

DEPARTMENT OF INDUSTRIAL RELATIONS

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To All Interested Parties:

Re: Public Works Case No. 2007-008,

Russ Will Mechanical, Inc. – Off-site Fabrication of HVAC Components

The Decision on Administrative Appeal, dated May 3, 2010, in PW 2007-008, Russ Will Mechanical, Inc. – Off-site Fabrication of HVAC Components, was affirmed in a published First District Court of Appeal opinion dated August 27, 2014. (See *Sheet Metal Workers' International Association, Local 104 v. Duncan* (2014) 229 Cal.App.4th 192.)

DEPARTMENT OF INDUSTRIAL RELATIONS
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November 13, 2008

Nathan D. Schmidt, Hearing Officer
Department of Industrial Relations
Office of the Director - Legal Unit
P.O. Box 420603
San Francisco, CA 94142

Re: Public Works Case No. 2007-008
Russ Will Mechanical, Inc.
Off-Site Fabrication of HVAC Components

Dear Mr. Schmidt:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced work under California's prevailing wage laws and is made pursuant to California Code of Regulations, title 8, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the off-site fabrication of HVAC components by Russ Will Mechanical, Inc. ("RWM") for the DeAnza College Administration Building Modernization is subject to prevailing wage requirements.

Facts

On November 8, 2005, Trident Builders, Inc. ("Trident") entered into a public works contract with Foothill-DeAnza Community College District ("District") for the work of improvement known as the DeAnza College Administration Building Modernization ("Project") in Santa Clara County, California. This contract specifies the payment of prevailing wages as provided in Labor Code section¹ 1720, et seq. On November 21, 2005, Trident subcontracted the heating, ventilation and air conditioning ("HVAC") portion of the public works contract to RWM. The subcontract provides that "The Project is to be built according to the contract documents described in the Prime Contract and the plans, specifications and general and supplementary conditions of the Prime Contract and any addenda, revisions or modifications thereto, and addendum B (hereinafter collectively "Contract Documents") all of which are available for contractor's review."

RWM's Class 20 Warm-Air Heating and Air-Conditioning contractor's license was issued on November 28, 1990. RWM has performed off-site fabrication in its own shop since 1991. The shop, located in Hayward, California, was not established for this particular project, but rather is utilized to fabricate items for its own private and public projects. RWM does not sell its products to the general public.

¹All further statutory references are to the California Labor Code unless otherwise indicated.

On May 22, 2006, an employee of RWM filed a complaint against RWM with the Division of Labor Standards Enforcement ("DLSE"), alleging that he was not paid prevailing wages pursuant to section 1771 and overtime pursuant to section 1810 for shop fabrication work he performed on the Project at RWM's shop. This work involved fabrication of sheet metal items called for by the Contract Documents, including ducts, flashings, square rounds and fittings. On July 13, 2007, DLSE issued and served a Civil Wage and Penalty Assessment ("Assessment") upon Trident and RWM for allegedly violating the Prevailing Wage Law in connection with the shop fabrication work. On or about March 29, 2007, RWM requested a review of the Assessment as provided in section 1742(a).

The relevant documents show that the specifications for "General Requirements Mechanical" provide for the contractor to "supply and install all supports, piping, ductwork, controls and auxiliaries, electrical and other trades work to make a complete job." The specifications designate particular equipment and supplies manufactured by third parties, requiring certain standards. In some cases, specific manufacturers are named. The section on duct work, however, appears to contemplate fabrication by the contractor.² It states:

2.02 DUCTWORK FABRICATION

- A. Fabricate and support in accordance with SMACNA HVAC Duct Construction Standards-Metal and Flexible, and as indicated. Provide duct material, gages, reinforcing, and sealing for operating pressure as indicated.
- B. Construct T's, bends, and elbows with radius of not less than 1-1/2 times width of duct on centerline. Where not possible and where rectangular elbows must be used, provide air foil turning vanes ...
- C. Increase duct sizes gradually, not exceeding 15 degrees divergence whenever possible; maximum 30 degrees divergence upstream of equipment and 45 degrees convergence downstream.
- D. Provide standard 45 degree lateral wye takeoffs unless otherwise indicated where 90 degree conical tee connections may be used.

In contrast, in the next paragraphs of the specifications describing other work, specific manufacturers are named.

Most of the items described in the specifications can be purchased from retail material suppliers, although in this case materials were supplied by businesses that sell only to HVAC contractors, not to the general public. These items include duct work, diffusers, slot diffusers, filters, safety grates, dampers, ceiling panels, etc. One material supplier, ECO Duct Products, Inc., states that

²Additionally, RWM submitted at least one change order increasing the cost of the Project by nearly \$3,000. Most of the additional cost is for labor, broken down as \$720 for "Fabrication labor" and \$1,210 for "Field labor." This fact is further evidence that the contract contemplated that RWM would be doing a portion of the fabrication work itself.

"All duct is available in any length requested. STANDARD LENGTHS ARE 4', 5' AND 6'." This would mean that any other length would be a "special order item."

RWM had contemplated ordering 18 inch high plenums³ from Norman S. Wright Mechanical Equipment Corporation, which in turn was going to order them from a manufacturer, Titus Flowbars. A fax from Norman S. Wright to RWM stated, however, that: "I have contacted a vendor who is willing to fabricate the 18" high plenum for Titus Flowbar. The problem is cost. Due to the special height you need, 18", the pricing is really high." RWM ended up fabricating the plenums in its own shop.

Positions of the Parties

Division of Labor Standards Enforcement

DLSE cites *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985 and other cases stating that: "The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." It further notes that prevailing wage laws are to be liberally construed. Section 1774 requires subcontractors to "pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract." DLSE contends that the word "execution" has a plain meaning which does not require interpretation: "The words 'execute,' 'executed' and 'execution' when used in their proper sense, convey the meaning of carrying out some act or course of conduct to its completion." *Northwest Steel Rolling Mills, Inc. v. Commissioner of Internal Revenue* (9th Cir. 1940) 110 F.2d 286, 289-290, quoting 23 Corpus Juris 278. DLSE argues that when work is done in the execution of a public works contract, the requirement to pay prevailing wages is not dependent on the situs of the work. In support of this argument, DLSE quotes *Theisen v. County of Los Angeles* (1960) 54 Cal.2d 170, 183, which states that "the essential feature which constitutes one a subcontractor rather than a materialman is that in the course of performance of the prime contract he constructs a definite, substantial part of the work of improvement in accord with the plans and specifications of such contract, not that he enters upon the job site and does the construction there" DLSE also cites *Everett Concrete Products, Inc. v. Dept. of Labor and Industries* (Wash. 1988) 748 P.2d 1112, which held that the Washington prevailing wage law extends "to off-site manufacturers when they are producing nonstandard items specifically for a public works project."

DLSE additionally argues that failure to cover off-site work would result in an unconstitutional denial of equal protection of the law because it would favor non-union contractors over union contractors.⁴ It also asserts that under the doctrine of *expressio unius est exclusio alterius*, there

³A plenum is "An enclosure in which air or other gas is at a pressure greater than that outside the enclosure." *The American Heritage Dictionary of the English Language* (New College Ed. 1979) at p. 1007. In the context of HVAC systems, a plenum is a piece of sheet metal that connects the blower to the ductwork.

⁴DLSE provides neither a factual basis nor a legal argument for this assertion, and it must be rejected as unfounded.

are no exceptions to the requirement to pay prevailing wages, and the requirement therefore applies irrespective of where the work is performed.⁵

Russ Will Mechanical, Inc.

RWM asserts that the off-site work is not covered under the reasoning of prior coverage determinations based on the analysis in *O.G. Sansone v. Dept. of Transportation* (1976) 55 Cal.App.3d 434. For example, in PW 92-036, *Imperial Prison II South* (April 5, 1994), the off-site fabrication of pre-cast concrete panels was covered because it was done at a site "whose sole purpose is the fabrication of those materials for a public works site" In PW 1999-032, *San Diego City Schools/Construction of Portable Classrooms* (June 23, 2000), the work was covered for the same reason. RWM notes that in contrast to these cases, its shop was not established solely for this Project, but has been operating since 1991. Products fabricated for the Project at that shop could have been produced by a third party, including one outside of California or even the United States. In PW 2004-023, *Richmond-San Rafael Bridge/Benicia-Martinez Bridge/San Francisco-Oakland Bay Bridge* and PW 2003-046, *West Mission Bay Drive Bridge Retrofit Project, City of San Diego* (July 31, 2006) ("Towboats") the Director determined that whether prevailing wages are required depends on the nature of the work performed, rather than on the status of the worker as an employee of a subcontractor or material supplier.

RWM also cites PW 2005-037, *Jurupa Unified School District-Glen Avon High School* (January 12, 2007), in which prevailing wages were not required for the testing of materials done off-site in a structural steel supplier's shop based in part on the fact that the testing employees had no interaction with the construction workers. RWM asserts that the same reasoning is applicable here in that its employee was working in a long-established, permanent shop in Hayward, had no interaction with the construction workers on the job site in Santa Clara County, and his work was not an integrated aspect of the flow process of construction. Therefore, according to RWM, he was not employed in the execution of a contract for public work within the meaning of sections 1771, 1772 and 1774.⁶

⁵Sheet Metal Workers' International Association, Local Union No. 104 ("Union") submitted a lengthy position statement in support of DLSE's position, asserting that prevailing wages are required "for the fabrication of sheet metal items made for a particular public works project in accordance with plans and specifications contained in the public works contract documents for the project, even if the fabrication is performed at an off-site location that was not established solely for the project." (Union brief of June 19, 2007, at p. 2.) Union asserts that whether the Prevailing Wage Law applies to employees who perform off-site fabrication work depends on a case-by-case analysis, citing PW 92-036, *Imperial Prison II South* (April 5, 1994) and PW 1999-032, *San Diego City Schools/Construction of Portable Classrooms* (June 23, 2000). It contends that the critical factor in such analysis is whether the off-site fabrication is "an integral part of the prime contract," citing PW 99-037, *Alameda Corridor Ready Mix Concrete* (April 10, 2000). "The integral nature of the work in furtherance of completing the project is the single most important factor" (Union brief of June 19, 2007, at p. 10, quoting *Imperial Prison II, supra*.)

⁶Several contractor associations submitted position statements in support of RWM's position. These associations include Associated Builders and Contractors of California, Inc. ("ABC"), Associated General Contractors of California, Inc. ("AGC"), Construction Employers Association ("CEA"), Air Conditioning Trade Association ("ACTA"), Engineering & Utility Contractors Association ("EUCA") and Precast/Prestressed Concrete

Discussion

Section 1720(a)(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" 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.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

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 statutory term "execution" recently was interpreted by the First District Court of Appeal in *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, 749-750:

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.

Manufacturers Association of California ("PCMAC"). AGC, for example, asserts that workers "employed on public works" within the meaning of sections 1771 and 1772 are those performing actual construction work as defined by section 1720(a)(1), and not ancillary work performed away from the job site for which a contractor's license is not required. (AGC letter of June 1, 2007, at p. 3.)

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.)

Williams and *Sansone* recognized an exemption for material suppliers, basing their analyses in part on *H. B. Zachry Company v. United States* (1965) 344 F.2d 352, a federal case that applied to truck drivers a long-standing interpretation of the Davis-Bacon Act generally exempting material suppliers from coverage. In *Zachry*, the court explained that:

Beginning as early as 1942 [fn. omitted], the Solicitor [of the Department of Labor] has excluded from statutory coverage the employees of bona fide materialmen who sell to a contractor engaged in construction contracts covered by the Davis-Bacon Act. The exemption has been qualified to the extent that the materialmen must be selling supplies to the general public, the plant must not be established specially for the particular contract, and the plant is not located at the site of the work. [Fn. omitted.] The Solicitor has always held that truck drivers employed by materialmen (exempt from statutory coverage) to transport supplies to the jobsite are no more subject to the provisions of the Davis-Bacon Act and the Eight-Hour Laws than are other employees of the materialmen. [Fn. omitted.]

Id. at p. 359, quoted in *Sansone, supra*, 55 Cal.App.3d at p. 442.

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 supplied.) Thus, here as in *Sansone* and *Williams*, it is appropriate to follow *Zachry*.

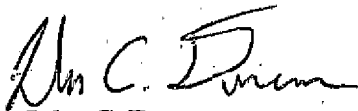
The issue of whether prevailing wages are required for the fabrication work done by RWM therefore turns on the question of whether RWM is exempt from coverage as a material supplier. Although RWM's shop was not established specially for this Project, and is not located at the site of the Project, it does not sell supplies to the general public. Thus, RWM is not a material supplier exempt from prevailing wage obligations under the *Zachry-Sansone-Williams* analysis. To the contrary, RWM is indisputably a subcontractor. Trident and RWM entered into a "Subcontract Agreement," subtitled "Contract Between General Contractor and Subcontractor." That agreement recites that Trident and District had entered into a contract for the construction of the Project, and that Trident wished to subcontract certain work to RWM. Paragraph 1 of the agreement provides that: "Subcontractor agrees to furnish in accordance with that portion of the Contract Documents ... applicable to the 'Work,' all labor, materials, supplies, equipment, services, machinery, tools, and other facilities of every kind and description, including proper supervision at all times, required for the prompt and efficient execution of the work as described in Addendum A, attached hereto" Addendum "A" in turn describes the scope of work as follows: "Subcontractor shall furnish all labor, materials, equipment, services and supplies

necessary to complete, in full accordance with the Contract Documents, the HEATING, VENTILATING, AND AIR CONDITIONING work, generally as outlined in Sections 15010 thru 15086, 15182, 15720 thru 15850, and 15950 of the Project Specifications." It is clear from these facts that RWM is a subcontractor within the meaning of section 1772.⁷

Under section 1772, prevailing wages are due to all RWM workers employed in the execution of the public works contract. Therefore, prevailing wages are due employees for work at the RWM shop that carried out or completed the terms of the construction contract RWM entered into with Trident.

I hope this letter satisfactorily answers your inquiry.

Sincerely,



John C. Duncan
Director

⁷Given that RWM contracted to perform a substantial part of the construction at the Project site, it is unnecessary to reach the conclusion urged by DLSE, citing *Theisen v. County of Los Angeles*, *supra*, 54 Cal.2d 170, that the status of subcontractor does not require entering upon and doing work at the job site. It should be noted in this regard that the *Sansone* court declined to follow *Theisen*, finding that *H. B. Zachry Company v. United States*, *supra*, 344 F.2d 352 afforded more guidance with respect to the resolution of the question of whether one is a subcontractor or material supplier. *Sansone*, *supra*, 55 Cal.App.3d at p. 442.

RWM's reliance on certain past coverage decisions is similarly misplaced. While this matter was pending, the Department decided it would no longer designate public works coverage determinations as "precedential" under Government Code section 11420.60. Consequently, the determinations relied upon by RWM no longer have precedential effect. Public notice of the Department's decision to discontinue the use of precedent decisions can be found at [www.dir.ca.gov/DLSF/09-06-2007\(pwcd\).pdf](http://www.dir.ca.gov/DLSF/09-06-2007(pwcd).pdf). Notwithstanding the discontinuation of precedent decisions, PW 2005-037, *Jurupa Unified School District-Glen Avon High School*, *supra*, is factually distinguishable. In that case, the work in question was not only performed off-site, but was performed in a fabrication shop operated by a bona fide material supplier, not a subcontractor. In PW 2004-023/2003-046, *Towboats*, *supra*, the decision was issued prior to, and without benefit of, *Williams v. SnSands*, *supra*, 156 Cal.App.4th 742. Contrary to *Towboats*, the court in *Williams* stressed the importance of distinguishing between subcontractors and material suppliers under the statutory scheme. Both PW 92-036, *Imperial Prison II South*, *supra*, and PW 1999-032, *San Diego City Schools/Construction of Portable Classrooms*, *supra*, entailed off-site work done in dedicated facilities. In both cases, the work was covered because the material supplier exemption did not apply. The results in both cases are consistent with the result here.