

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

ASM Affiliates, Inc.

Case No. 14-0418-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Alleged subcontractor ASM Affiliates, Inc. (ASM) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to work performed by ASM related to the Sorrento to Miramar Double Track Project for the San Diego Association of Governments. (SANDAG). The Assessment determined that \$126,322.78 in unpaid prevailing wages and statutory penalties was due. By Order dated January 22, 2015, the matter was set for hearing on the sole issue set forth below, with all other issues deferred. A Hearing on the Merits occurred on March 25, 2015, in San Diego, California, before Hearing Officer Douglas P. Elliott. Chad T. Wishchuk appeared for ASM and William A. Snyder appeared for DLSE. The matter was submitted for decision on March 25, 2015.

The issue for decision is:

- Whether the work performed by employees of ASM, Inc. was subject to the prevailing wage requirements of Labor Code section 1720 et seq.¹

The Director finds that the work in question is not subject to the prevailing wage requirements of section 1720 et seq. Accordingly, ASM has no liability for the wages and penalties assessed, and the Assessment is dismissed.

¹ All subsequent statutory references are to the California Labor Code unless otherwise specified.

FACTS

The Sorrento to Miramar Double Track Project Phase 1 (Project) entailed the construction of 1.1 miles of railroad track, parallel to the existing track, south of Sorrento Valley Boulevard and east of I-805 in San Diego. A wooden trestle bridge built in the early 1940s was replaced, and a new track crossover was installed. The track is operated and maintained by the North County Transit District (NCTD) and is used by Coaster commuter trains and Amtrak Pacific Surfliner trains.

In July 2008, SANDAG entered into a design services agreement with David Evans and Associates, Inc. (DEA), under which DEA was to provide various design and related architectural and engineering services to SANDAG on an ongoing, on-call basis. Under this Standard Services Agreement, SANDAG issued task orders further specifying the nature and scope of requested work. In February 2012, SANDAG issued to DEA "SANDAG Task Order No. 47" for the Project. Under this task order, DEA was the prime designer for this design-bid-build Project. DEA provided plans, specifications and estimates for the prime construction contract.

Flatiron/H&H, a Joint Venture (Flatiron/H&H), consisting of Flatiron Construction Corporation and H&H Engineering Construction, was selected by SANDAG as the prime construction contractor pursuant to a SANDAG construction contract solicitation. DEA was not privy to any contract with Flatiron/H&H and had no reporting or operational relationship with it. (Declaration of Michael Widmann.)

ASM Affiliates, Inc. was a subconsultant team member on the DEA on-call team for the SANDAG on-call agreement. On January 18, 2010, ASM was contracted by DEA to conduct an archaeological survey and evaluation of cultural resources within the Area of Potential Effect (APE) of the Project. ASM's study took place over two years prior to the start of the construction project. In November 2010, ASM prepared a Historic Property Treatment Plan (HPTP) for the Project. The HPTP stated in its management summary:

The San Diego Association of Governments (SANDAG) proposes the construction of the Sorrento-to-Miramar Double Track Phase 1 project in the City of San Diego's Sorrento Valley, California. ... In compliance with Section 106 of the National Historic Preservation Act (NHPA), ASM

& Affiliates, Inc. (ASM) completed a cultural resource inventory and National Register of Historic Places (NRHP) evaluation within the project area of potential effect (APE). Two previously recorded archeological sites, CA-SDI-4609/SDM-W-654 and SDI-10438, are located within the project APE. A portion of SDI-4609/W-654, also known as the Sorrento Valley site, has been listed in the NRHP since 1975. This site has been identified as the location of the ethnohistoric village site of Ystagua. Portions of this site have been recorded at the San Diego Museum of Man and South Coastal Information Center (SCIC)... Human remains, including both inhumations and cremated remains, have also been recovered from this site.... The results of ASM's NRHP evaluation program indicate that the cultural deposits within the project APE contain high densities of archaeological materials along with good artifact diversity.... This Historic Property Treatment Plan is provided to describe a program to mitigate adverse impacts to the NRHP archaeological resource in the form of the proposed implementation of a data recovery plan for those portions of SDI-4069/W-654 within the project APE. This HPTP includes monitoring and discovery protocol for additional cultural resources that may be discovered during construction.

Construction on the Project did not begin until about June 2012. From December 14, 2011 through March 2, 2012, ASM implemented the data recovery program described in the HPTP. The data recovery program resulted in the recovery of over 21,000 artifacts and cultural materials including bone and shell artifacts, ceramics, stone tools, vertebrate remains and charcoal. ASM's data recovery included coordination with the local Native American community through the Kumeyaay Cultural Repatriation Committee (KCRC). (Declaration of Dr. Sinead Ni Ghabhlain.)

Ground disturbing activities by construction contractors on the Project began in about June 2012 and continued through at least February 2013. Under its subconsultant agreement with DEA, ASM monitored these activities for purposes of preserving the cultural resources. A Native American monitor was present on site during all ground-disturbing activities during Project construction to help manage inadvertent discoveries. All of the cultural materials recovered in association with human remains were repatriated to the KCRC. (*Id.*)

ASM's function with regard to the Project essentially was to observe. If and when cultural resources were disturbed during construction, ASM or the Native American monitors could halt the construction to assess the need for scientific data recovery or other mitigation measures. There was no reporting or other operational

relationship between ASM and the prime construction contractor (or any other construction contractor) on the Project. In late 2014, after the conclusion of its work, ASM provided a written monitoring report to DEA. (*Id.*)

On projects where human remains are discovered, the typical protocol is to immediately contact the coroner, allow the coroner to determine whether the remains are those of a Native American, and then work with the Native American Heritage Commission (NAHC) and a "Most Likely Descendant" designated by the NAHC to ensure the full recovery and proper treatment of the remains. Thus, ASM was more likely to report or operate in connection with the NAHC or the San Diego County Coroner than it was to interact with a construction contractor on the Project. (*Id.*)

Data recovery relating to the artifacts and remains found on the Project site required scientific methods such as water screening. Water screening is essentially the careful use of water to wash and separate soil from archaeological materials for the purpose of recovering and identifying artifacts and human remains. During ground disturbing activities by the construction contractor on the Project, water screening was utilized in the recovery of human remains. Soils that were disturbed during the construction that had yielded human remains during ASM's previous archaeological data recovery program were water screened to recover human remains and artifacts. No soil testing was ever performed by ASM on this Project. The data recovered by ASM on the Project site were not relevant to the construction of the Project. Rather all data recovered by ASM related to archaeological artifacts and cultural materials and were incorporated into historic reports and cultural resource reference documents. (*Id.*)

ASM's work on the Project site was in accordance with the applicable laws governing cultural resources, specifically the National Historic Preservation Act (NHPA), Public Law 89-665; 16 U.S.C. 470 et seq., and not any construction contract specifications, engineering specifications, or building standards. (*Id.*)

DLSE became aware of ASM's work when Deputy Labor Commissioner Lance A. Grucela made a random inspection of the Project site on August 9, 2012. Grucela testified that he observed five ASM employees performing archaeological monitoring of soils during that visit. Initially he observed two workers filling a 500-gallon water tank

truck from a fire hydrant across the street from the site entrance. He subsequently observed workers carrying buckets of soil, dumping soil onto large screens, pouring water over the soil and examining its contents. He interviewed two ASM workers who stated that they were inspecting the excavated soil to ensure no culturally sensitive items were present, the discovery of which would cause construction immediately to cease. Workers used screens, buckets, shovels, rakes, hoses and a truck to perform their duties at the Project site. Artifacts recovered were later transported offsite to a laboratory for sorting and cataloguing. The two workers indicated that they were being paid \$17.50 and \$20.00 per hour for work on the project.

Grucela subsequently obtained a written statement from Scott T. Bigney, an ASM employee who performed more than six hundred hours of work at the site. Bigney described the ASM workers' typical job duties as follows:

Water Screening: Water screen the [sic] has been removed from the W-654 site during construction. Identify artifacts and culturally significant material while water screening and sorting. Using 5 gallon buckets soil was spread in a 1/8" mesh sifter with a window screen mesh and screened till the clay and silt sized particles were removed. The cleaned material was then dried in the sun and brought to the sorting area. During the sorting artifacts and culturally significant material was identified and placed in the appropriate containers. Fill 500 gal tank using a local fire hydrant.

Monitoring: Monitor construction during potentially ground disturbing activities near culturally sensitive areas. Communicate with construction crews throughout the day to know what, when, and where potential native ground disturbing activities will be taking place. Identify artifacts and culturally significant material where ground disturbance takes place. Immediately report any culturally significant material observed to the crews when retrieving culturally significant material, such as the midden soil at the site of W-654. Write a summary of daily events and submit with photos and photo log to the Associate and/or the PI in charge of the project.

Dry Screening: Dry Screen soil the [sic] has been removed from the W-654 site during construction using manual and automatic 1/8" screens. Identify artifacts and culturally significant material while dry screening and sorting. Using 5 gallon buckets soil was spread into a manual or automatic 1/8 inch screen removing a percentage of the soil in order to speed up later processing and sorting methods. The material is kept in piles collected and moved from the screen using a wheel barrel [sic] and placed into pile. During dry screening when artifacts and culturally

significant material was identified it was placed in appropriate containers.

Lab: Clean, identify, and catalogue artifacts and other culturally significant materials from the various phases of the project.

At the conclusion of his inspection, Grucela issued to ASM a Notice to Discontinue Labor Law Violations for failure to submit Certified Payroll Records (CPRs) and for failing to post a Workers Compensation Insurance Notice. ASM initially responded on August 13, 2012, with a letter asserting in part that ASM was not required to submit payroll records for the project, and that the Department of Industrial Relations (DIR) had not issued a prevailing wage determination for archaeologists. ASM further asserted that the required workers compensation notices were posted at its headquarters and branch offices.

On March 28, 2013, DLSE opened an investigation and sent a Request for Certified Payroll Records to ASM. On April 5, 2013, Grucela spoke with a representative of Flatiron/H&H, who confirmed receipt of the Notice of Investigation and explained that ASM was not a subcontractor to Flatiron/H&H, but rather had a services contract with SANDAG. On June 12, 2013, Grucela spoke with counsel for SANDAG, who clarified that ASM's work was performed under an ongoing services contract between SANDAG and DEA, and provided copies of the Standard Services Agreement and Task Order No. 47, specifying ASM's work.

In April 2013, ASM asserted to Grucela that prevailing wages do not apply to the work performed by its employees. In May 2013, Grucela responded that his request for CPRs was still outstanding. Counsel for ASM replied by letter dated May 17, 2013, reiterating that the work was not covered under public works laws, and requesting that the Request for Certified Payroll Records be rescinded.

On July 15, 2013, an Order to Appear with documents, including payroll records, was issued to ASM. On August 6, 2013, counsel for ASM appeared and submitted a binder containing the requested payroll documents. On August 20, 2013, Grucela mailed Employee Questionnaires to the workers for whom ASM had provided addresses. The completed questionnaires indicated rates of pay ranging from \$15.50 to \$30.00 per hour, except for the project manager, Sinead M. Ni Ghabblain. She received an annual salary of \$86,320.00, which Grucela calculated to amount to \$41.50 per hour.

For purposes of the Assessment, Grucela deemed the classification Field Soils and Materials Tester to be applicable. Determination SD-23-63-3-2011 set the prevailing hourly rate for that classification at \$57.17 for straight-time work performed prior to July 1, 2012, and \$58.87 for work performed on or after that date. In the Assessment, Grucela applied that rate only to field work and not to lab work, project management or administrative tasks.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 987 [citations omitted]

(Lusardi).) DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a), and *Lusardi, supra.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a Civil Wage and Penalty Assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1741. An

affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that “[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty Assessment is incorrect.”

The Archaeological Work Performed By ASM’s Employees On The Project Site Was Not Subject To Prevailing Wage Requirements.

The critical issue for decision is whether the archaeological work performed by ASM’s employees on an undisputed public work site requires the payment of prevailing wages. For the following reasons, the archaeological work performed on the Project site was not done in the execution of a contract for public work within the meaning of section 1772 and is not subject to prevailing wage requirements.

Section 1771 provides:

Except for public works projects of one thousand dollars (\$1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

Section 1772 provides that: “Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.” Section 1774 provides that: “The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.”

The term “execution” was interpreted in *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, 749-750 (“*Williams*”):

In determining legislative intent, courts are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. [Citations and quotation marks omitted.] The familiar meaning of “execution” is “the action of carrying into effect (a plan, design, purpose, command, decree, task, etc.); accomplishment” (5 Oxford English Dict. (2d ed.1989) p. 521); “the act of carrying out or putting into effect,” (Black’s Law Dict. (8th ed.2004) p. 405, col. 1); “the act of carrying out fully or putting completely into effect, doing what is provided or required.” (Webster’s 10th New Collegiate Dict. (2001) p. 405.)

Therefore, the use of "execution" in the phrase "in the execution of any contract for public work," plainly means the carrying out and completion of all provisions of the contract.

The analysis in *O.G. Sansone Co. v. Department of Transportation* [1976] 55 Cal.App.3d 434, 127 Cal.Rptr. 799 (*Sansone*), of who is, and who is not, a subcontractor obligated to comply with the state's prevailing wage law also informs our assessment of the intended reach of the prevailing wage law to "[w]orkers employed ... in the execution of any contract for public work." (§ 1772.)

* * *

Sansone also applied the reasoning of *Green v. Jones*, 128 N.W.2d 1 (*Green*), in which the Wisconsin court applied the Wisconsin prevailing wage law to a trucking company that delivered roadbed materials to various highway improvement project sites. (*Sansone, supra*, 55 Cal.App.3d at p. 444.) In *Green*, the trucking company contracted with the material suppliers to deliver the materials for some projects and contracted directly with the general contractor for delivery to other projects. *Green* held that the trucking company drivers were covered by the prevailing wage law because the materials they delivered were immediately distributed over the roadway surface. Their tasks "were functionally related to the process of construction." (128 N.W.2d at p. 7.) As soon as the driver dumped or spread the material, it was leveled by graders or mixed with cement under the general contractor's supervision. "The delivery of materials was an integrated aspect of the 'flow' process of construction." (*Ibid.*) Similarly, *Sansone* observed, prime contractor Sansone contracted to furnish a particular material for the project, it obtained borrow sites designed exclusively to supply the project site with this particular material, and it engaged Wright, who engaged Heck, to haul the material from the borrow site to the project site.

Because Sansone contracted with Wright to "perform an integral part of [Sansone's] obligation under the prime contract," Wright and Heck were subcontractors within the meaning of the prevailing wage law, not material suppliers. (*Sansone, supra*, 55 Cal.App.3d at p. 445.)

By its terms, section 1772 requires prevailing wages only for "[w]orkers employed by contractors or subcontractors in the execution of any contract for public work" (Emphasis added.) Here it is undisputed that the prime construction contractor on the Project was Flatiron/H&H, and ASM has shown that it had no contractual or reporting relationship with Flatiron/H&H. Rather, ASM was a subconsultant to DEA, which had an ongoing service contract with SANDAG. Thus, the relevant legal agreements support the conclusion that ASM was not a subcontractor on

the Project within the meaning of section 1772.

Sansone and *Williams*, however, look beyond the transactional characterizations of the parties and focus on the actual nature of the work in question. As the court observed in *Sheet Metal Workers International Association, Local 104 v. Duncan (Russ Will Mechanical)* (2014) 229 Cal.App.4th 192, 205-206:

Sansone and Williams are relevant to our analysis to the extent they set forth a general framework for considering whether certain functions are integral to the performance of the public works contract. Of particular importance to the issue posed here is whether an operation is fully independent of the contract construction activities—i.e., whether it is integrated into the flow process of construction.” (Citations omitted.)

Here the archaeologists employed by ASM were not performing work pursuant to the specifications of any construction contract, and were not providing goods or services directly related to the construction of the Project. Their work was not necessary to the physical completion of the Project or the safety and integrity of the completed structure. It had nothing to do with the process of construction. Archaeological work commonly takes place where there is no construction activity, and vice-versa. Here ASM’s work was necessary for a reason extrinsic to actual construction requirements or standards, the legal mandate of the NHPA. ASM’s archaeologists performed their work separately from the work of the construction workers, and their work did not further the construction process.

For these reasons, the tasks performed by ASM’s workers were not “functionally related to the process of construction.” (*Sansone, supra*, 55 Cal.App.3d at p. 445, quoting *Green v. Jones, supra*, 128 N.W.2d at p. 7.) Those tasks were not “an integrated aspect of the ‘flow’ process of construction.” (*Ibid.*) Rather, they were “fully independent of the contract construction activities.” (*Russ Will Mechanical, supra*, 229 Cal.App.4th at 205-206.) Thus ASM was not a subcontractor within the meaning of sections 1772 and 1774, and its workers were not employed in the execution of a contract for public work within the meaning of those sections. Accordingly, the work was not subject to the prevailing wage requirements of Labor Code section 1720 et seq.

In view of this conclusion, all other issues are moot.

FINDINGS

1. Alleged subcontractor ASM Affiliates, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. ASM was not in fact a subcontractor on the Project in question, and its employees were not employed in the execution of a contract for public works within the meaning of Labor Code sections 1772 and 1774.
3. The archaeological work performed by ASM's employees was not subject to the prevailing wage requirements of Labor Code section 1720 et seq., and therefore ASM has no liability for the wages and penalties set forth in the Assessment.

ORDER

Based on these findings, it is ordered that the Assessment is dismissed in its entirety. The Hearing Officer shall issue a notice of Findings which shall be served with this Decision on the parties.

Dated: 6/22/2015



Christine Baker
Director of Industrial Relations