

DEPARTMENT OF INDUSTRIAL RELATIONS

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September 15, 2009

SHN Consulting Engineers and Geologists, Inc.
812 W. Wabash
Eureka, CA 95501-2138

Attention: Arnie Herskovic
Economic Planning Manager

RE: Application for a Third Party Labor Compliance Program

Dear Mr. Herskovic:

In accordance with the provisions of California Code of Regulations, Title 8, section 16426, approval of SHN Consulting Engineers and Geologists, Inc.'s (SHN) Labor Compliance Program is denied for the following reasons:

- Existence of potential conflict of interest
- Past poor performance in labor compliance monitoring
- Relatively low level of experience among SHN staff to perform labor compliance monitoring.

Each reason is discussed below.

Existence of Potential Conflict of Interest

Within the public works context, one role SHN has been engaged in is that of a subcontractor of soils/materials testing and inspection (such as welding) at public works projects. SHN is required to pay prevailing wage rates when so engaged. For some of the public works projects in which SHN was a subcontractor, monitoring by a labor compliance program (LCP) approved by the Director was also required. For example, from 2003 to 2007 SHN was the subcontractor for testing and inspection at several school modernization projects of the Eureka City Schools District (Eureka) funded by school bond funds. Those projects were subject to the LCP requirements under California Labor Code sections 1771.5 and 1771.7.

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A second role SHN would engage in if its application for a third party LCP were to be approved is that of a statutorily required labor compliance monitor at certain public works projects to make sure that prevailing wage rates are paid to workers of contractors and subcontractors.

LCPs are required to perform enforcement functions “in a manner consistent with the practice of the Labor Commissioner.” Cal. Code Regs., tit. 8, §16434. This subsumes the statutory responsibility under Labor Code section 90.5(a) to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions ... and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards.”

California Government Code section 87100 states that “No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” Government Code section 87103(d) states that “A public official has a financial interest in a decision within the meaning of section 87100 if it is reasonably foreseeable that the decision will have a material financial effect...on * * * (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.” Under Government Code section 82048(a) “‘Public official’ means every member, officer, employee or consultant of a state or local government agency.”

A third party LCP should be construed as “public official” in that it is not only contracted by a public agency to perform statutorily required prevailing wage compliance monitoring and enforcement on behalf of the public agency, but also is performing traditional labor standards enforcement functions of the Labor Commissioner. It follows that the decision of a third party LCP relating to labor standards enforcement is a “governmental decision.” And a third party LCP, such as SHN, that also engages in a contract/subcontract work in public works projects can have a “financial interest” in the labor standards enforcement decisions it makes if it or its competitors were awarded a contract/subcontract at the project it monitors.

Therefore, the dual roles – on the one hand SHN is a subcontractor whose prevailing wage payment practice is subject to monitoring by an LCP and on the other hand SHN wears a public official hat and makes a governmental decision relating to labor standards enforcement in which it has a financial interest – engaged in by a single entity, SHN, present a built-in potential conflict of interest.

In handling the built-in potential conflict of interest problem SHN has not shown prudence in the past. Prior to seeking approval as a third party LCP, SHN had contracted to administer the LCP of Eureka (LCP I.D. 2006.00529) from 2003 to 2008 while it was

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engaged in the testing and inspection subcontract for Eureka's school modernization projects. The LCP of Eureka was subject to a revocation proceeding stemming chiefly from the allegation of conflict of interest based on the dual roles SHN provided to the LCP of Eureka. It is noted parenthetically that other allegations against the LCP of Eureka included poor labor enforcement (provided by SHN) and potential impropriety of contracting with an unapproved third party monitor (SHN). The revocation proceeding of the LCP of Eureka closed in April 2009 when Eureka voluntarily revoked its LCP approval status.

Past poor performance in labor compliance monitoring

As noted above, SHN was a contracted monitor of the LCP of Eureka from 2003 to 2008 and monitored the prevailing wage payment compliance of the contractors/subcontractors at Eureka's school modernization projects. The approximate aggregate construction fund for those projects was in the range of \$40 million. The records available to the Division of Labor Standards Enforcement show that SHN handled improperly a complaint of worker(s) against a contractor/subcontractor's failure to pay prevailing wages. Additionally, SHN had a very low rate of finding violations – only three violations of underpayment of wages in a 4-year period (2003-2007).

Relatively low level of experience among SHN staff to perform labor compliance monitoring

With the exception of one staff member, the level of experience of three other employees of SHN in labor compliance monitoring is not extensive. Additionally, those four employees assigned to handle SHN's LCP work already have other job responsibilities, such as economic planning and environmental planning. Therefore, without a specified allocation of time for labor compliance monitoring, it is difficult to determine whether SHN would have an adequate level of staffing for a third party LCP work. Demonstration of an adequate level of experience in labor compliance monitoring and of staffing resource is required for approval.

If you have any questions or concerns about this determination, please contact Tess Gormley, Special Assistant, at (415) 703-4282.

Sincerely,



John C. Duncan
Director

cc: Angela Bradstreet, Labor Commissioner
Susan Nakagama, Regional Manager, DLSE