA to compete with market- rate buyers, and enables the JPA to make the units available to low and moderate income households. The typical split of units is one third at 80% AMI, one third at 100% AMI, and one third at 120% AMI.

...

The project sponsor acts on behalf of the JPA as the asset manager.

...

The JPA issues the tax exempt governmental bonds. As the bond issuer, the JPA will oversee the underwriting of the bonds prior to issuance and the performance of the project sponsor during the life of the bonds.

(July 20, 2021 City Staff Report.)

The City also noted in the report that Catalyst Housing Group, LLC (Catalyst) “approached the City with an opportunity to acquire two existing apartment complexes in Huntington Beach and convert them into “workforce housing” units.” One of them is the Breakwater Apartments, comprised of a total of 402 market rate units. Catalyst was the project sponsor, which had been negotiating a sale of the Breakwater Apartments to Finance Agency VII while approval for the formation of Finance Agency VII was pending before the City Council.

Separately, a CMFA staff report similarly recommended the formation of Finance Agency VII because the finance agency, described as “an affiliated single purpose ‘mini-JPA,’” could issue tax exempt bonds “to acquire a market-rate apartment facility and convert it to workforce housing with affordability tiers at 80%, 100% and 120%. Rents would be restricted to 35% of the applicable income tier.” No tenants would supposedly be evicted, but any tenants above the income limits would have to pay market rents. “Because ownership is governmental, the property would be exempt from property tax.” The staff report further promised: “Neither the CMFA nor the municipality [i.e. Huntington Beach] would be liable for the liabilities of the single purpose JPA.” A different section described how proceeds from some of the tax-exempt bonds would be spent:

The proceeds of the Series 2021A Bonds will be applied by the Agency for the purpose of (i) paying the acquisition costs of the Project, (ii) financing the cost of certain capital improvements through a deposit into the Capital Expense Fund, (iii) funding deposits and reserves for the payment of debt service and certain other uses as set forth herein; (iv) funding a portion of Operating Expenses for the Project into the Operating Account under the Property Management Agreement; and (iv) paying the costs and expenses incidental to the issuance of the Bonds.

(July 23, 2021 CMFA Breakwater Apartments Staff Report.)

On July 20, 2021, the City adopted Resolution 2021-44 to approve the joint powers agreement with CMFA to form Finance Agency VII, to approve Finance Agency VII’s issuance of governmental purpose revenue bonds “solely to finance or refinance the acquisition, construction, development and certain related costs” of the Breakwater Apartments, and to execute a Public Benefit Agreement which gives the City the right to purchase the Breakwater Apartments beginning 15 years after the bonds are issued.

C. Financing for Public Acquisition of the Breakwater Apartments and Conversion into Middle Income Housing.

On August 1, 2021, Finance Agency VII and Wilmington Trust, National Association (Trustee), entered into a Trust Indenture for the issuance of the tax-exempt bonds, “the net proceeds of which shall be used to (i) finance the acquisition of the Project, (ii) finance the cost of certain capital improvements through a deposit into the Capital Expense Fund, (iii) fund deposits and reserves for the payment of debt service and certain other uses as set forth herein; (iv) fund a portion of Operating Expenses for the Project into the Operating Account under the Property Management Agreement; and (v) pay the costs and expenses incidental to the issuance of the Series 2021 Bonds.” (Trust Indenture, p. 2.) The bonds are secured by the Property and the leases and rents it collects. (*Id.* at § 5.01, pp. 21-22.) Specifically, the Trust Indenture identified the bonds to be issued in the following amounts, for a total of \$221,885,000:

“CMFA Special Finance Agency VII Senior Essential Housing Revenue Bonds, Series 2021A-1 (The Breakwater Apartments),” in an aggregate principal amount of \$138,750,000, a Series of Bonds designated as

“CMFA Special Finance Agency VII Junior Essential Housing Revenue Bonds, Series 2021A-2 (The Breakwater Apartments)” in an aggregate principal amount of \$78,135,000, and a Series of Bonds designated as “CMFA Special Finance Agency VII Subordinate Essential Housing Revenue Bonds, Series 2021B (The Breakwater Apartments)” in an aggregate principal amount of \$5,000,000.

(*Id.* at § 3.01(d), pp. 6-7.)

A portion of the net proceeds of the sale of the bonds is specifically directed to be deposited into the Capital Expense Fund: “\$23,500,000.00 shall be deposited into the Capital Expense Fund” (*id.* at § 3.03(a)(vi), p. 10) and the Operating Reserve Fund: “\$662,108.30 shall be deposited into the Operating Reserve Fund.” (*Id.* at § 3.03(a)(iii), p. 10.)

On the same day, August 1, 2021, a number of other agreements to carry out Finance Agency VII’s main purpose were also executed. Finance Agency VII entered into a property management agreement with Greystar California, Inc. to manage the Breakwater Apartments and a property administration agreement with Catalyst to “monitor, supervise, coordinate, analyze and report to Finance Agency VII.” The aforementioned Public Benefit Agreement was executed to give the City the right to purchase the property.

On August 3, 2021, Jefferies, LLC, an underwriter, executed a Bond Purchase Agreement to purchase the Series 2021A-1 senior bonds and Series 2021A-2 junior bonds for price of “\$227,397,732.92, representing the principal amount of the Bonds [\$138,750,000 + \$78,135,000 = \$216,885,000], plus original issue premium of \$13,534,100.25, less an Underwriter’s discount of \$3,021,367.33.”² The closing date for the delivery of the bonds was set for August 19, 2021.

On August 19, 2021, Finance Agency VII made a written request to Trustee to authenticate the tax-exempt bonds pursuant to the provisions of the Trust Indenture. The written request further instructed that the “\$38,512,562.89 received by you shall be deposited in the funds and accounts pursuant to Section 3.03 of the Indenture.” On the same day, the underwriter Jefferies, LLC acknowledged the delivery of the bonds.

D. Agreement between Master Builders and Owner of Breakwater Apartments.

On an unspecified date, SD-CAP Construction Management, LLC issued a Request for Proposals for the Paint Project with proposals due September 23, 2022. In Section 2.1, the Request states: “Contractor to supply all prevailing wage labor, materials, permits if necessary, supplies and equipment necessary to complete the repaint project.” Further in Section 10.4, the Request also states: “All work is to be paid with a prevailing wage labor rate.” Master Builder’s proposals dated September 2 and September 13, 2022

² The Bond Purchase Agreement noted that the Series 2021B-2 bonds “are being privately placed with Catalyst Housing Group LLC, a California limited liability company.”

contain this statement: "NOTE: This project is bid as prevailing wage. If for whatever reason project exceeds 24 months, prevailing wage cost may increase which could result in a change order to our agreement."

On October 7, 2022, Master Builders entered into the Paint Project contract with the "owner" of Breakwater Apartments for \$1,031,200. The contract is ambiguous as to the exact identity of the owner and its agent. On the first page, the contract states that "CMFA" is the owner and that the owner "shall act through its agent, Catalyst Housing Group." But on the signature page, the owner was identified as "CalCHA"³ and SD-CAP Construction Management, LLC is the authorized agent signing on behalf of the owner. The Department construes these discrepancies as typographical errors and that the owner is actually Finance Agency VII.

The scope of the work for the contract includes "pressure washing the buildings, scrapping of stucco in areas that are peeling, and repainting all previously painted surfaces." The contractual documents stated: "Contractor to supply all prevailing wage labor, materials, permits if necessary, supplies and equipment necessary to complete the repaint." The contract also provides: "The Contractor to whom the contract is awarded, and its subcontractors hired for the public works project are required to pay not less than the specified general prevailing wage rates to all workers employed in the execution of the contract." A further warning is included: "Contractor fully understands that failure to comply with all Labor Law requirements (LC § 1720-1861) may subject it to penalties." A document entitled "Prevailing Wage Requirements" details the requirements that Master Builders was expected to comply with.

The contract specified that the Paint Project must be completed by May 31, 2023.

E. Referral for Coverage Determination.

On May 30, 2023, the Division of Labor Standards Enforcement (DLSE) issued a civil wage and penalty assessment against Master Builders, as authorized under section 1741. Master Builders filed a request for review of the assessment under section 1742. During the section 1742 proceedings, Master Builders disputed coverage of the Paint Project under the prevailing wage law. Thereafter, the assigned hearing officer referred the matter for a coverage determination.

Contentions

Master Builders argues that the work performed was done under contract "between private persons and/or involved a private residential project, and/or does not fall within the meaning of 'public works' nor was it 'paid for in whole or in part out of public funds' as defined under Labor Code sections 1720, *et seq.*" More specifically, Master Builders argues that the real estate developer may have received some public financing from a quasi-public entity "under a complex financial structure underwritten by private investment banks" for the acquisition of an apartment complex, but none of that public

³ CalCHA appears to refer to California Community Housing Agency, yet another joint powers agency that issues government bonds for affordable housing.

financing was provided for construction. And because no public funding paid for actual construction, the project is not a public work.

Catalyst Housing Group argues that the contract between the CMFA and Master Builders required the payment of prevailing wages for all work required under their contract. The contract also required Master Builders to abide all laws that pertain to prevailing wage requirements. “As such, there is no need for any determination requiring the contractual obligations of the General Contractor on the issue of prevailing wages and the related requirements.”

DLSE makes essentially the same arguments as Catalyst Housing Group, citing the contractual provisions requiring compliance with prevailing wage requirements as evidence that the project is a public work. By executing the contract, Master Builders has, DLSE argues, “specifically acknowledged” that the project is a public work.

Master Builders responds by arguing that contractual language alone does not determine whether a project is a statutory public works under the Labor Code.

Discussion

All workers employed on public works projects must be paid at least the applicable prevailing wage rates. (§ 1771.) Section 1720, subdivision (a)(1) (hereafter section 1720(a)(1)) defines “public works” to mean: “Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds” “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 (*Busker*).)

No party disputes that the Paint Project involved construction work. Master Builders appears to question whether the “done under contract” element was satisfied but makes no direct argument as to this point. The Court of Appeal has stated that the “done under contract” element in section 1720(a)(1) means that the work is not done “by the public entity’s own employees.” (*Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 20.) This is consistent with one of the objectives of the prevailing wage law “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.) There is no assertion here that any work on the Paint Project was done by public employees. Thus, the first two elements to a public work under section 1720(a)(1) are met here.

The only issue presented is whether the Paint Project is “paid for in whole or in part out of public funds” within the meaning of section 1720.

A. Finance Agency VII is a Public Entity.

Finance Agency VII is a joint powers authority or joint powers agency formed by a joint powers agreement between CMFA and the City. (Gov. Code, §§ 6502, 6503.5.). A

joint powers authority is formed by two or more public agencies. (Gov. Code, § 6502.) A joint powers authority is a public agency. (Gov. Code, § 6500.)

Finance Agency VII is a “public entity separate from the parties to the agreement.” (Gov. Code, § 6507.) This is made all the more apparent in its authority to issue revenue bonds to “pay the cost and expenses of acquiring or constructing” a variety of structures, including low-income housing projects (Gov. Code, § 6546) and “pay the cost of any public capital improvement, working capital, or liability or other insurance program.” (Gov. Code, § 6588.) “Cost” is defined broadly. (Gov. Code, § 6585, subd. (e).) Public capital improvements include low-income housing projects. (Gov. Code, § 6565, subd. (n), 6546.) As the California Supreme Court held, the bond issuing authority “does not derive from any power of the contracting parties to issue bonds; rather, it derives from state law. Moreover, a joint powers agency *holds this power independently of the contracting parties*. In this regard, the term ‘joint powers agency’ is somewhat misleading because, when issuing bonds under article 2 of the Act, the agency exercises its own power, not the joint powers of the contracting parties.” (*Rider v. City of San Diego* (1998) 18 Cal.4th 1035, 1051 (*Rider*), italics added.) Under Article 4 of the Joint Exercise of Powers Act, Finance Agency VII is authorized by state law to take all manners of actions to effectuate its purpose to pay for public capital improvements. (Gov. Code, § 6588.) “The power to issue bonds under articles 2 and 4 of the Act is a power a joint powers agency holds independently.” (*Rider, supra*, 18 Cal.4th at p. 1053.)

Master Builder identifies Finance Agency VII as the owner of Breakwater Apartments.⁴ Its argument that a “developer appears to have obtained favorable financing from a quasi-public entity” and that “there is nothing ‘public’ about the work that was performed by MBA” is an inaccurate description of the facts, because the owner of Breakwater Apartments is Finance Agency VII, a public agency.

B. The Paint Project was Paid for Out of Finance Agency VII’s Funds.

Master Builder argues that any public financing going to this project was sourced from a quasi-public entity “under a complex financial structure underwritten by private investment banks” for the acquisition of an apartment complex, but none of that public financing was provided for construction. This is essentially the gravamen of the argument. In addressing this argument, it must be noted that Master Builder unfortunately did not have the benefit of the facts of the admittedly complex financing structure employed by CMFA, Finance Agency VII, the City, Catalyst Housing, and the other interested parties to the transaction. Master Builder, however, did have many indications that all the parties considered the project to be a public work subject to prevailing wage requirements.

As detailed above, there are numerous references to the City forming Finance Agency VII in order to issue tax-exempt bonds to acquire Breakwater Apartments and to make necessary improvements. Because Finance Agency VII is a public agency, the proceeds from the bonds it issued are public funds.

⁴ Master Builder accurately points out that its contract for the Paint Project appears to mistakenly identify CMFA as the owner.

Furthermore, as a joint powers agency, Finance Agency VII's assets are either sourced from the public agencies that formed Finance Agency VII (see Gov. Code, § 6502) or they are sourced from the proceeds of the bonds Finance Agency VII used to acquire the property *and* pay for capital and operating expenses. In either case, Finance Agency VII's funds are public funds. The Finance Authority VII-issued bonds are secured by the property, and the revenue the property generates from leases and rents pays the debt service on the bonds. (Gov. Code, § 6588.)

Master Builder counters that Finance Agency VII's latest financial statements do not include any contracts for improvement and repairs and maintenance liabilities are paid by Breakwater Apartments, not Finance Agency VII itself. Master Builder appears to recognize that the Paint Project constitutes an improvement or repair and maintenance. The Paint Project is a capital expense. Not only does it encompass repainting, the Paint Project is part of an overall restoration of the Breakwater Apartments that includes replacing and repairing stucco, and replacing doors, door jambs, and thresholds. The Trust Indenture and other documents indicate that over \$23 million was set aside from the bond proceeds for capital expenses, such as the Paint Project. Capital expenses such as the Paint Project were funded through the bond proceeds. (Trust Indenture, p. 2.) If the Paint Project constituted maintenance and repairs, the Trust Indenture indicates that the bond proceeds also paid for a portion of operating expenses. (*Ibid.*)

Moreover, even if the Paint Project were funded by revenue derived from the operation of the Breakwater Apartments rather than the bond proceeds, the Paint Project would still ultimately be funded by Finance Agency VII's funds, which are public funds. Any revenue generated by Breakwater Apartments may be collected by Greystar California, Inc. or Catalyst Housing Group, but the revenue is used to pay for operating and capital costs and to pay debt service. These are all debts and liabilities of Finance Agency VII, not Catalyst Housing Group, Greystar California, Inc., or any other entity. (Gov. Code, §§ 6508.1, 6551.) Whether they are revenue from the property or proceeds from the bonds, the funds used to pay for the Paint Project, or any other debts and liabilities, all belong to Finance Agency VII and constitute public funds.

This should not come as a complete surprise to Master Builder. There are numerous references to public works and prevailing wage requirements in the Paint Project request for proposals and the contractual documents. Master Builder itself acknowledged that the Paint Project was subject to prevailing wages when it submitted its proposals with a clear note: "NOTE: This project is bid as prevailing wage. If for whatever reason project exceeds 24 months, prevailing wage cost may increase which could result in a change order to our agreement." While not all projects requiring prevailing wages are public works projects, if there were any doubt, Master Builder could have inquired with any of the many entities involved in the Paint Project. There is no indication Master Builder ever made such an inquiry.

In short, the Paint Project meets all of the three elements to a public work in section 1720(a)(1). (*Busker, supra*, 11 Cal.5th at p. 1157.) Prevailing wage requirements therefore apply.

Conclusion

For the foregoing reasons, the Breakwater Exterior Paint Project (Paint Project) for Catalyst Housing Group on behalf of the CMFA Finance Agency VII is a public work subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in black ink, reading "Katrina S. Hagen". The signature is written in a cursive, flowing style.

Katrina S. Hagen
Director of Industrial Relations