

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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December 9, 2010

Kevin Mack
Mike Davis
WestVenture Development, LLC
P.O. Box 991599
Redding, CA 96099

Re: Public Works Case No. 2010-022
Construction of Tenant Improvements
Department of General Services/California Department of Transportation

Dear Messrs. Mack and Davis:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to section 16001(a) of title 8 of the California Code of Regulations. Based on my review of the facts presented in this case and an analysis of the applicable law, it is my determination that both the demolition of existing partitions, finishes and fixtures, and the construction of new tenant improvements (collectively the "Project") for the California Department of Transportation ("Caltrans") at the WestVenture Office Building (the "WOB") located at 1031 Butte Street in the City of Redding ("City") is a public work subject to prevailing wage requirements.

Facts

On March 31, 2006, WestVenture Development, LLC ("WestVenture") entered into a \$10.2 million contract with Mack Construction¹ ("Mack") for the renovation of the WOB, a three-story office building, 55,030 square feet in size (the "2006 contract"). The renovation was undertaken to prepare the WOB for use as a medical office building by the Shasta Regional Medical Center ("SRMC") pursuant to a lease between WestVenture and SRMC. In 2008, SRMC withdrew from the lease whereupon WestVenture halted all construction under the 2006 contract.

On August 11, 2009, the Department of General Services ("DGS") posted an advertisement seeking office space in City for the administrative offices of Caltrans. Caltrans was seeking approximately 45,632 net usable square feet of office space and employee parking. WestVenture responded to the advertisement and subsequently entered into negotiations with DGS concerning the terms of a proposed lease. WestVenture

¹ Mack Construction is owned by Kevin Mack, who is also a member of WestVenture.

retained an architect at Nichols, Melburg & Rossetto ("Nichols") to create a "test fit"² for the proposed lease. Nichols and a DGS space planner worked jointly on a space study of the WOB. Nichols then created drawings of each floor of the WOB denoting the number of offices and other improvements required by Caltrans.

On April 21, 2010, WestVenture and DGS, on behalf of Caltrans, entered into a lease agreement (the "Lease"). Under the Lease, Caltrans is to lease 47,027 net usable square feet of office space on the first, second and third floors of the WOB, which represents approximately 85 percent of the WOB's net usable square footage. The Lease allows Caltrans to use the WOB's common areas, and includes 43 reserved parking spaces and 172 nonexclusive parking spaces. The term of the Lease runs from September 1, 2010, through August 31, 2020. The monthly rent is set at \$105,810.75 from September 1, 2010, through August 31, 2015, and \$112,864.80 from September 1, 2015, through August 31, 2020. Incorporated into the Lease are Exhibits A, B and C, which describe and depict the new tenant improvements to be built in the proposed lease space (the "DGS/Caltrans tenant improvements").

Exhibit A is a set of architectural drawings prepared by Nichols with the assistance of the DGS space planner. The drawings illustrate the scope of tenant improvements required by DGS and Caltrans. The "Site Plan" contained therein includes a list of categories of construction requirements for the tenant improvements. The list includes requirements for finishes, casework, electrical and ceilings. The Site Plan's "General Notes" state, among other things, that the "lessor shall complete all demolition required to construct the tenant improvements as shown and specified" and that "prior to construction, samples of the proposed finishes such as paint, carpet, tile, etc., shall be submitted to the planner for review/selection and approval." The drawings also include a layout of each floor of the WOB indicating the precise location of offices, modular workstations and conference rooms. Each office or modular workstation location is labeled with a Caltrans job title such as "Trans Surveyor," "Senior Env. Planner," etc. The detailed drawings even include the location of projectors, white boards, water coolers, and voice and data cables.

Exhibit B is entitled "Outline Specifications" and sets forth the specifications for the tenant improvements as required by DGS and Caltrans. These requirements address acceptable floor construction, finishes, doors, hardware, construction waste disposal, toilet room accessories, minimum lighting levels, communication cable systems, and computer room build-out, including but not limited to heating, ventilation and air conditioning ("HVAC").

Exhibit C is entitled "State Fire Marshal, CBC/ADA Access Compliance & Sustainable Measure Procedures." It contains an assortment of more generic requirements relating to fire prevention, the Americans with Disabilities Act, the California Building Code and environmental compliance.

² A "test fit" is an architect's first attempt to put specific office space criteria on paper in the form of a preliminary space plan.

Pursuant to the Lease, any work not in “conformity with said Exhibits ‘A’ and ‘B’ and ‘C’ shall be immediately corrected by the Lessor at Lessor’s sole cost and expense.” In addition, subdivision C of Section 01.00 of Exhibit B states that “Lessor shall be responsible for complying with all aspects and requirements of the lease and its exhibits” Further, subdivision A of Section 2.19 of Exhibit B states:

The building shell and core and leasehold improvements shall be considered substantially complete when constructed in accordance with Exhibits ‘A’, ‘B’ and ‘C’ which define a level of completion that will allow the State tenant program to operate without material interference.

On May 19, 2010, Mack began demolishing the previous set of tenant improvements constructed pursuant to WestVenture’s lease with SRMC. On June 10, 2010, Mack and WestVenture executed Change Order 12 for “T.I. DEMOLITION” in the amount of \$150,000. Change Order 12 encompassed the work begun on May 19, 2010, which entailed the demolition, removal and disposal of partitions, finishes, fixtures, etc. Mack completed this work on or about July 9, 2010.

On June 23, 2010, Mack and WestVenture executed Change Order 13. Change Order 13 called for Mack to “construct tenant improvements for current tenant plan” at a cost of \$1,555,310. These improvements are listed by category as follows: demo/earthwork, landscaping, concrete, structural steel and miscellaneous metal, carpentry, casework, insulation, doors and hardware, aluminum and glass, lath and plaster, metal framing and drywall, ceramic tile, acoustical ceilings, resilient flooring and carpet, painting and wall covering, toilet compartments and accompaniments, building specialties, fire protection, plumbing, HVAC, and electrical.

The demolition, removal and disposal work required under Change Order 12 and the construction of the DGS/Caltrans tenant improvements required under Change Order 13 constitute the Project at issue here.

Discussion

Labor Code section 1720.2,³ provides that:

For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, “public 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:

³ All section references are to the Labor Code, unless otherwise provided.

(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.

It is undisputed that the first two elements of section 1720.2 are satisfied. Mack, a private contractor, contracted with WestVenture, a private developer, to undertake the Project, thereby satisfying the first element under subdivision (a).⁴ Approximately 85 percent of the assignable square feet of the WOB is to be leased to DGS, on behalf of Caltrans, upon completion of construction, thereby satisfying the second element under subdivision (b).

The third element under subdivision (c) may be satisfied in one of two ways. Either the lease agreement between WestVenture and DGS must be entered into prior to the construction contract (subd. (c)(1)); or the construction work must be performed according to the plans, specifications, or criteria furnished by DGS/Caltrans, and the lease agreement be entered into during or upon completion of the construction work (subd. (c)(2)). On April 21, 2010, WestVenture and DGS entered into the Lease. Change Order 12 for demolition, removal and disposal and Change Order 13 for the DGS/Caltrans tenant improvements were executed by Mack and WestVenture on May 19, 2010, and June 23, 2010, respectively. Because the Lease was entered into prior to the change orders, the third element is satisfied under subdivision (c)(1).

WestVenture contends that "the construction contract" referred to in subdivision (c)(1) is the 2006 contract, and therefore the Lease was entered into after, not prior to, the construction contract. There is no dispute that the 2006 contract is a construction contract. So too, however, are Change Orders 12 and 13,⁵ which are new agreements entered into by the parties whereby consideration was given in exchange for the performance of work neither required nor contemplated under the 2006 contract.⁶ The relevant construction contract for purposes of determining whether subdivision (c)(1) is satisfied is not the 2006 contract. The 2006 contract was executed long before DGS advertised that it was seeking office space or negotiated the Lease with WestVenture. The relevant construction contract under subdivision (c)(1) necessarily would be any binding agreements for construction executed subsequent to the Lease including Change Orders 12 and 13. The plain language of section 1720.2 does not differentiate between types of contracts for construction. Here, because Change Orders 12 and 13 constitute contracts for

⁴ All subdivision references are to section 1720.2 unless otherwise provided.

⁵ Section 2.3.3 of the 2006 contract defines a change order as a written order "[s]igned by the Owner and Contractor" that indicates "changes in the scope of Work..."

⁶ The Civil Code defines a contract simply as "an agreement to do or not to do a certain thing." (Civ. Code, § 1549.)

construction executed after the Lease, any construction performed pursuant to those contracts is public work under subdivision (c)(1).

Even assuming, however, that WestVenture is correct that the 2006 contract is the relevant contract, the result would be the same under subdivision (c)(2)⁷ because, contrary to WestVenture's assertions, the Project was undertaken according to plans, specifications, or criteria furnished by DGS/Caltrans. WestVenture's architect, Nichols, worked jointly with the DGS space planner to generate architectural drawings of the WOB. The DGS space planner referred to the Project as a "joint venture." The architectural drawings, attached to the Lease as Exhibit A, include the requisite dimensions of the offices and modular workstations as well as other building requirements. The Lease expressly conditions occupancy on WestVenture's completion of the work specified in Exhibits A, B and C. Whether WestVenture would have constructed the same tenant improvements for another lessee misses the point. Change Order 13 expressly states that Mack is required to "construct tenant improvements *for current tenant plan.*" (Italics supplied.) The only conclusion that can be drawn from the facts is that the tenant improvement work called for in Change Order 13 is performed according to the plans, specifications or criteria of DGS and Caltrans within the meaning of subdivision (c)(2).⁸ The demolition, removal and disposal work called for in Change Order 12 is also performed in accordance with plans, specifications or criteria of DGS and Caltrans because that work is expressly required by Exhibit A as a precondition to the construction of the DGS/Caltrans tenant improvements.

WestVenture claims that the DGS/Caltrans tenant improvements were either implicitly or explicitly already included within the scope of work in the 2006 contract. The 2006 contract required construction of tenant improvements for a medical office building while the DGS/Caltrans tenant improvements were designed to accommodate administrative offices. The office space requirements of the two tenants are clearly distinct. If, in fact, the work required by DGS and Caltrans was truly generic and already included within the 2006 contract's scope of work, then neither Change Order 12 calling for demolition nor Change Order 13 calling for construction of improvements "for current tenant plan" would have been necessary.

WestVenture also argues that because it procured the architectural drawings at its own expense, the drawings do not constitute the plans, specifications or criteria of DGS and Caltrans. That WestVenture employed the architect and paid the cost of the architectural services does not affect the factual determination whether construction was performed according to the plans, specifications or criteria of the public entity lessee.

⁷ If, as WestVenture asserts, the relevant construction contract is the 2006 contract, it would follow that the Lease, which was executed on April 21, 2010, was entered into "during ... the construction work" within the meaning of subdivision (c)(2).

⁸ Further support for this conclusion appears in a news article in the Redding Record-Searchlight dated May 5, 2010, wherein Mack is quoted as saying that WestVenture will spend about \$1.5 million getting the building ready for Caltrans. The article also discusses how Mack and his partner will be "retrofitting the inside of the building for the agency."

Letter to Kevin Mack and Mike Davis

Re: Public Works Case No. 2010-022

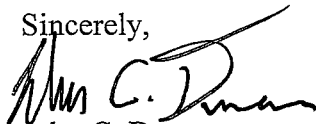
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Finally, WestVenture contends that the demolition work performed pursuant to Change Order 12 was not done pursuant to any specific requirement of DGS and Caltrans, but rather was necessitated by SRMC's abandonment of its lease. If, however, WestVenture had secured another tenant needing medical office space, the demolition would not have been necessary. The demolition was in fact necessary because DGS and Caltrans needed administrative office space, not medical office space. Moreover, WestVenture's argument is contradicted by the express terms of the Lease. Exhibit A states that the "lessor shall complete all demolition required to construct the tenant improvements as shown and specified."

For the foregoing reasons, the Project, comprised of the demolition and tenant improvement work required under Change Orders 12 and 13, is public work under section 1720.2.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Duncan". The signature is written in a cursive style with a large, sweeping initial "J".

John C. Duncan

Director