STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

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

March 12, 2024

Ann Wu, Hearing Officer
Office of the Director – Legal Unit
355 S. Grand Avenue, Suite 1800
Los Angeles, California 90071

Re: Public Works Case No. 2021-010
Eastwood Framework Street Improvement for Wet Utilities
Irvine Ranch Water District

Dear Ms. Wu:

This constitutes the determination of the Department of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Labor Code section 1773.5[1] 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 Eastwood Framework Street Improvement for Wet Utilities project (Project) is not a public work and is therefore not subject to prevailing wage requirements.

Facts

On January 5, 2016, the Planning Commission of the City of Irvine passed Resolution No. 15-3473, for the development of a 6.68-acre site into 60 single-family attached residential condominium units (the Development). As part of Resolution No. 15-3473, Standard Condition 2.1 specified that the developer had to construct or guarantee the construction of sewer, reclaimed and/or domestic water systems, as required by the appropriate sewer and water districts.

On or about September 8, 2016, Irvine Community Development Company, LLC (ICDC) submitted an Application for Service and Agreement with Irvine Ranch Water District (the Application), wherein ICDC applied to construct domestic water, sewer, and recycled water facilities for the Development. As part of the Application, ICDC agreed, once the facilities were built, to issue a Bill of Sale to the Irvine Ranch Water District (IRWD). Upon acceptance of the Bill of Sale by IRWD, all right, title and interest in the facilities would transfer to IRWD. (Application, Section 8.)

[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.

On July 1, 2016, ICDC entered into an Owner – Contractor Construction Contract (the Contract) with Shoffeitt Pipeline, Inc. (Shoffeitt) for the construction of the Project. Construction of the Project was completed and a Certificate of Completion was issued on October 13, 2018. Subsequently, the completed Project was transferred to IRWD by way of three (3) Bill of Sale documents – one dated November 27, 2019, and the other two dated January 22, 2020. IRWD formally accepted the transfer of the Project on January 24, 2020.

The Division of Labor Standards Enforcement (DLSE) investigated whether the construction of the Project was a public work for which the payment of prevailing wages was required. On May 14, 2021, DLSE issued a Civil Wage and Penalty Assessment that found Shoffeitt had failed to pay prevailing wages and had failed to make training contributions to the California Apprenticeship Council or to an approved apprenticeship program. (§ 1741.) Shoffeitt was assessed a total of $722,707.55 in wages and penalties. On June 22, 2021, Shoffeitt requested review of the assessment. (§ 1742.)[2]

Contentions

DLSE contends that the work performed by Shoffeitt constitutes a public work under section 1720, subdivisions (a)(2) (hereafter section 1720(a)(2)) and (a)(3) (hereafter section 1720(a)(3)), as the work was done under the supervision and direction of IRWD. DLSE further contends that the Project was a public work under section 1720, subdivision (c)(2) (hereafter section 1720(c)(2)), as the work was required by a political subdivision as a condition of regulatory approval. DLSE also argues that the Project was a public work under section 1720, subdivision (f) (hereafter section 1720(f)), because the Contract between ICDC and Shoffeitt applied prevailing wage law to the Project. (See DLSE's responsive correspondence to the Department dated February 15, 2022 (DLSE Response).) No parties appear to argue that the Project is a public work under section 1720, subdivision (a)(1) (hereafter section 1720(a)(1)).

Shoffeitt contends that the construction of the Project does not constitute a public work, as the Contract was between private parties (Shoffeitt and ICDC) for work to be performed on private property, and did not involve the use of public funds. Shoffeitt further argues that the Project was exempt from prevailing wages under section 1720, subdivision (c)(1), because the work done was for a private residential project built on private property and did not involve an agreement with a governmental agency. Shoffeitt also asserts that the Project did not constitute a public work under section 1720(a)(3), because it was not done under the direction and supervision or by the authority of any officer or public body or related entity. Finally, Shoffeitt contends that section 1720(c)(2) does not apply as there was no state or political subdivision requirement to perform the work done, nor was there a contribution of money, or the equivalent of money, by the

[2] In section 1742 proceedings to review the assessment, the parties disputed whether the work on the Project was covered under the prevailing wage law. The matter was thereafter referred for a coverage determination.

state or political subdivision to the Project. (See Shoffeitt responsive correspondence to the Department dated January 28, 2022 (Shoffeitt Response).)

ICDC joined in Shoffeitt's contentions.

When asked to offer an opinion on this matter, IRWD stated that it had "no opinion as to whether the work performed is subject to prevailing wage requirements under Labor Code section 17320 [sic], et seq. As we were not involved in the construction of the infrastructure, and only accepted the domestic water, sanitary sewer and recycled water infrastructure upon its donation to the District, it would be inappropriate for IRWD to provide an opinion at this time." (See IRWD's responsive letter to the Department dated February 9, 2022, at page 3 (IRWD Response).)

Discussion

All workers employed on public works projects must be paid at least the applicable prevailing wage rates. (§ 1771.) The standard definition of public works is set forth in section 1720(a)(1): "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds." (§ 1720, subd. (a)(1).) "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*).)

There are other definitions of "public works" in the California Labor Code. Section 1720(a)(2) defines "public works" to also mean work "done for irrigation, utility, reclamation, and improvement districts, and other districts of this type." Public works under section 1720(a)(2) "is not limited by a different definition set out in section 1720(a)(1)." (*Kaanaana v. Barrett Business Services, Inc.* (2021) 11 Cal.5th 158, 180 (*Kaanaana*).) Section 1720(a)(3) further defines "public works" to also mean the following: "Street, sewer, or other improvement work done under the direction and supervision or by the authority of an officer or public body of the state, or of a political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not."

Section 1720(c)(2) provides an exception to the definition of public work in section 1720(a)(1). (*Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 37 (*Azusa Land Partners*).) When the exception's requirements are met, the statute offers a partial exemption for the "private development work" within a project. (*Id.* at pp. 34-35.) The statutory language explains that the exception is inapplicable to the project's public improvement work, which remains subject to prevailing wage requirements:

> If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political

> subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

(§ 1720, subd. (c)(2), italics added.)

In its Response, DLSE states that the Project does not fall within the more "common" definitions of a public work. (DLSE Response, page 7.) In fact, no party asserts that the project falls within the standard definition of public work because the project fails to satisfy the three basic elements of a public work under section 1720(a)(1). (*Busker, supra,* 11 Cal.5th at p. 1157.) Rather, the issue is whether the Project qualifies as a public work under the other statutes cited by the parties.

A. The Project Is Not a Public Work Under Section 1720(a)(3) as the District Did Not Supervise or Direct the Work Done.

DLSE asserts that the Project constitutes a public work under section 1720(a)(3), which defines "public works" to include:

> (3) Street, sewer, or other improvement work done under the direction and supervision or by the authority of an officer or public body of the state, or of a political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

DLSE asserts that the Project was done under the supervision and direction of IRWD, as the Project had to "follow strict guidelines and regulations provided by the IRWD." DLSE further asserts that IRWD "had to be involved in the preconstruction stages of the project to approve any master plan for connecting the development to the IRWD." (DLSE Response, pages 2-3.) In support of these assertions, DLSE cites to *Reclamation Dist. No. 684 v. Department of Industrial Relations* (2005) 125 Cal.App.4th 1000 (*Reclamation Dist. No. 684*), and *Azusa Land Partners.*[3]

DLSE's argument is unpersuasive. It is true IRWD created parameters and guidelines under which the Project was to be built; these parameters and guidelines were set forth, for example, in the Procedural Guidelines and General Design Requirements for Irvine Ranch Water District (Guidelines). (Attached as Exhibit 2 to DLSE's Response.) However, such overarching general parameters and guidelines over the Project do not make the work on the Project "done under the direction and supervision" of IRWD. (§ 1720, subd. (a)(3).) The Guidelines are general design guidelines published by IRWD,

[3] As an initial matter, the case law cited to and relied on by DLSE does not support its contentions; indeed, the two cases cited, *Reclamation Dist. No. 684* and *Azusa Land Partners*, do not discuss or interpret section 1720(a)(3). Instead, as discussed further below, these cases deal with section 1720(a)(2). As such, DLSE's reliance on these cases is misplaced.

and were not specific requirements for the Project. Moreover, there is nothing to suggest that IRWD oversaw and directed in any way the execution of the work done by Shoffeitt. Rather, the record shows that IRWD's involvement in the Project was limited to approving the plans and accepting the completed Project from ICDC. And where IRWD performed plan checks and inspections, IRWD was compensated for these services. (See Exhibit C to the IRWD's Response.) While not binding, it is noteworthy that IRWD's response when asked to offer an opinion was to say that it was not "involved in the construction of the infrastructure." (IRWD Response, page 3.)

Furthermore, if DLSE's interpretation of "done under the direction and supervision" were accepted, any time plans for a project are approved or authorized by a public agency, such an approval or authorization would subject the project to prevailing wage laws. Given that many construction plans, even those for projects as small as a minor addition to an existing private residence, are typically reviewed and approved by a public agency responsible for compliance with the building code, all such projects would then be subject to prevailing wage laws – under DLSE's interpretation. In essence, section 1720(a)(3)'s "done under the direction and supervision" definition of public work would swallow the other definitions of public work and render them superfluous. That could not have been the Legislature's intent. (See *Kaanaanaa, supra,* 11 Cal.5th at p. 168.)

DLSE makes no argument about whether the work on the Project was done "by the authority of an officer or public body of the state, or of a political subdivision or district thereof." (§ 1720, subd. (a)(3).) The Department declines to address an issue that no party raises and that no party has provided evidence in support or in opposition.

B. The Project Is Not a Public Work Under Section 1720(a)(2) as the Work Was Not "Done For" the District.

Alternatively, DLSE asserts that the Project should be considered a public work under section 1720(a)(2). However, DLSE does not provide any specific argument as to why this statute should apply to the facts at hand; rather, DLSE appears to assert that the statute should simply be broadly applied, citing the *Reclamation Dist. No. 684* and *Azusa Land Partners* cases.

Under section 1720(a)(2), work "done for irrigation, utility, reclamation, and improvement districts, and other districts of this type" are considered public works for which prevailing wages would apply. However, the facts do not demonstrate that the work was "done for" IRWD. Rather, the facts indicate that the work was done by Shoffeitt specifically for ICDC. ICDC contracted with Shoffeitt for the Project. ICDC provided oversight and approval for the work to be done. And ICDC paid Shoffeitt to perform the work.[4] In contrast, IRWD did not contract with Shoffeitt, nor did it provide any type of

[4] Payment for a project is not a requirement under section 1720(a)(2) for the project to be considered a public work. (*Azusa Land Partners, supra*, 191 Cal.App.4th at p. 21, fn. 10. ["unlike subdivision (a)(1), subdivision (a)(2) does not require a payment of public funds."]) ICDC's payment to Shoffeitt indicates, however, that the work was being "done for" ICDC, not IRWD.

oversight or control over the work being done. Indeed, it appears IRWD's sole involvement in the Project itself was to accept ownership of the completed facilities from ICDC. Based on such minimal involvement, the work was not being "done for" IRWD. If anything, the work appears to be "done for" ICDC, a private entity.

Moreover, DLSE's reliance on *Reclamation Dist. No. 684* and *Azusa Land Partners* appears to be misguided. Unlike the case here where the work appears to be "done for" a private entity, the construction work was indisputably being "done for" the public agencies involved in the two cited cases.

In *Reclamation Dist. No. 684*, the public agency reclamation district directly entered into a contract with a contractor to perform maintenance work on district property, and the reclamation district paid the contractor public funds for this work. (*Reclamation Dist. No. 684*, *supra,* 125 Cal.App.4th at p. 1003.) The reclamation district argued, however, that the work should be considered exempt as being the operational work of a reclamation district, under an exception specifically described in section 1720(a)(2). (*Id.* at p. 1006.) In making that argument, which the court soundly rejected, the reclamation district implicitly conceded, as it had to, that the contractor's maintenance work on district property was work "done for" the reclamation district. There was no question the contracted-for maintenance work was "done for" the reclamation district, which selected the contractor and entered into a binding contract with the contractor to perform the maintenance work. The "general rule [under section 1720(a)(2)] is that any work done for a reclamation district is 'public work' and that maintenance work is included." (*Ibid.*)

While there is a vague claim that Shoffeitt's work is being "done for" IRWD, DLSE's argument is undeveloped as to this point. Instead, as Shoffeitt points out, and the record reveals, the contract at issue was between two private entities: Shoffeitt and ICDC. IRWD did not call for or require Shoffeitt's work on the Project to be done. By contrast, the contract in *Reclamation Dist. No. 684* was entered into directly between the reclamation district and the contractor. Under that contract, the reclamation district required the contractor to perform the maintenance work "on a levee to protect an island in the Delta from flooding." (*Reclamation Dist. No. 684, supra*, 125 Cal.App.4th at p. 1002.) Nothing analogous took place here.

In *Azusa Land Partners*, the private developer entered into a contract directly with the public agency (the City of Azusa) to develop public infrastructure and facilities, a portion of which was to be paid using Mello-Roos bond funds. (*Azusa Land Partners*, *supra, 191* Cal.App.4th at p. 10.) In contrast, IRWD did not contract with Shoffeitt for the work to be performed.

No public funds were utilized for any portion of the Project. Nor did IRWD require any infrastructure as a condition of regulatory approval, so it cannot be said that Shoffeitt's work was "done for" IRWD. Further, unlike in *Azusa Land Partners,* IRWD did not fund Shoffeitt's work; there was no funding agreement between Shoffeitt and IRWD; and there is no indication that IRWD requested Shoffeitt to do the work. While *Azusa Land Partners* recognized that public funding is not one of the elements of section

1720(a)(2),[5] the existence of public funding provided by a covered district to a private entity to perform work is often strong indication that the private entity's work is being "done for" the covered district. Similarly, though section 1720(a)(1)'s "done under contract" element is not one of the elements of section 1720(a)(2), a contract between a private entity and a covered district where the private entity agrees to perform work for a covered district is yet another indication that the work is being "done for" the covered district. But, as already explained, IRWD neither provided public funding nor entered into any contract with Shoffeitt or ICDC.

For these reasons, DLSE's reliance on these two cases as they relate to section 1720(a)(2) is unwarranted. DLSE presents no supporting evidence or other argument why it believes that Shoffeitt's work was "done for" IRWD within the meaning of section 1720(a)(2).[6] As there is no indication that Shoffeitt's work on the Project was "done for" IRWD, the Project is not a public work under section 1720(a)(2).

C. Section 1720(c)(2) Is Inapplicable.

Section 1720(c)(2) states:

> (c) Notwithstanding subdivision (b), all of the following apply:
>
> (2) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

Section 1720(c)(2) operates as a partial exception to a section 1720(a)(1) public works project that is *funded partially with public funds* and contains both public improvement work and "otherwise" private development work. (*Azusa Land Partners, supra,* 191 Cal.App.4th at p. 30.) This exception often comes into play in this type of scenario: a private developer seeks approval for a project, but the public agency requires some public improvement work be done as part of the project in order for approval to be granted. The public agency may also contribute funds to pay for some or all of the public improvement work to be undertaken. Under section 1720(a)(1)'s definition, the entire

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[5] See footnote 4, *ante*, page 5.

[6] DLSE also assumes, without analysis, that IRWD is a "covered district." (*Kaanaana, supra*, 11 Cal.5th at p. 168 [section 1720(a)(2) "contains three basic elements: (1) work; (2) done for an irrigation, utility, reclamation, improvement, or other similar district (*a covered district*); except (3) the operation of an irrigation or drainage system for an irrigation or reclamation district (irrigation exclusion)," italics added.])

project, both the public improvement work and the private development work, is a public works project. However, if section 1720(c)(2)'s requirements are met, the private development work is exempt, but the public improvement work required as a condition of regulatory approval remains subject to prevailing wage requirements, since it is being paid for out of public funds. (*Id.* at pp. 31-32.)[7] It is apparent from the structure of the statute that the fundamental requirement for section 1720(c)(2) to be invoked is that there must first be public funding that pays for construction. Once there is a publicly-funded "public work" under section 1720(a)(1), then, and only then, does section 1720(c)(2) come into play. Without public funding there is no public work under section 1720(a)(1), and one never reaches the exception in section 1720(c)(2).

Despite how the exception operates, DLSE cites section 1720(c)(2) and *Azusa Land Partners* for its argument that the Project should be considered a public work. However, DLSE does not explain cogently how section 1720(c)(2) is applicable here. As explained, it must first be determined that the Project is a public work under section 1720(a)(1) such that prevailing wages apply. Only after that determination would it then be necessary to determine whether the exception under section 1720(c)(2) is applicable. As DLSE concedes, the Project is not receiving any public funding and therefore cannot be a public work under section 1720(a)(1). For purposes of section 1720(c)(2), that should be the end of the inquiry. DLSE is trying to either leapfrog over the core requirement of public funding or somehow back into the public works definition through an exception. Either way, DLSE's contortionist argument cannot establish that the Project is a public work via section 1720(c)(2).

D. DLSE Fails to Explain How Section 1720(f) Is Applicable.

As with the section 1720(c)(2) argument, DLSE again argues that the Project is a public work through a provision – section 1720(f) – that does not actually define what a public work is. Section 1720(f) states in its entirety: "If a statute, other than this section, or a regulation, other than a regulation adopted by this section, or an ordinance or a contract applies this chapter to a project, the exclusions set forth in subdivision (d) do not apply to that project." While DLSE's brief discusses section 1720(f), it fails to articulate a rational argument for why section 1720(f) supports its position that the Project is a public work. Though DLSE's position may have merit, the Department is unable to discern, with the argument presented, how section 1720(f) is applicable to this Project.

[7] The *Azusa Land Partners* court explained the legislative intent behind section 1720(c)(2)'s enactment: "Prior to SB 975, once a project was determined to be covered, all work on the project was subject to the payment of prevailing wages. At the same time, public entities required private developers to build public infrastructure in order to develop private projects. In enacting SB 975, the Legislature intended to reduce, but not eliminate, the prevailing wage obligation for private development projects where the public funds paid do not exceed the cost of required construction." (*Azusa Land Partners, supra,* 191 Cal.App.4th at p.31.)

Conclusion

For the foregoing reasons, the Eastwood Framework Street Improvement for Wet Utilities is not a public work and is not subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Katrina S. Hagen
Director of Industrial Relations