STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Harbor Construction Co., Inc. Case No.: **09-0095-CPR**

From a Notice of Withholding issued by:

Antelope Valley Union High School District

DECISION OF DIRECTOR

INTRODUCTION

Harbor Construction Co. ("Harbor") timely sought review of a Notice of Temporary Withholding Of Contract Payments Due To Delinquent or Inadequate Payroll Records ("Notice") issued by the Awarding Body, Antelope Valley Union High School District ("District") on April 24, 2009. The Director of Industrial Relations appointed Anthony Mischel as hearing officer to hear the factual dispute and recommend a decision for his review. A hearing on the merits occurred on August 3, 2009, in Los Angeles. James W. Biedebach appeared for Harbor; and James Reed appeared for the District. Now, having considered the evidence, I affirm the Notice.

Labor Code section 1776[1] and related regulations requires each contractor and subcontractor on a public work to maintain and furnish Certified Payroll Records ("CPRs") to the awarding body. As it is uncontested that Baron Cleaning Services ("Baron") did not provide CPRs for the work it contracted to perform for Harbor, the sole issue in this proceeding is whether Baron was required to do so. Harbor claims that Baron performed janitorial work that was not subject to the payment of prevailing wages, and therefore, that CPRs were not required under section 1776. The District claims that Baron performed work pursuant to the public works construction contract between Harbor and the District and therefore was subject both to prevailing wages under section 1772 and the duty to maintain and furnish CPRs under section

[1] All subsequent references are to the Labor Code unless otherwise specified.

1776.

FACTS

Harbor contracted with the District to construct three buildings. Construction began on or about November 9, 2006; the anticipated completion date was October 19, 2008. As part of the construction contract, Harbor was obligated to perform "final cleanup" and to have the premises clean at the time of final inspection.

Harbor and its subcontractors performed the cleanup work required under the provisions of section 01770 of the construction contract. Those provisions require that: "Contractor shall conduct all final cleaning required to comply with requirements of this Section prior to final inspection." Following this general requirement is more than a page of specific requirements for final cleaning. Final inspection occurs after all punch list items are completed and the project is ready to be accepted.

Harbor estimates that it spent approximately $20,000.00 for cleanup work performed by its own workers and the workers of subcontractors. The parties disagree on when this final cleanup may have actually occurred, and the record demonstrates that a dispute existed between the parties. Harbor, who was in the best position to provide specific dates when final cleanup occurred, did not present sufficient evidence to justify a finding as to such date(s).

On or about October 15, 2008, the District's architect presented Harbor with an extensive punch list of what work he claimed was undone. Some of the work identified as undone consisted of cleanup work the District considered contractually required.

On or about December 10, 2008, Harbor engaged Baron to perform specified cleaning services, including vacuuming, dusting, cleaning and polishing windows, walls and floors for a contract price of $8,721.00. Harbor's president, Steven Padula, identified Baron's bid as Harbor's contract with Baron.[2]

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[2] Somewhat surprisingly, on cross examination Padula could not identify the signature of the person who accepted the bid for Harbor. Since Harbor presented the bid as evidence of Baron's scope of work, it appears reasonable to

Baron's services were needed to keep the insides of the buildings clean after final cleanup had occurred and before the project was accepted as complete, as Harbor wanted to ensure that there was no question that the project was cleaned. Baron's services were to "buff out" the building. The buildings needed regular cleaning because people who were not engaged in activities specified in Harbor's contract with the District tracked dirt into the buildings.

On or about December 23, 2008, the District's witness, Mat Havens, wrote to Harbor reiterating the District's claim that the work remained unperformed and that final cleanup had not yet occurred. The letter makes clear that disputes continued to exist as to whether items the District had on its punch list were contractual items and whether Harbor had continuing obligations to clean up the job site:

> You made the statement that signing off of punch list items is ongoing at all buildings and that you will schedule a final clean and turn the buildings over to the owner. First of all, only a partial punch list signoff is ongoing at all buildings. Not all punch lists have been completed. Building B1 punch list walk is not complete due to the fact that the stainless steel snack bar counter has not been installed and besides that, no punch list has been issued by NTD. A complete punch list has not been issued for Building F because in several of the rooms, contractual work had not been completed. On December 19, 2008 the final punch list walk was conducted at Building F as a result of the contractual work finally being completed. Secondly, even though the entire project should have been completely and thoroughly clean prior to the punch list walk, at your request the District agreed to conduct the punch list walk prior to final cleaning. Even though you have never final cleaned any one of your three buildings, you make the statement in your schedule narrative that because you gave unrestricted site access to the District on June 18, 2008, you will not be held responsible for recleaning of these buildings. The District suggests that you retract that statement from your narrative and plan to do the final cleaning that is required by contract.

Starting in late December 2008 or early January 2009 (after Baron was engaged by Harbor), a separate landscape project began on the property of the high school where Harbor's construction occurred. Havens assumed that some dust was created by that work although no one testified as to the amount of dust created. Havens opined that any cleanup of dust created by

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find that Harbor in fact entered into a contract with Baron in spite of Padula's testimony.

the landscape project (whether outside or inside a building) was the responsibility of the landscape contractor, not Harbor.

Baron spent 475 person hours from January 12 through January 27, 2009, cleaning the schools. It spent a further 144 person hours on four specific days from February 11 through March 18, 2009, cleaning the schools. Harbor continued to perform work on the project of an unspecified nature throughout this period. Harbor and its subcontractors continued to clean up after themselves in addition to the cleaning done by Baron.

Padula could not explain why so much work by Baron was necessary in January nor did he provide any explanation of who, if anyone, cleaned the buildings from March through acceptance of the project on or about May 7, 2009.

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*].) Whether work is subject to prevailing wages is a statutory decision; parties do not have the power to restrict by contract what work is subject to prevailing wages. (Id.)

A Labor Compliance Program such as the District 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 *see Lusardi, supra.*)

When the District determines that a violation of the prevailing wage laws has occurred, a written Notice of Withholding is issued pursuant to section 1771.6. An affected contractor or subcontractor may appeal the Notice of Withholding by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that the contractor or subcontractor shall have the burden of proving that the basis for the Notice of Withholding is incorrect. The District withheld contract payments pursuant to its authority under section 1771.5(b)(5) and California Code of Regulations, title 8, section 16435.[3] Review of the District's notice and action "is limited to the issue of whether the [CPRs] are delinquent or inadequate of the [District] has exceeded its authority under this section." (Cal.Code Reg., tit. 8 §16435(f).) Harbor does not contest that the CPRs are delinquent or inadequate. The only question is whether the District exceeded its authority to demand CPRs.

The Work Performed By Baron Is Subject To The Prevailing Wage Law.

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 . . . shall be paid to all workers employed on public works.

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[3] (e) The withholding of contract payments when payroll records are delinquent or inadequate is required by Labor Code Section 1771.5(b)(5), and it does not require the prior approval of the Labor Commissioner. The Awarding Body shall only withhold those payments due or estimated to be due to the contractor or subcontractor whose payroll records are delinquent or inadequate, plus any additional amount that the Labor Compliance Program has reasonable cause to believe may be needed to cover a back wage and penalty assessment against the contractor or subcontractor whose payroll records are delinquent or inadequate; provided that a contractor shall be required in turn to cease all payments to a subcontractor whose payroll records are delinquent or inadequate until the Labor Compliance Program provides notice that the subcontractor has cured the delinquency or deficiency.

(f) When contract payments are withheld under this section, the Labor Compliance Program shall provide the contractor and subcontractor, if applicable, with immediate written notice that includes all of the following: (1) a statement that payments are being withheld due to delinquent or inadequate payroll records, and that identifies what records are missing or states why records that have been submitted are deemed inadequate; (2) specifies the amount being withheld; and (3) informs the contractor or subcontractor of the right to request an expedited hearing to review the withholding of contract payments under Labor Code Section 1742, limited to the issue of whether the records are delinquent or inadequate or the Labor Compliance Program has exceeded its authority under this section.

. . . . This section is applicable to contracts let for maintenance work.

Section 1772 provides

> 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

> 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.

In *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, the Court of Appeal acknowledged that the right to be paid prevailing wages is governed by the plain meaning of sections 1771, 1772 and 1774:

> 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.

(*Williams, supra,* 156 Cal.App.4th at pp. 749-750.) The contractual requirements for cleaning create the obligation on the part of Harbor to keep the buildings clean prior to the final inspection, whether or not "final cleanup" occurred prior to January 2009. Certainly the District believed that the contractor had an on-going obligation to clean the premises, and the contract provisions introduced into evidence support the District's interpretation.

Sections 1771, 1772, and 1774, collectively require the payment of prevailing wages in two distinct situations: to workers employed in the execution of a public works contract[4] and on

[4] Public work is defined as "Construction, alteration, demolition, installation, or repair work done under contract and

"contracts let for maintenance." (§ 1771.) This interpretation is consistent with the section's history, as the maintenance provision, as a stand alone basis for requiring prevailing wages, was not added until 1974, well after the creation of the obligation to pay prevailing wages on public works (Stats. 1974, ch. 1202, pg. 2593, § 1; see also, *Franklin v. City of Riverside* (1962) 58 Cal.2d 114.).

Harbors's primary argument is that the work Baron performed is defined as "janitorial" and therefore is excluded from the any obligation to pay prevailing wages for maintenance work. Maintenance (from which janitorial work is excluded) is defined in California Code of Regulations, title 8, section 16000 as

> Maintenance. Includes: (1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired. Contractors and subcontractors on public works projects are required to prepare CPRs on a weekly basis. (§ 1776(a).)
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> * * *
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> Exception: 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.

Contrary to Harbor's argument, the janitorial exception to maintenance work has no applicability where the root obligation to pay prevailing wages is found in sections 1772, and 1774. The janitorial exception only applies to contracts let solely for maintenance work and not to cleaning work performed as a requirement of a broader public works contract. Baron's contract to clean was not independent of Harbor's contract with the District, and therefore the janitorial exception cannot apply.

The evidence shows that Harbor has not met its burden to prove that Baron's work was not in the execution of its contract with the District. Most of Harbor's evidence concerned

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paid for in whole or in part out of public funds . . ." (§ 1720(a)(1).)

whether Baron's work met some undefined notion of "janitorial work" rather than addressing the actual factual issue of how Baron's work fit into the requirements of public work contract. The fact that the Baron contract preceded the landscape work and was signed in the midst of a dispute over what work remained to be performed, demonstrates that the District correctly viewed Baron's work as within the scope of Harbor's contract. Harbor failed to prove this interpretation to be incorrect.

Because the prevailing wage law applied to Baron's work, Baron was obligated to prepare and submit CPRs to the District. Since Baron admittedly failed to do so, the District was authorized and justified in issuing its Notice.

FINDINGS

1. Harbor entered into a contract for public works with the District. All work in the execution of this contract required compliance with sections 1770 et seq.

2. Harbor's contract with Baron was in the execution of its public works contract with the District.

3. Baron was required by section 1776(a) to prepare CPRs for the work it performed under its contract with Harbor. Baron failed to do so.

4. The District did not exceed its authority by issuing the Notice.

ORDER

For this reason, the Notice is affirmed.

SO ORDERED

Dated: 8/20/09

John C. Duncan, Director of Industrial Relations