STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

To All Interested Parties:

Re: Public Works Case No. 2000-030
Repair and Maintenance of Heavy Equipment - Pahla Corporation and Shepherd Machinery Corporation - County of Orange Landfills

The Decision on Administrative Appeal, dated July 8, 2002, in PW 2000-030, *Repair and Maintenance of Heavy Equipment - Pahla Corporation and Shepherd Machinery Corporation - County of Orange Landfills*, was reversed by the Orange County Superior Court on May 14, 2003. See *Shepherd Machinery Co. v. Chuck Cake, in his acting capacity as the Acting Director of Industrial Relations for the State of California*, Case No. 02CC16216.

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2000-030

REPAIR AND MAINTENANCE OF HEAVY EQUIPMENT
PAHLA CORPORATION AND SHEPHERD MACHINERY CORPORATION

COUNTY OF ORANGE LANDFILLS

I. INTRODUCTION AND PROCEDURAL HISTORY

On November 2, 2001, the Department of Industrial Relations ("Department") issued a public works coverage determination ("Determination") that found the repair and maintenance of heavy equipment at County of Orange ("County") landfills performed by employees of Shepherd Machinery Corporation ("Shepherd") and Pahla Corporation ("Pahla") (collectively "Appellants") to be a public work subject to the payment of prevailing wages pursuant to what is now Labor Code[1] section 1720(a)(1)(as amended by statutes 2001, chapter 938, section 2) and section 1771.

On December 3, Pahla served its Notice of Appeal. On December 6, Shepherd served its Notice of Appeal. Shepherd was granted additional time to file a supplemental appellate brief following receipt of documents requested from Department's Division of Labor Statistics and Research.

[1] Unless otherwise noted, all statutory references are to the Labor Code.

Shepherd's supplemental brief was served on April 17, 2002. Although Pahla was also granted permission to file a supplemental brief, it declined to do so, relying on the arguments contained in its December 3 appeal. On May 6, 2002, the party requesting the determination, Southern California Labor/Management, Operating Engineers Contract Compliance, submitted a letter brief in response to Shepherd's supplemental brief.

II. COMMON ARGUMENTS ON APPEAL

The common arguments of Appellants can best be characterized as follows:

1. No contract, as contemplated by section 1720(a), exists between the Appellants and County for repair work.
2. The type of work performed by Appellants is not "maintenance" under section 1771 and title 8, California Code of Regulations ("CCR"), section 16000.
3. The Determination in this case violates Appellants' constitutional right to contract, is an unconstitutional taking and amounts to a violation of Appellants' due process rights.
4. A hearing should be conducted on all issues.

ARGUMENT RAISED ONLY BY SHEPHERD

5. The force account exemption to the payment of prevailing wages under section 1771 extends to Shepherd employees doing maintenance and repair work on County-owned equipment.

ARGUMENTS RAISED ONLY BY PAHLA

6. County did not pay for the work with public funds.

7. The Department should be estopped from retroactively enforcing the determination because Pahla relied upon representations from County that the project was not a public work, and County, Pahla and the Union considered the contract to be private.

III. RELEVANT FACTS

The underlying facts are not in dispute. County, under its Integrated Waste Management Department, owns and operates with its own personnel three active landfills - the Olinda Alpha Landfill in the City of Brea, the Prima Desheca Landfill in the City of San Juan Capistrano and the Frank R. Bowerman Landfill near the City of Irvine. County also has several closed landfills that require ongoing maintenance. County's own employees use heavy equipment, including scrapers, trash and dirt bulldozers, front-end and skip loaders, compactors, tractors, fuel and water trucks, graders, dump trucks, backhoes and steam cleaners in the operation of the landfills to push, spread and cover the trash.

On April 1, 1997, Pahla and County entered into a Price Agreement for Rental of Fully Maintained Heavy Equipment at the Frank Bowerman Landfill. This three-year contract was extended for an additional three years, terminating on March 31, 2002. Under the agreement, Pahla provides on-site

service and maintenance personnel, storage containment and all required tools and equipment necessary to perform daily and periodic repairs and service, including checking oil, coolant and fuel levels, replacing parts and lubricating equipment on the equipment it leased to County at the Frank Bowerman Landfill.

On February 1, 1998 Shepherd and County entered into a Price Agreement for Service and Repair of Heavy Equipment at all three of County's active landfills. On February 1, 2002 Shepherd and County renewed the contract for an additional two years, with one major difference. The most recent renewal includes a paragraph that advises Shepherd of its responsibilities to pay prevailing wages as required under the Labor Code.

Under the contract and its extensions, Shepherd provides on-site service and maintenance personnel and all tools and equipment necessary to perform the required tasks at all three landfills. Shepherd's employees perform scheduled and daily routine maintenance and minor repairs on the heavy equipment during non-operation hours at each landfill. Except for major repairs, the maintenance and repair work is done on the site of the landfill.

IV. ANALYSIS

1. APPELLANTS HAVE CONTRACTS WITH COUNTY FOR REPAIR WITHIN THE MEANING OF SECTION 1720(a)(1).

Appellants argue that there was no contract for repair between them and County as contemplated under section 1720 (a)(1). This section defines "public works" as: "Construction or repair work ... done under contract and paid for in whole or in part out of public funds, ..." The written agreements between Appellants and County, although labeled as Price Agreement(s), are in effect written contracts binding the appellants to provide repair and maintenance work for a set price. Thus, there were contracts between County and Appellants for the work.

Pahla argues that its contract was for rental of equipment, not for repair of equipment, and therefore its contract does not come within the purview of 1720(a)(1). Shepherd argues 1720(a)(1) is not applicable to its contract since its employees' work does not include repairs of real property or any fixtures attached thereto.

Exhibit A to Pahla's contract entitled, "Statement of Work," specifically Paragraph C, makes it clear that one of the duties of Pahla under the contract is not only to maintain the equipment but also to repair it, including replacement of parts as needed during the contract period. Thus its contract includes repair work.

As to Shepherd's argument, 1720(a)(1) does not restrict repair work to work performed only on real property or fixtures attached to real property. Thus its contract includes repair work.

2. THE WORK PERFORMED BY APPELLANTS IS MAINTENANCE UNDER SECTION 1771 AND TITLE 8, CALIFORNIA CODE OF REGULATIONS SECTION 16000.

Section 1771 provides that pay prevailing wages must be paid on contracts for maintenance work.

Title 8, California Code of Regulations ("CCR") Section 16000 provides:

> **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.
>
> (2) Carpentry, electrical, plumbing, glazing, touchup painting, and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations

on machinery and other equipment permanently attached to the building or realty as fixtures…."

Appellants argue that this regulation does not specifically include maintenance of movable equipment. They therefore conclude that their work cannot be a public work since it is repairing and maintaining moving equipment.

In reaching their conclusion, Appellants ignore the plain language of the definition of maintenance, and the fact that it is not meant to limit the type of maintenance covered under the prevailing wage law of California. The definition of maintenance in the regulation begins with the words, "**Maintenance.** *Includes*: ... ." The courts have held the word "includes" connotes enlargement, not limitation. *People v. Western Airlines, Inc.* (1954) 42 Cal.2d 621, 268 p.2d 723. This is especially true when the purpose of the definition lists a type of activity. In *People v. Western Airlines, supra*, the defendant argued it could not be fined by the Public Utilities Commission because its business activity - air transportation - was not one of the activities listed in the definition of what constituted a public utility. The California Supreme Court rejected this argument, stating that the word "includes" was one of enlargement and not limitation. It found that air transportation was just another type of activity to be included along with the other public transportation activities listed in the definition. Similarly, section

16000 simply lists examples of maintenance activity and the Determination addresses another example of maintenance activity that is to be covered under section 1771.

Furthermore, the work performed by Appellants is a public work under section 1771 because it is a necessary component of preserving the landfills, a public facility. Without well-maintained equipment, the work of the landfills could not be performed, and these public facilities would deteriorate. Since County, under contract with Appellants, is paying for maintenance, it is a public work pursuant to section 1771.

3. THE DETERMINATION DOES NOT VIOLATE APPELLANTS' CONSTITUTIONAL RIGHTS.

Appellants' claim that the retroactive enforcement of the Determination as to their contracts that began in the years 1997 and 1998 would unconstitutionally impair their right to contract and constitute a taking under the Fifth Amendment of the United States Constitution. Appellants also allege a violation of their due process rights when they were not given notice of the pending public works coverage request, an opportunity to be heard and service of the decision.

In support of its arguments, Shepherd cites two prior determinations and an opinion previously issued by this Department that were in place at the time the contracts were entered into and state that maintenance of personal movable

equipment is not a public work. As discussed below, these issues are not relevant to the question whether the Determination should be sustained or reversed.

First, questions of coverage and compliance are distinct. Title 8, CCR, section 16001 vests the Director with the quasi-legislative authority to determine questions of coverage under the public works laws. *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976. The Director's coverage determinations are legally constructed policy decisions. While Appellants raise the issue of retroactive enforcement, the matter currently being decided is public works coverage.

Second, Shepherd's reliance on prior determinations and opinions of this Department in support of Appellants' due process arguments is misplaced. Government Code section 11425.60, subsections (b) and (c), allow an administrative agency to select those decisions that contain significant legal or policy determinations to be designated as precedential. An index of these significant precedential decisions is to be published in the California Regulatory Notice Register ("CRNR"). Government Code sections 11425.10(a)(7) and 11425.60(a) state clearly that no agency decision can be relied on unless it has been designated as precedential. Pursuant to the above Code sections, in 1999 the Department filed with the CRNR an index of its precedential determinations. None of the determinations or

letters relied on by Shepherd have been designated as precedential determinations. Hence, its reliance on these earlier determinations is of little use in this decision.

In addition to the fact that the determinations cited by Shepherd are not precedential and therefore cannot be relied upon, they are also distinguishable from the instant case on both the facts and the law. In Public Works Case No. 93-060, Off-Hauling of Biosolids from a Publicly Owned Treatment Facility, December 21, 1993, and Public Works Case No. 94-018, Dewatered Sludge Disposal and Re-Use Projects, June 10, 1994, the then-director was reviewing off-hauling of biosolids and sludge. This off-hauling work was reviewed in light of then sections 1720(a) and 1720.3, not at issue in this case. Unlike the instant situation, the question of what constitutes repairs under 1720(a) and maintenance under 1771 was not at issue in these determinations and therefore never addressed. In addition, the letter of former Division of Labor Standards Research Chief, Dorothy Vuksich, dated April 7, 1995, and cited by Shepherd bears no weight whatsoever since it was not rendered by the Director of the Department and therefore could not be binding on the Department.

Appellants also argue in their briefs that they were not given an opportunity to participate in the initial process leading up to the issuance of the determination, nor were they directly served with the determination when it was

rendered. Although this Department welcomes all arguments, authorities and documents for its review prior to issuing a coverage determination, there is no requirement under Title 8, CCR, section 16001, that the Department contact every possible interested party and seek their input prior to issuing a determination. Also, although Appellants were not directly served with the November 9, 2001 determination, this Department not only accepted their appeals and briefs, but also provided additional time for them to file supplemental briefs. Any alleged irregularity in giving notice or providing an opportunity to be heard has been cured.

4. NO HEARING IS REQUIRED.

Appellants have asked the Department to conduct a hearing pursuant to title 8, CCR, section 16002.5(b). This section states, "The decision to hold a hearing is within the Director's sole discretion." Because the material facts are undisputed and the issues raised in the instant appeal are legal ones, there are no factual issues to be decided and no hearing is necessary or required.

5. THE FORCE ACCOUNT EXEMPTION UNDER SECTION 1771 DOES NOT EXTEND TO SHEPHERD'S EMPLOYEES.

Shepherd appears to argue that the section 1771 force account exemption for the County employees on the landfills extends to its employees. This position is a misapprehension of the force account exemption. Under section 1771, it is only a public entity's own personnel who

enjoy the exemption as force account from payment of prevailing wages. (See, *Industry Force Account Council v. Amador Water Agency* (1991) 71 Cal.App.4th 810, 84 Cal.Rptr.2d 139, footnote 3; Precedential Public Works Coverage Determination Case No. 2000-032, Maintenance and Repair Work at Commerce Refuse-to-Energy Facility, County Sanitation District No. 2, Los Angeles County, October 9, 2001.) Such an exemption does not, as Shepherd argues, carry over to the employees of a private contractor.

6. PUBLIC FUNDS WERE PAID FOR THE REPAIR AND MAINTENANCE OF THE HEAVY EQUIPMENT.

Pahla asserts that no public funds were used to pay for the repair and maintenance of its heavy equipment. It claims that the monies used to pay Pahla under the contract came from the user fees collected at the landfill. These fees, according to Pahla, amounted to an enterprise fund and cannot therefore be considered public funds. No legal authority is provided in support of this argument.

The question whether city-imposed fees constitute public funds was addressed in Precedential Public Works Coverage Determination Case No. 93-054, Tustin Fire Station (Tustin Ranch) (June 28, 1994). In *Tustin*, the Director referenced Title 8, CCR, section 16000, which defines public funds as state, local and/or federal monies. No distinction is made in this definition between monies raised through the use of the public entity's taxing powers and their police

powers; both generate public funds.[2] In the present matter, the fees are deposited into County coffers and used to pay for the maintenance and repair of the heavy equipment; therefore, the statutory requirement of payment of public funds is met.

7. NEITHER THE COUNTY'S REPRESENTATIONS NOR ANY PARTIES' UNDERSTANDINGS DETERMINE WHETHER A PROJECT IS A PUBLIC WORK.

Pahla argues that the Department should be estopped from enforcing the determination both because County allegedly made representations that the contract was not a public work and because County, Pahla and an unnamed Union all believed that the contract was not a private one. It should first be noted that no evidence was submitted with Pahla's briefing to support the above representations. The fact that at least the entity requesting the determination is a labor-management organization involving the Operating Engineers would seem to contradict the representation that the Union interested in the project believes it not to be a public work.

However, even if Pahla's factual representations are correct, they are irrelevant. The Director, by statute, has sole authority in deciding whether a construction project is

[2] The *Tustin* decision was made precedential by this Department in 1999. Recently, the Legislature amended section 1720 effective January 1, 2002. This section now defines "paid for in whole or in part out of public funds" as the payment of money or the equivalent of money by a state or political subdivision, essentially codifying the *Tustin* holding.

a "public work." *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976 at 989 (4 Cal.Rptr.2d 837). The obligation of a contractor to pay prevailing wages on a public work is statutory in nature, and the parties to a contract cannot determine that a project is not a public work. (*Lusardi, supra*, at p. 994).

The argument that the Department should be estopped from enforcing the determination because the County allegedly informed Pahla that it was not a public works was made and rejected in *Lusardi, supra*, at 994. In that case, the contractor argued that the awarding body represented that the construction was not a public work and that prevailing wages need not be paid. Rejecting the defense of equitable estoppel, the *Lusardi* Court pointed out that the Director of the Department of Industrial Relations did not make any representations regarding the need to pay prevailing wages and there was no privity or identity of interest between the Director and the awarding body. In the instant case, Pahla did not rely on any representation by this Director whether prevailing wages should be paid on its contract with the County. Additionally, there is no privity or identity of interest between the County and this Department. Therefore, equitable estoppel is not a viable defense in this appeal.

V. CONCLUSION

Based on the foregoing, Appellants' appeals are denied and the original determination is sustained. The repair and maintenance work in question is a public works for which prevailing wages must be paid.

Dated: 7/8/02

Stephen J. Smith, Director