

1 STATE OF CALIFORNIA

2 DEPARTMENT OF INDUSTRIAL RELATIONS

3 DECISION ON REQUEST FOR RECONSIDERATION

4 IN RE: PUBLIC WORKS CASE NO. 2000-032

5 MAINTENANCE AND REPAIR WORK AT
6 COMMERCE REFUSE-TO-ENERGY FACILITY,
7 COUNTY SANITATION DISTRICT NO. 2, LOS ANGELES COUNTY

8
9 I. Introduction and Procedural History

10 On November 14, 2001, the County Sanitation Districts of Los
11 Angeles County ("CREA") requested reconsideration of the Decision
12 on Administrative Appeal issued in this matter, Public Works Case
13 No. 2000-032, Decision on Administrative Appeal, October 9, 2001.
14 Both the Decision on Appeal and the underlying public works
15 coverage determination hold that certain maintenance and repair
16 work undertaken at the CREA facility is a public work for which
17 prevailing wages must be paid. This holding was based on the
18 finding that the workers provided by Total Western, Inc. ("TWI")
19 to perform the work at the CREA facility under contract with CREA
20 were not the force account of CREA.

21 The sole issue raised by this request for reconsideration is
22 whether the recent decision in *Metropolitan Water District of*
23 *Southern California v. Superior Court (Cargill)* (2001) 92 Cal.App.
24 4th 1112, 112 Cal.Rptr.2d 513, dictates a different result.

25 Procedurally, there is no statutory or regulatory requirement

1 for the Director to entertain a request for reconsideration after
2 a decision on appeal has issued. Nevertheless, and for the
3 reasons stated below, I find no substantive basis to alter, based
4 on *Cargill*, the Decision on Appeal in this case.

5 II. Issue and Conclusion

6 The issue raised by this request for reconsideration is
7 whether *Cargill* mandates the Director find that the employees
8 supplied by TWI to the CREA facility are force account employees
9 of CREA, a public entity. I conclude that the *Cargill* decision
10 does not change the determination that the employees supplied by
11 TWI to CREA are not force account of CREA, but rather are
12 employees of a contractor performing maintenance and repair work
13 under a contract with CREA. For this reason, CREA may not invoke
14 the force account exemption to the requirement to pay prevailing
15 wages on this public work.

16 III. Analysis

17 EMPLOYEES EMPLOYED BY CONTRACTORS PERFORMING PUBLIC WORK
18 UNDER CONTRACT ARE ENTITLED TO THE PAYMENT OF PREVAILING
19 WAGES.

20 Since the February 11, 2000, public works coverage request of
21 its Purchasing Manager, CREA has sought a determination that the
22 workers performing maintenance and repair work at its facility
23 under contract with TWI are CREA's own employees. The reason
24 sought such a determination is that the personnel of a public
25 entity, or force account, are exempt from prevailing wage

1 requirements under Labor Code section 1771.¹ In both the
2 original public works coverage determination and in the Decision
3 on Appeal in this case, the Department found that the employees
4 were not force account of CREA, but employees of a contractor,
5 TWI, and entitled to the payment of prevailing wages. In this
6 reconsideration, CREA again requests a determination that said
7 employees have an employment relationship with CREA under common
8 law rules allegedly mandated by *Cargill*. Presumably CREA's
9 argument is the same as before: if an employment relationship, in
10 particular a dual one, is found to exist between the TWI workers
11 and CREA, then CREA can claim the workers as its force account and
12 prevailing wage obligations for these workers are avoided. The
13 *Cargill* decision does not alter the conclusion herein that the
14 workers provided by TWI to CREA must be paid prevailing wages.

15 In *Cargill* the Court held that certain workers, ostensibly
16 employed by private contract service providers, were, under a
17 common law control test for employment, in fact Metropolitan Water
18 District ("MWD") employees eligible for retirement benefits under
19 the Public Employee Relations Law ("PERL"). The decision in
20 *Cargill* does not affect the determination here. Even if, under a
21 common law employment test, the workers provided by TWI to CREA,
22 were co-employed by TWI and CREA, the Prevailing Wage Law ("PWL")
23

24 ¹ "...This section is applicable only to work performed under contract, and is
25 not applicable to work carried out by a public agency with its own forces..."
Labor Code Section 1771.

1 requires that employees of contractors or subcontractors employed
2 on public works must be paid prevailing wages. Labor Code
3 Sections 1772, 1774. The only exception to this obligation is
4 for force account, Labor Code Section 1771, which definition is
5 limited to work performed by a public entity's own personnel,
6 Title 2, Cal.Code Regs., section 1988; 70 Ops.Cal.Atty. Gen.92,
7 97 (1987).

8 The Attorney General recognized that the term force account
9 has been given a specific meaning in the context of the PWL and
10 that, under the PWL, the definition has been narrowly construed
11 to include only public employees. Even common law dual
12 employment, were it to exist in this case, cannot vitiate the
13 requirement of the PWL that workers employed by contractors,
14 whether solely or dually, must be paid prevailing wages. While
15 the Court in *Cargill* did not address whether the workers were co-
16 employed by the MWD as well as the service providers, under the
17 PWL, a public entity cannot claim as its force account workers
18 who are also employed by a contractor. The overall purpose of
19 the PWL is to benefit and protect employees on public works
20 projects. Subsumed within this goal are protection of employees
21 from substandard wages, permitting union contractors to compete
22 with nonunion contractors, benefiting the public through the
23 superior efficiency of well-paid employees, and compensating non-
24 public employees with higher wages for the absence of job
25 security and employment benefits enjoyed by public employees.

1 *Lusardi Construction Company v. Aubry* (1992) 1 Cal.4th 976, 987,
2 4 Cal. Rptr.2d 837, 843. Adopting CREA's argument would not only
3 undermine the judicially recognized restriction in the PWL
4 requiring that all work done under contract be paid for at the
5 appropriate prevailing wage rate, it would also deprive the
6 workers provided TWI by CREA of prevailing wages *without* giving
7 them the benefits of public employment.² [cf. *Bishop v. San Jose*
8 (1969) 1 Cal.App.3d. 56, 61, 81 Cal.Rptr. 465, ("the electricians
9 are civil service employees of the city, and since 1958 have been
10 paid monthly salaries on a year-round, full-time basis, plus
11 extra pay for overtime and holiday work, and plus various other
12 benefits such as holidays, vacation and sick leave, health
13 insurance and retirement benefits.")] Under the current
14 arrangement between TWI and CREA, the workers enjoy none of the
15 common benefits and protections enjoyed by most public employees
16 in California, including the employees in *Bishop*.

17 IV. Conclusion

18 For the foregoing reasons, I reaffirm my conclusion that the
19

20
21 ² It must be pointed out that the holding in *Bishop*, decided by
22 California Supreme Court in 1969, was codified by the Legislature in 1974, by
23 an amendment to section 1771 (see ft. 1, supra). That the Legislature only
24 distinguished "force account" as an exempt class of workers, and not "day
25 labor" or "co-employment" is significant to interpreting the statutory scheme
26 today. The dicta in *Beckwith v. Superior Court* (1959), 175 Cal.App.2d. 40,48,
27 to the effect that "prevailing wages statutes... have no application to work
28 undertaken by force account or day labor" does not alter this conclusion. As
29 *Beckwith* Court noted, the public entity "employed only its own workmen." (*Id.*
30 at page 41).

1 workers supplied by TWI, a contractor providing maintenance and
2 repair workers under contract with CREA, are not CREA's force
3 account and must therefore be paid prevailing wages. The request
4 for reconsideration is denied.

5
6 DATED: 3/29/02


7 Stephen J. Smith
8 Director

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26