

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2010-022

CONSTRUCTION OF TENANT IMPROVEMENTS

**DEPARTMENT OF GENERAL SERVICES/CALIFORNIA DEPARTMENT OF
TRANSPORTATION**

I. INTRODUCTION

On December 9, 2010, the Director of the Department of Industrial Relations (Department) issued a public works coverage determination (Determination) finding that 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 (WOB) located at 1031 Butte Street in the City of Redding (City) is a public work subject to the prevailing wage requirements in Labor Code¹ section 1720.2.

On January 7, 2011, WestVenture Development, LLC (WestVenture) timely filed a notice of appeal of the Determination pursuant to section 16002.5 of title 8 of the California Code of Regulations (the Appeal). WestVenture also requested a hearing on the appeal.

With regard to the request for a hearing, section 16002.5(b) of title 8 of the California Code of Regulations provides that the decision whether to hold a hearing is within the Director's sole discretion. Here, the facts set forth in the Determination material to the coverage question are not in dispute. The issues raised in the appeal are solely legal and, therefore, no hearing is necessary. To the extent that WestVenture's

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

appeal challenged certain facts in the Determination, the additional facts supplied by the parties resolve these issues. As such, the request for a hearing is denied.

All of the submissions have been considered carefully. For the reasons set forth in the Determination, which is incorporated into this decision, and for the additional reasons stated below, the Appeal is denied and the Determination is affirmed.

II. FACTS

The facts set forth in the Determination are incorporated herein by reference and are supplemented as follows.

A. The Lease Negotiations between DGS/Caltrans and WestVenture.

In the course of the investigation into this matter, the Department's investigative staff interviewed DGS' Associate Planner, Richard Sonnenleiter (Sonnenleiter). Sonnenleiter confirmed that he evaluated the WOB in August/September of 2009 and took measurements of the space with DGS' Real Estate Officer Michael Stump and Caltrans employees Keith Winstead and Cindy Copeland. Sonnenleiter made the following observations:

(1) The tenant suites were designated for medical offices and were in varying stages of completion;

(2) Some of the tenant suites were near completion and included millwork, ceilings and doorframes while other areas were raw space;

(3) The first floor of the building was primarily raw space except for one small area that Sonnenleiter speculated would be used for a deli;

(4) The second and third floors of the building had corridors completed and some suites were partially developed;

(5) Demolition work was required to remove the corridors and partially developed areas for occupancy by Caltrans because Caltrans' requirements were for an "open space" design as opposed to an end to end corridor wall with multiple suites design.

Sonnenleiter confirmed that DGS provided WestVenture's architect, Nichols, Melburg & Rossetto (Nichols), its space requirements for the Project including requirements for file rooms, conference rooms, cubicles, offices and storage. The architect then transferred DGS/Caltrans' space design requirements onto the building plans. Sonnenleiter also worked together with the architect to develop the layout or

design to meet Caltrans' office space needs (e.g., Sonnenleiter provided information concerning where Caltrans needed such things as recessed projection screens, outlets, and other technical information).

B. WestVenture's Supplemental Statement of Facts.

In 2005, WestVenture entered into a lease agreement with Shasta Regional Medical Center (SRMC). On March 31, 2006, based on the pre-leasing commitment of SRMC, WestVenture entered into a \$10.2 million contract with Mack Construction (Mack) for the construction of a three story office building. As of May, 2007, SRMC had failed to initiate the space planning process to allow tenant improvement work to begin as scheduled. In January 2008, SRMC initiated the space planning process; however, on January 6, 2009, SRMC filed for bankruptcy and Mack ceased all construction on Project.

On August 11, 2009, DGS posted an advertisement seeking administrative office space. WestVenture responded and provided information regarding the WOB through Nichols. The communication between Nichols and DGS, among other things, included a representation that WestVenture would "design tenant spaces for Caltrans" and that WestVenture would provide "Custom Space Planning and Tenant Improvement Construction."

The architectural plans, dated April 20, 2010, attached to the lease agreement (the Lease) as Exhibit C and to WestVenture's appeal as Exhibit 5, were drafted by Nichols pursuant to a 2006 contract between WestVenture and Nichols. Exhibit A to the Lease was provided by WestVenture to DGS and Exhibits B and C are "minimum generic references to standards for construction on government projects." (Appeal p. 5.) DGS did not assist with the preparation of the Exhibit A Architectural Plans." (Appeal p. 5.)

Finally, WestVenture and Mack entered into two change orders on the Project. Change Order 12 and Change Order 13 required Mack to perform the tenant improvement work that it was already contractually bound to perform, with minor modifications and a price increase.

III. CONTENTIONS ON APPEAL

First, WestVenture argues that because no public funds paid for construction, the project does not meet the definition of public work under section 1720, subdivision (a)(1)

(construction, done under contract and paid for in whole or in part out of public funds). Further, as a result of the Determination’s conclusion that no public funds are required under section 1720.2, section 1720 is rendered surplusage.

Second, WestVenture argues that the Project does not satisfy either condition in subdivision (c) of section 1720.2 because, the change orders executed by Mack do not constitute a “construction contract” (subd. (c)(1)); and, the construction was not performed according to the plans, specifications or criteria of DGS/Caltrans (subd. (c)(2)). WestVenture contends that building requirements provided by DGS/Caltrans that WestVenture classifies as generic are not “plans, specifications or criteria” of DGS/Caltrans within the meaning of subdivision (c)(2).

Third, WestVenture argues that it was prejudiced in bringing this appeal because the Department did not timely and appropriately respond to a Public Records Act (PRA) request for documents supporting the Determination under Government Code section 6250, *et seq.*

IV. DISCUSSION

A. Labor Code Section 1720.2 Does Not Require That Construction Work be Paid for in Whole or in Part Out of Public Funds.

Section 1720.2 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:

(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.

WestVenture’s argument that public funds are required under section 1720.2 because the statutory scheme, including sections 1720 and 1720.2, must be read as a whole is disposed of by the Court in *Plumbers and Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083 (*Plumbers*). In *Plumbers*, the Court states that under section 1720.2, the definition of public works is “expanded.” This characterization comports with the preamble to section 1720.2 which states that “‘public works’ *also* means work done under private contract” when certain conditions are satisfied. (§ 1720.2) Further, in *Plumbers*, the private building owner, Kramer, paid for all of the construction work.

Section 1 requires Kramer to construct, *at its sole cost*, “utility services to the building, including water, sewer, gas, ... a minimum of one restroom core to serve at least 200 employees in accordance with the California Plumbing Code, ... sewer and water laterals and underground drainage systems ... and other improvements and costs pursuant to the building plans and specifications.” (*Emphasis added.*)

(*Plumbers, supra*, 157 Cal.App.4th at p. 1087.) The Court concluded that section 1720.2 applied to the project despite the fact that no public funds directly paid for construction and opined that the public entity lease provides a public subsidy that indirectly pays for the construction. (*Id.*, at p. 1092.) As such, WestVenture’s argument that the Project is not a public work because there are no public funds directly paying for construction is incorrect based on the holding in *Plumbers*.

WestVenture’s argument that the Project is not a public work because it was not paid for in whole or in part out of public funds is also not supported by the plain language of the statute. (See *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1588 [“To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning.”].) On its face, section 1720.2 does not contain any public funding requirement. Therefore, the plain language of the statute provides no basis for WestVenture’s contention that the payment of public funds for construction work is a required element for coverage under section 1720.2.

In addition, in section 1720, subdivision (a)(1), the Legislature explicitly required that enumerated activities such as construction be paid for in whole or in part out of public funds. Therefore, the absence of a public funds requirement in section 1720.2 cannot be “assumed to be without meaning.” (*Azusa Land Partners v. Department of*

Industrial Relations (2010) 191 Cal.App.4th 1, 19-20 (*Azusa*.) In *Azusa*, the Court stated:

[we] are not at liberty to insert into the statute a term the Legislature chose to omit. Its absence cannot be assumed to be without meaning. “[W]hen the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded.” (Citations omitted.)]

(*Ibid.*) Section 1720, subdivision (a)(1) defines “public works” to include “Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds” The absence of similar language regarding public funds in section 1720.2 means that the Legislature did not intend to require public funds for construction work performed under private contract as defined in section 1720.2. Accordingly, WestVenture’s argument that public funds are required under section 1720.2 is not supported by the principles of statutory construction.²

Finally, WestVenture is incorrect that the failure to require public funds under section 1720.2 renders section 1720 surplusage. Section 1720, subdivision (a)(1) has three required elements: that construction, alteration, demolition, installation or repair work is performed; that the work is performed “under contract” (rather than by a public entity’s own employees); and that the work is “paid for in whole or in part out of public funds.” Section 1720.2 has essentially one function. It was enacted to prevent private building owners from avoiding prevailing wage requirements when they constructed buildings under private contract that would be primarily leased by public entities.³ Accordingly, the Determination’s failure to require public funds under section 1720.2 does not render section 1720, subdivision (a)(1) surplusage because section 1720.2 does

² This conclusion is consistent with a prior public works determination issued by the Department addressing the issue of whether public funds are required under section 1720.2. See PW 2003-008, *Office Quarters Project – Department of Corrections, Bakersfield, California* (May 7, 2003) (*Office Quarters Project*).

³ In 1974, the Legislature passed Assembly Bill No. 3235, which enacted section 1720.2 (Stats. 1974, ch. 456, § 1.) to require prevailing wages be paid on the construction of building space being prepared for lease to a public entity whose public funds indirectly fund construction through its lease payments. See Enrolled Bill Report on Assembly Bill No. 3235 dated August 27, 1974, and prepared by the Department of Water Resources: “A building constructed privately for the express purpose of being leased to the state or a government entity is in effect a state building. Appropriately, its construction should come with the prevailing wage law.”

not contain the same or similar requirements of subdivision (a)(1) and applies independently of subdivision (a)(1) to contracts by private parties on privately owned buildings.⁴ The statutes have independent purposes. To require a payment of public funds for construction under section 1720.2 would defeat the purpose of the statute.

B. The Project Satisfies the Elements of Labor Code Section 1720.2 and, Therefore, is a Public Work.

It is undisputed that the Project meets the first two elements of section 1720.2. The construction contracts are between private persons and approximately 85 percent of the assignable square footage of the WOB is leased to DGS/Caltrans. The issue is whether the Project meets either prong of subdivision (c).

1. The Two Change Orders Executed by Mack Construction and WestVenture for Tenant Improvement Work Constitute “Construction Contracts” Under Section 1720.2(c)(1).

The Legislature’s intent in subdivision (c)(1) is unambiguous. Construction work performed under any contract executed after a lease agreement with a public entity constitutes public work. That there may be multiple construction contracts or subcontracts is not unusual.⁵ In *Plumbers*, the Department argued that the Court should not focus exclusively on the date of the construction contracts but should also look to the nature of the contracts for guidance on coverage. The Court interpreted the statutory requirements literally using the plain language of the statute and held that *any* construction performed under a contract executed after the lease agreement was signed was public work subject to prevailing wage requirements.

A change order is a binding agreement for certain construction work to be performed for a certain price.

A change order is “[w]ritten authorization provided to a contractor approving a change from the original plans, specifications, or other contract document, as well as a change in the cost.” (Means, *Illustrated Construction Dictionary* (3d ed.2000) p. 117.) According to Miller & Star,

⁴ See also *McIntosh v. Aubry* (1993) 14 Cal.App.4th1596 [court analyzed whether project was a public work under section 1720.2 and 1720 independently].

⁵ See PW 2003-033, *Plumbing and Fire Sprinkler Installation, Humboldt County Department of Health and Human Services* (January 6, 2004) and Decision on Administrative Appeal (June 28, 2005) [Multiple construction contracts were executed for building shell work.].

a “change order describes the extra work or materials that will be supplied and specifies the additional cost (or the reduction in the contract price) that will result from the change.” (10 Miller & Starr, Cal. Real Estate (3d ed.2000) § 27:27, p. 81.) “ ‘Extra work’ means work that is not required by the contract, not contemplated by the parties, and not controlled by the terms of the contract.” (*Id.*, § 27:23, p. 69.)

(*Affholder, Inc. v. Mitchell Engineering, Inc.* (2007) 153 Cal.App.4th 510, 519, fn.9.) Here, Change Orders 12 (T.I. Demolition⁶) and 13 (Tenant Improvement Work⁷), executed after the Lease, dated April 21, 2010, reflect modifications to the tenant space necessitated by the DGS/Caltrans Lease. According to Sonnenleiter’s observations of the WOB prior to DGS’ lease, tenant improvements required for medical office space for SRMC were semi-completed and thus, had to be demolished and rebuilt according to DGS’ plans for an “open space” design. Sonnenleiter also confirmed that the open office design required by Caltrans was different than the original design for an end to end corridor wall with multiple suites. Therefore, it is reasonable to conclude that demolition work in Change Order 12 as well as other tenant improvement work in Change Order 13 were not contemplated nor controlled by the terms of the 2006 contract for construction of a medical office building.

The prevailing wage law is a minimum wage law that is to be liberally construed to further its purpose. (*Azusa, supra*, 191 Cal.App.4th at p. 15.) The purpose of section 1720.2, as stated *infra*, is to require prevailing wages on the construction of building space being prepared for lease to a public entity whose public funds indirectly fund construction from its lease payments. “Both the language and the legislative history of the provision thus confirm a legislative determination that construction work performed on a property that is mostly leased by a public agency should be considered public work for purposes of the prevailing wage law.” (*Plumbers, supra*, 157 Cal.App. 4th at p. 1091.)

⁶ Change Order 12, executed on June 10, 2010, encompassed the work begun on May 19, 2010, which entailed the demolition, removal and disposal of partitions, finishes, fixtures, etc.

⁷ Change Order 13, executed on June 23, 2010, 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 term “construction contract” is not defined by statute. Therefore, consistent with the holdings in *Plumbers* and *Azusa*, any type of contract for construction work executed after the Lease will satisfy the statutory requirement. Because a change order is a type of contract that is expressly *for construction work*, the change orders executed by WestVenture and Mack constitute construction contracts within the meaning of subdivision (c)(1) of section 1720.2.

WestVenture argues that the Determination’s conclusion that change orders are contracts for construction within the meaning of section 1720.2 will cause confusion or disrupt the bidding requirements for public contracts under the Public Contract Code. WestVenture is incorrect. Contracts for construction under section 1720.2 are not subject to the Public Contract Code because they are contracts between private persons. (§ 1720.2(a).) Public Contract Code requirements apply to public agencies, as specified by statute. (Pub. Contract Code § 22030 *et seq.*) As such, the Determination does not conflict with the bidding requirements contained in the Public Contract Code.

2. WestVenture Performed Tenant Improvement Work Pursuant to Plans, Specifications or Criteria Provided by DGS/Caltrans.

WestVenture makes three arguments to support its contention that no construction work was done according to the plans, specifications or criteria of DGS/Caltrans. First, WestVenture contends that the exhibits to its lease agreement with DGS/Caltrans are not directives from DGS/Caltrans about how to construct the Project. WestVenture asserts that its architect, Nichols, provided the drawings to DGS to confirm that the space planning would comply with DGS’ solicitation for available office space. Therefore, because DGS/Caltrans did not prepare and provide the actual construction drawings to WestVenture, the Department erred when it concluded that Mack performed construction according to plans, specifications, or criteria of DGS.

The fact that WestVenture hired the architect does not mean that the work performed under Change Orders 12 and 13 was not done pursuant to the plans, specifications or criteria of DGS/Caltrans.⁸ WestVenture ignores the fact that the original

⁸ The analysis here is consistent with a prior public works coverage determination issued by the Department. In *Office Quarters Project*, the Department found that “...although the plans and specifications were drawn by a private architect paid for by the Owner, these plans and specifications

2006 construction contract called for the WOB to be built for medical offices. Sonnenleiter confirmed that when he first visited the WOB, the tenant suites were designed for medical offices and in varying stages of completion. As such, demolition work referenced in Change Order 12 was required for Caltrans' occupancy and planned "open space" design. Sonnenleiter also confirmed that he provided Nichols with Caltrans' space requirements as well as the configurations for file rooms, conference rooms, cubicles, offices, storage, recessed projection screens and outlets and that Nichols translated those requirements onto the building plans. Accordingly, the tenant improvement work in Change Order 13 for the current tenant plan accurately represents work that is performed according to the plans, specifications or criteria of DGS/Caltrans, as identified in Lease exhibits A, B and C. WestVenture's contentions that the exhibits to the Lease were prepared solely by WestVenture's architect and are merely generic requirements are not supported by the above-stated facts.

Second, WestVenture argues that WestVenture's coordination with DGS regarding the terms of the lease is not sufficient to conclude that work was actually performed pursuant to DGS' plans, specifications or criteria. It contends that the Department failed to demonstrate that Mack actually performed specific construction required by DGS. For example, the informational items such as cubicle locations are not evidence of construction.

WestVenture's argument is contradicted by the Change Orders and the Lease. Pre-lease coordination between the parties and their representatives that results in a lease agreement with attached architectural plans as exhibits and subsequent change orders to the original construction contract is sufficient to demonstrate that construction is being performed according to either plans, specifications or criteria furnished by DGS/Caltrans.

Third, and finally, WestVenture contends that the lease was not entered into during, or upon completion of the construction work that was allegedly required by Caltrans. WestVenture argues that the construction required by Caltrans commenced after the lease was executed on April 21, 2010. Construction on the WOB, however, commenced in 2006 and was not completed until approximately November 2010. That

incorporate the tenant improvements and criteria submitted and required by DGS under the lease (see Exhibits A, B and C to the lease)."

there were periods of time where no construction activity occurred does not change the fact that the construction was not completed until November 2010. The Legislative history of section 1720.2 confirms that subdivision (c)(2) was added to prevent public entities and private building owners from avoiding prevailing wage requirements by entering into construction contracts based on the public entities' plans, specifications or criteria prior to executing a lease agreement.⁹ The conclusion here, that the work is covered under subdivision (c)(1), and in the alternative, it would be covered under subdivision (c)(2), is consistent with the Legislature's intent that construction on a building that will be primarily leased to a public entity and is performed under private contract, is public work subject to prevailing wage requirements.

C. WestVenture's Complaint Regarding a Public Records Act Request Has No Bearing on This Appeal.

WestVenture contends that the Department failed to timely and adequately respond to its request for public records relating to this matter under Government Code section 6250, et seq. (PRA) and, therefore, WestVenture was prejudiced in the Appeal. WestVenture, however, failed to provide any factual or legal basis for this allegation. First, WestVenture has not shown a violation of the PRA; and, second, it provided no connection between the PRA and the legal conclusion reached here.

On January 3, 2011, WestVenture requested all documents that supported the Director's Determination. Pursuant to the PRA, the Department has ten days to respond to WestVenture's request for records. On January 5, 2011, two days after its request, the Department responded to WestVenture and produced all non-privileged documents. Therefore, the Department complied with WestVenture's PRA request. Moreover, whether or not the Department complied with the PRA is not relevant to this appeal. Complaints against the Department with respect to PRA requests are subject to

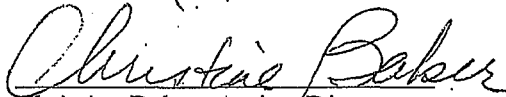
⁹ In 1980, section 1720.2 was amended by the passage of Assembly Bill 2557, which added subdivision (c)(2). In then Assemblyman Bill Lockyer's letter to then Governor Edmund G. Brown of September 4, 1980, he explained the intent of the bill was to address those instances where "developers and the state, or a local government, have entered into implicit agreements that after the completion of the project the state or local government would lease at least 50 percent of the property. In this way, the developer avoids the requirement to pay prevailing wages on a public works project." As explained in the Enrolled Bill Report of the Department of Finance dated of September 12, 1980, recommending that the Governor sign the bill, "[t]his bill eliminates a current loophole which exempts certain construction projects from public works requirements even though construction is done at the behest of governmental entities."

Government Code section 6258. Second, WestVenture, as the requesting party and the owner of the WOB, has all of the documentation surrounding the Project in its possession. The Department has no non-privileged independent documentation on the Project that was not provided to all of the interested parties to this matter. Accordingly, WestVenture's argument that the Department's alleged failure to produce privileged documentation prejudiced its appeal is both misplaced and irrelevant to the legal conclusion reached herein that the Project is a public work.

IV. CONCLUSION

In summary, for the reasons set forth in the Determination, as supplemented by this Decision on Administrative Appeal, the Appeal is denied and the determination that prevailing wages are required for the demolition and tenant improvement work required under Change Orders 12 and 13 is affirmed. This decision constitutes final administrative action in this matter.

Dated: 10/6/2011


Christine Baker, Acting Director