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STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2003-033

PLUMBING AND FIRE SPRINKLER INSTALLATION

HUMBOLDT COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES

I. INTRODUCTION

On January 6, 2004, the Director of Industrial Relations issued a public works coverage determination ("Determination") finding that all plumbing and fire sprinkler work performed at the Professional Building, 507 F Street, Eureka, California ("Building") is public work under Labor Code section[1] 1720.2 and therefore subject to the payment of prevailing wages.

On February 26, 2004, Kramer Properties, Inc. ("KPI") timely filed an administrative appeal of the Determination. United Association of Journeymen and Apprentices ("UA") filed its response to KPI's appeal on March 11, 2004.

Having fully considered the record and arguments on appeal, the undersigned reverses in part the Determination and now finds that only the fire sprinkler and plumbing work specifically performed on the office space leased by the Humboldt County Department of Health and Human Services ("County") is public work under section 1720.2.

II. ISSUES ON APPEAL

1. Whether the construction contracts entered into between KPI acting as owner/general contractor and the

[1] Unless otherwise noted, all section references are to the Labor Code.

subcontractors constitute construction contracts between private persons under section 1720.2.

2. What, if any, of the fire sprinkler work is public work.

3. Whether the plumbing work for the Building shell is public work.

III. RELEVANT FACTS

In April 2000, KPI purchased the Building, a five-story, 40,000 square-foot office structure built in 1917. Immediately following the purchase of the Building, KPI hired contractors and engineers to perform substantial structural and mechanical repairs to meet current seismic standards and building codes. In February 2002, County issued a Request For Proposal ("RFP") to lease office space and construct tenant improvements. Under the RFP, County required the lessor to abide by certain plans, specifications or criteria for the leased space to meet County's needs. These included the size and number of offices and work areas, types of cabinetry, windows, hardware and flooring as well as electrical, lighting, plumbing and fire sprinkler systems. On April 17, 2002, KPI submitted its proposal to provide County office space in the Building. County accepted KPI's proposal on June 11, 2002.

On December 3, 2002, KPI and Don Clogston Fire Protection, Inc. entered into a contract to install a fire sprinkler system throughout the Building, including in the office space to be leased by County.

On January 14, 2003, KPI and County entered into a lease wherein County leased 25,595 square feet of the Building, which represents approximately 63 percent of the Building's assignable square footage. Based on County's requirements, as set forth in the lease and RFP, KPI's architect drew up floor plans indicating placement and configuration of electrical wiring and outlets, lighting,

telecommunication and computer wiring, cabinets and doors as well as office space. County also required that KPI install a fire sprinkler system with wet sprinkler alternatives in certain areas, sinks in the break rooms and two water fountains on each floor leased. (See Scope of Work Specifications, Attachment No. 4, Part II, Division 15.2 of the RFP.) County approved the final plans for the tenant improvements including the configuration of the office space for each floor leased. It should be noted that the lease between County and KPI was entered into during ongoing construction work on the Building including installation of the fire sprinkler system.

On March 28, 2003, after the lease was entered into, KPI and Cruz Plumbing entered into two contracts for plumbing work on the Building. One contract was for the tenant improvements required under County lease. It required that prevailing wages be paid for this work. The other contract was for plumbing work throughout the Building shell. The second contract contained no requirement that prevailing wages be paid.

KPI's appeal is directed toward the entirety of the fire sprinkler work and the plumbing work performed on the Building shell.

IV. ANALYSIS

A. THE CONSTRUCTION CONTRACTS ENTERED INTO BETWEEN KPI AND ITS SUBCONTRACTORS EACH CONSTITUTE A "CONSTRUCTION CONTRACT ... BETWEEN PRIVATE PERSONS" UNDER SECTION 1720.2.

On appeal, KPI renews its argument that, since it is the owner of the Building and is also acting as the general contractor for the improvement work on the Building, there is no contract between private persons as required under section 1720.2 because the owner and general contractor are

the same person. KPI relies on PW 93-066, *Foothills Square Shopping Center* (March 15, 1994) for this proposition.

KPI's reliance on *Foothills Square* is misplaced for two reasons. First, it is not a precedent decision and hence cannot be cited or relied on by the parties. (Gov. Code § 11425.60.) Second, the owner/contractor in *Foothills Square* used its own employees to do the construction work. The owner/contractor in *Foothills Square* did not hire subcontractors. Here, KPI entered into construction contracts with private persons to perform the plumbing and fire sprinkler work. There is nothing in section 1720.2 limiting its application to construction contracts between an owner and a general contractor. Section 1720.2, therefore, applies to the construction contracts between KPI and its subcontractors.

B. ONLY THE PORTION OF THE FIRE SPRINKLER WORK PERFORMED ON THE SPACE LEASED BY COUNTY IS PUBLIC WORK.

Labor Code section 1720.2 states:

> "[P]ublic works" also means any construction work done under private contract when all of the following conditions exist:
>
> (a) The construction contract is between private persons.
>
> (b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.
>
> (c) Either of the following conditions exist:
>
> (1) The lease agreement between the lessor and the state or political subdivision, as lessee,

> was entered into prior to the construction contract.
>
> (2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work.

The Determination found that all of the fire sprinkler work on the Building was covered under section 1720.2(c)(2) because County had provided plans, specifications or criteria for the work performed on the portion of the property leased by County, and the lease was entered into during the construction work.

KPI argues that none of the fire sprinkler work is public work under section 1720.2 for two reasons. First, it was not performed pursuant to County criteria but only as required under the state building code. Second, KPI argues that the fire sprinkler work is part of the Building rehabilitation and not the tenant improvements.

In response, UA points out that the RFP does not simply request fire sprinklers, but specifies that wet sprinkler alternatives are to be installed in certain rooms of County-leased space. (See Scope of Work Specifications, Attachment No.4, Part II, Division 15.2 of the RFP.) Also, according to UA, the sprinkler system had to be installed to conform to the floor plan required by County for the space it was leasing. In further support of its argument, UA points out that the fire sprinkler bid was submitted after KP submitted its proposal to construct the tenant improvements required by County.

As indicated above, County's lease and RFP requirements dictated the location of offices and work areas. The location of the offices and work areas in turn dictated where the electrical, doors, walls, cabinets and fire sprinklers required by County would be situated. These requirements were part of County's plans, specifications or criteria for its tenant improvements. In addition, County specified a certain type of fire sprinkler for various offices and work areas. (See Scope of Work Specifications, Attachment No. 4, Part II, Division 15.2 of the RFP.) Installation of the fire sprinklers within County-leased space had to conform to County's plans, specifications or criteria. Therefore, the fire sprinkler work performed on the office space leased by County is public work because it was "performed according to plans, specifications or criteria furnished by" County, and because the lease was entered into during the construction work. (§ 1720.2(c)(2).)

KPI's argument that the fire sprinkler work was done only as part of the Building rehabilitation and not as County tenant improvements is incorrect since a portion of this work was performed within County-leased space according to County's plans, specifications or criteria. KPI's argument that there were no County criteria for the fire sprinkler work is also wrong since the RFP specifically set out the criteria referred to above.

The balance of any fire sprinkler work performed in the Building unrelated to County tenant improvements is not public work because the lease was not entered into prior to the construction contract for that work and because it was not performed according to County plans, specifications, or criteria.

C. ONLY THE PLUMBING WORK SPECIFICALLY PERFORMED ON THE SPACE LEASED BY COUNTY IS PUBLIC WORK UNDER SECTION 1720.2(c)(1).

The Determination concluded that, since the two plumbing contracts between KPI and Cruz Plumbing were entered into after the lease between KPI and County was executed, the plumbing work under both contracts was covered under section 1720.2(c)(1). KPI agrees with the Determination that the work performed by Cruz Plumbing under the contract to install the fountains and sinks required by the RFP is public work and advises that prevailing wages were paid for this work. It argues, however, that the plumbing work performed on the Building shell under the second plumbing contract should not be covered because it was neither done with County in mind nor paid for by County.

After reviewing the record, I conclude that, under the unique circumstances of this case, the phrase "any construction work" in section 1720.2 cannot be read to apply to construction contracts entered into after the execution of the lease for work on portions of a property that are not the subject of the lease.

Accordingly, even though the contract for the plumbing work on the Building shell was entered into after execution of the lease, such work is not public work because it pertains to plumbing work not performed on the portion of the property leased by County.

V. CONCLUSION

The Determination is reversed in part. For the reasons stated above, the plumbing work on the Building shell is not public work. Additionally, the fire sprinkler work that is unrelated to County tenant improvements is not public work.

Dated: 8 June '05

John M. Rea, Acting Director