

DEPARTMENT OF INDUSTRIAL RELATIONS

Katrina S. Hagen, Director

Office of the Director

1515 Clay Street, 17th Floor

Oakland, CA 94612

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



October 4, 2021

Jennifer Berg
Energy Programs Manager
Association of Bay Area Governments
Bay Area Metro Center
375 Beale Street, Suite 700
San Francisco, California 94105

Re: Public Works Case No. 2020-015
Water-Energy Efficiency Improvements for Multifamily Homes
Association of Bay Area Governments

Dear Ms. Berg:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws, and it is made pursuant to Labor Code section 1773.5 and California Code of Regulations, title 8, section 16001, subdivision (a). Based upon my review of the facts of this case and an analysis of the applicable law, it is my determination that the Water-Energy Efficiency Improvements for Multifamily Homes under the Water Upgrades \$ave Program administered by the Association of Bay Area Governments (ABAG) are not subject to the prevailing wage requirements.

Facts

A. The Water Upgrades \$ave Program Administered by ABAG.

ABAG, a joint powers authority, is the comprehensive regional planning agency and council of governments for the nine counties and 101 cities and towns of the San Francisco Bay Area. ABAG is the program administrator of the San Francisco Bay Area Regional Energy Network (BayREN). BayREN was approved by the California Public Utilities Commission (CPUC) in Decision 12-11-015, and is funded by ratepayer dollars as directed by the CPUC. BayREN is a collaboration of the nine Bay Area counties.

BayREN implements a portfolio of energy and water efficiency programs throughout the region. BayREN's portfolio includes the Water Upgrades \$ave Program (the Program), codified in Government Code section 6588.8. The Program helps Bay Area residents, including those occupying multifamily homes, upgrade their properties to be more water efficient. Projects are small in nature, such as the installation of low-flow toilets and shower heads.

B. The Water Upgrades \$ave Program Funding.

The Metropolitan Transportation Commission (MTC) authorized funding to ABAG to provide initial funds for the upfront project costs anticipated for the Program services. MTC funding comes from generally available resources drawn from MTC operating reserves. ABAG has contracted with the Sonoma County Regional Climate Protection Authority (RCPA) to oversee the Program through a subcontracted third-party Program Operator. Participating water utilities, or the applicable associated government agency, sign a Master Agreement with ABAG, allowing them to implement the Program.

The Program Operator enters into agreements with participating contractors to rehabilitate the utility customer's property with improvements selected by the customer. The project costs include labor, materials, quality assurance, and contractor oversight. Customers select a contractor from the list of participating contractors to make the improvements at their property, and the Program Operator pays the contractor for the completed work from the ABAG start-up capital through RCPA. The Program Operator informs the utility when the project has been completed and also informs the utility of the overall project costs.

The customer has no upfront costs and participating utilities use a voluntary on-bill efficiency charge, also known as "on-bill charge" for repayment of the project costs. The repayment for the energy efficiency improvement is assigned to a meter, not to an individual, and stays with the meter regardless of property occupancy or ownership change. Customers repay the Program for the improvements over time. Customers also pay three percent APR, which includes a one percent administrative fee payable to ABAG. (Gov. Code, § 6588.8, subd. (d)(2).) The repayment obligation for the project cost, APR, and the administrative fee is collected as an on-bill charge, which must be "bill neutral" and cannot exceed 80 percent of the utility bill savings expected from the installed improvements. (*Ibid.*) The on-bill charge stops at the end of the financing term, or if the energy efficiency improvement fails and cannot be repaired. (Gov. Code, § 6588.8, subd. (b)(6).)

ABAG is repaid by the utility the full amount of the invested capital, plus interest and the Program fee. While ABAG states that it envisions the utility will repay ABAG regardless of their collections from participating customers and that all funding, including interest and fees, must be repaid by the utilities within 10 years, the statute provides that the utility "shall act as a servicing agent for purposes of collecting the [on-bill charge]" on behalf of ABAG. (Gov. Code, § 6588.8, subd. (e)(1).) In fact, the "servicing agreement" between ABAG and the participating utility "shall provide that the obligation to pay the efficiency charge shall remain associated with the meter at the customer property on which the efficiency improvement is located until [ABAG] is fully repaid." (Gov. Code, § 6588.8, subd. (e)(7).) A notice of efficiency charge is recorded against the customer property where the efficiency improvement is located as notice to a subsequent customer of the obligation to pay the efficiency charge (Gov. Code, § 6588.8, subd. (b)(5).) In other words, the utility is a collector, not a guarantor, and the repayment obligation attaches to the meter and remains associated with the meter at the property on which the efficiency improvement is located until the efficiency charge has been repaid in full. (*Ibid.*)

Discussion

Workers employed on public work projects must be paid at least the prevailing wage rates applicable to their work. (§ 1771.) Labor Code section 1720, subdivision (a)(1)¹ defines “public works” as “[c]onstruction, alteration, demolition, installation, or repair work done under contract, and paid for in whole or in part out of public funds” Subdivision (b)(1) defines “paid for in whole or in part out of public funds” to mean “[t]he payment of money or the equivalent of money by the state or political subdivision.” Subdivision (b)(4) also defines “paid for in whole or in part out of public funds” to mean “loans, interest rates, or other obligations that are paid, reduced, charged at less than fair market value, waived or forgiven by the state or a political subdivision.”

A. The Program Does Not Meet the Definition of a Public Work.

The water efficiency upgrades to multifamily properties under the Program are installation work done under contract. (Subd. (a)(1).) ABAG contends, however, that despite public funds that initially pay for the water efficiency improvements, these public funds are eventually repaid in full, with interest, and not reduced, waived, or forgiven. Therefore, according to ABAG, the Program is not paid for in whole or in part out of public funds. ABAG’s position is the correct one.

The Program is not paid for in whole or in part out of public funds. (Subds. (a)(1), (b)(4).) As previously noted, “paid for in whole or in part out of public funds” includes “loans” or “other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.” (Subd. (b)(4).)

On-bill charges for the water efficient upgrades eventually pay back all the public funds provided from ABAG to the participating customer. Although the public funds must be repaid and are not “forgiven,” the repayment plan is “bill neutral,” insofar as the payments must account for energy savings. (Gov. Code, § 6588.8, subd. (b)(4).) The Program, however, includes a feature described as “stay with the meter,” to enable ABAG to recoup any unpaid balance from the next customer who benefits from the water efficient upgrades. (Gov. Code, § 6588.8, subd. (d)(5).) And, as servicing agent, the utility is responsible for collecting the efficiency charge on the bill on behalf of ABAG, but the obligation to pay ABAG back the entire cost of the water efficient improvements, plus interest, and administrative fees “shall remain associated with the meter at the customer property on which the efficiency improvement is located until [ABAG] is fully repaid.” (Gov. Code, § 6588.8, subd. (e)(7).) This unique financing is similar to an installment payment plan. Further, all the public funds are reimbursed, ultimately by the private customer, with market rate interest and administrative fees, so no “fees . . . loans, interest rates, or other obligations . . . are paid, reduced, charged at less than the fair market value, waived or forgiven by” ABAG. (Subd. (b)(4).) Accordingly, the energy efficient improvements are not paid for in whole or in part out of public funds as that term is defined in section 1720. Thus, the Program does not meet the definition of a public work.

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.

B. ABAG's Subdivision (c)(5)(C) Argument Need Not be Addressed.

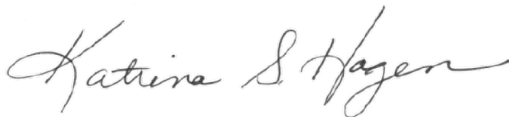
ABAG also contends that the exception in section 1720, subdivision (c)(5)(C) applies to exempt the Program from prevailing wage requirements. Despite the statutory language of the exception making reference to single-family homes, ABAG insists the exception should apply also to multifamily properties because the same water efficiencies are achieved, and the only distinction between the statutory exception and its Program is the number of residents/tenants that will benefit from the improvements. Given the conclusion reached in this determination, it is unnecessary to address this argument.

Conclusion

For the foregoing reasons, based upon the specific facts of this case, the Water-Energy Efficiency Improvements for Multifamily Homes under the Water Upgrades \$ave Program administered by the Association of Bay Area Governments (ABAG) are not subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Katrina S. Hagen".

Katrina S. Hagen
Director of Industrial Relations