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DEPARTMENT OF INDUSTRIAL RELATIONS
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Arnold Schwarzenegger, *Governor*

October 12, 2007

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

Dear Ms. Perkins:

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 replacement conveyor and enclosure improvement work at Pier G, Pad 14 in the City of Long Beach ("City") is a single, integrated public works project subject to prevailing wage requirements.

Facts

City owns a parcel of land ("Pad 14") located at 1029 Pier G Avenue at the Port of Long Beach. Historically, Pad 14 contained a City-owned conveyor system consisting of mechanical shiploaders, conveyors and related structures and equipment used for stockpiling and loading coal and petroleum coke. By agreement dated June 29, 1990, City leased Pad 14 to Applied Industrial Materials Corporation ("AIMCOR"), which built an enclosure consisting of four walls open at the top and a system of conveyors. AIMCOR used Pad 14 to store petroleum coke within the enclosure until it could be loaded onto ocean-going vessels docked at Pier G. AIMCOR ceased using Pad 14 for the storage and handling of coke on December 31, 2000.

In December 2003, AIMCOR sold its leasehold interest in Pad 14 to Oxbow Carbon & Minerals LLC ("Oxbow"). On February 11, 2005, Oxbow entered into a lease amendment with City, which required Oxbow to perform construction to bring Pad 14 into compliance with new air quality control rules that prohibited the open storage and handling of coke. Under the lease amendment, Oxbow was obligated to construct replacement conveyors in accordance with plans and specifications approved by City's harbor executive director and subject to conditions set forth in a harbor development permit. The harbor development permit described the approved work as roofing the enclosure; upgrading the existing conveyors, dust suppression system and electrical system; and adding new conveyors.[1]

[1]The replacement conveyor scope of work per the lease amendment included the erection of two new conveyors enclosed in a steel tube outside the enclosure, a third new shuttle conveyor inside the to-be-roofed enclosure, and an enclosed transfer tower.

Under the lease amendment, City agreed to provide Oxbow with rent relief comparable to what City had proposed for Oxbow's predecessor, AIMCOR, based, in substantial part, on economic hardship caused by the new air quality control rules. Also, under the lease amendment, City agreed to reimburse Oxbow up to $2.258 million for its expenses in adding the replacement conveyors. The lease amendment specifically acknowledged that City's reimbursement rendered the replacement conveyor work a public work subject to prevailing wage requirements. Upon reimbursement, Oxbow would convey title to the replacement conveyors to City.

Oxbow entered into a contract with W.B. Allen Construction ("Allen") for construction of the roof for the enclosure ("Enclosure Contract"). The Enclosure Contract also called for Allen to construct and/or install a cupola structure for entry of a conveyor into the enclosure, steel frame doors for security, vinyl curtains, closures for four mobile equipment access openings, a new asphalt floor, a bobcat access vestibule, an access stairway and various elements for support and routing of a dust suppression system. The purpose of the Enclosure Contract is to achieve full compliance with the new air quality control rules banning the open storage of coke. Under the Enclosure Contract, Oxbow maintained inspection and approval control over the construction activities.

Thereafter, Oxbow entered into a contract with Bragg Investment Co., Inc. dba Bragg Crane and Rigging ("Bragg") for the replacement conveyor work ("Conveyor Contract"). The Conveyor Contract called for the erection of two enclosed tube belt conveyors, a third shuttle conveyor, maintenance platforms, emergency egress platforms and ladders for the shuttle conveyor, a stack tube, an enclosed transfer tower and an electrical building. The purpose of the Conveyor Contract is to allow for the delivery of coke to the enclosure and the distribution of the coke within the enclosure in full compliance with the new air quality control rules. Under the Conveyor Contract, Oxbow maintained inspection and approval control over the construction activities.

Drawings define the interface connections between the replacement conveyors and the enclosure improvements. As designed, the new conveyor system will transport coke from ground level to a transfer tower at the level of the roof. From the transfer tower, the coke will travel through the roof of the enclosure and down the length of the enclosure just under the roof. At the end of the conveyance process, the coke will be dumped into piles on the floor of the newly roofed enclosure.

Oxbow represents that while City agreed to reimburse Oxbow up to $2.258 million for the replacement conveyor work, Oxbow anticipates the total cost under the Conveyor Contract is more likely to be $4.8 million. Oxbow also represents that the total cost under the Enclosure Contract will be $4.2 million.

Discussion

Under Labor Code section 1720(a)(1)[2], a public work is defined in pertinent part as: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds ... ." There is no dispute the work described in the Facts, above, involves

[2]All statutory references are to the California Labor Code, unless otherwise indicated.

construction and installation done under contract and paid for in part out of public funds in the form of City's reimbursement to Oxbow of up to $2.258 million.[3]

The threshold issue concerns identification of the scope of the project to which public works status attaches under section 1720(a)(1). Oxbow and City contend that City's monies apply only toward construction of the replacement conveyors, which they admit is a public work. They argue that construction of the enclosure improvements is a separate project from the conveyor work. As a separate project, they argue, construction of the enclosure improvements is not being paid for out of public funds and is therefore not a public work. Whether the work entailed under the Enclosure and Conveyor Contracts is a single, integrated project or two separate projects is relevant in determining the scope of coverage and the extent to which prevailing wage obligations apply. By necessity, the inquiry must be made on a case-by-case basis. A single, integrated project that is paid for "in part out of public funds" as specified in section 1720(b) is a public work in its entirety as is a project that is paid for "in whole" out of public funds. This is so because such a project meets the three elements of a public work under section 1720(a)(1) – (1) construction, alteration, demolition, installation or repair; (2) done under contract; and (3) paid for in whole or in part out of public funds.

Construction under the Enclosure and Conveyor Contracts produced one structure that functioned as a unified system for the distribution and storage of coke. Oxbow undertook, oversaw and completed the enclosure improvement and replacement conveyor work on a single parcel of land owned by City at the port. The conveyor work called for by the lease amendment was implicitly conditioned on there being a newly built roof to and through which the replacement conveyors would be anchored. The harbor development permit explicitly called for the enclosure improvements, including the roof, and the replacement conveyors, which together served the singular purpose of ensuring that coke is never exposed to the open air.

According to the drawings, the replacement conveyors were designed as an essential element of the improved enclosure, not as a stand-alone undertaking. For example, the three conveyors physically connect to the enclosure, into which the coke enters through a cupola structure built into the roof. The first conveyor is in an enclosed tube outside the enclosure and receives the coke; the first conveyor is connected to the second conveyor, which is also in an outside tube until it enters the enclosure through the roof; the second conveyor is connected to the third conveyor, which runs underneath and is supported by and secured to the ceiling of the roof. The third conveyor is not in an enclosed tube and, therefore, once the coke enters the third conveyor, the coke is covered only by the roof. That a segment of the conveyors is located outside the enclosure does not detract from the physical connectedness of the entire system constructed under both contracts.

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[3]Oxbow and Iron Workers Union Local No. 433 ("Local 433") raise the issue whether the reduced rent under the lease amendment constitutes a payment of public funds under section 1720(b)(4), which includes rents that "would normally be required in the execution of the contract, that are ... reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision." Because this determination finds that the work performed under the Conveyor Contract and the Enclosure Contract is a single, integrated public works project paid for in part with City's reimbursement to Oxbow of $2.258 million, the question of rent reduction as an additional payment of public funds need not be addressed.

While the lease amendment limits City's reimbursement obligation to Oxbow's expenses incurred in adding the replacement conveyors, City's commitment of public funds under the lease amendment was as a contribution towards the total costs of constructing a unified and operable facility for the lawful handling and storage of coke. The replacement conveyors could not be used without the improvements to the enclosure, including the roof. The enclosure roof constitutes the sole cover for the conveyor that is located within the enclosure walls and secured to the enclosure roof. Without the roof, not only would the shuttle conveyor not be enclosed, but the piles of coke delivered by the conveyors to the enclosure floor would not be enclosed. That there were separate bids and separate subcontractors used by Oxbow is inconsequential, given that the replacement conveyors and the enclosure improvements were fully interdependent components of a single distribution and storage system. Both the replacement conveyors and the enclosure improvements, most notably the roof, were essential to bring the facility into compliance with the new air quality control rules.

The totality of the facts in this case dictate finding that the work under the Enclosure and Conveyor Contracts is a single, integrated project. It entails construction and installation that is performed under contract and paid for in part out of public funds. As such, the elements of a public work under section 1720(a)(1) are satisfied.

City argues that the "under contract" element in the definition of a public work under section 1720(a)(1) is not met because City is not an "awarding body" and neither issued a call for bids nor entered into a construction contract. There is no merit to this argument. Public works status does not turn on whether City is an "awarding body" or a construction contract signatory. (See, *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63-64 [explaining that the "under contract" language of section 1771 refers to work done under contract, not work carried out by a public agency with its own forces].) This analysis is consistent with longstanding administrative interpretation. (See, e.g., PW 98-005, *Goleta Amtrak Station* (November 23, 1998).) Here, the work is being performed by contract labor, not force account, and therefore it is subject to coverage under California's prevailing wage laws. Specifically, the "under contract" element is met both by the lease amendment, which calls for Oxbow to construct a replacement conveyor system, and by the construction contracts Oxbow entered into with Allen and Bragg.

While this matter was pending, the Department decided it would no longer designate public works coverage determinations as "precedential" under Government Code section 11425.60. Consequently, PW 2000-016, *Vineyard Creek Hotel and Conference Center, Redevelopment Agency, City of Santa Rosa* (October 16, 2000), which was cited to and argued by the parties, no longer has precedential effect. While *Vineyard Creek* provided a useful analytical tool to assist in ascertaining the scope of the public work under section 1720(a)(1), the factual analysis set forth above accomplishes the same purpose.[4] Public notice of the Department's decision to discontinue the use of precedent decisions can be found at www.dir.ca.gov/DLSR/09-06-2007(pwcd).pdf.

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[4]Oxbow argues *Vineyard Creek* equates project costs with construction costs, something Oxbow contends was rejected by *Greystone Homes, Inc. v. Cake* (2005) 135 Cal.App.4th 1. While *Vineyard* Creek no longer stands as a precedent, it should be noted that *Greystone* found that public funds as reimbursement of land acquisition costs was not an expenditure for construction under former section 1720(a), an issue not present in this case. Otherwise, because the determination here does not rely on *Vineyard Creek*, there is no need to address the parties' *Vineyard Creek* arguments.

Based on the foregoing, the work under both the Conveyor Contract and the Enclosure Contract at Pier G, Pad 14 is a single, integrated public works project subject in its entirety to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

John C. Duncan
Director