

DEPARTMENT OF INDUSTRIAL RELATIONS

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



August 15, 2002

Jim Aja, Administrator
Foundation For Fair Contracting
3807 Pasadena Avenue, Suite 150
Sacramento, CA 95821

Re: Public Works Case No. 2001-041
City of Clovis Sewer Improvements Project
Reimbursable Agreement

Dear Mr. Aja:

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 Title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the construction of two new sewer mains and the abandonment of a sewer lift station ("Project") in the City of Clovis ("City") is a public work subject to the payment of prevailing wages.

As a condition of City's approval of the construction of a residential subdivision development in City by Buchanan Estates III, Inc. ("Buchanan"), Buchanan was required to construct certain off-site sewer improvements. The improvements include construction of two new sewer mains (one in Willow Avenue and one in West Nees Avenue) and the abandonment of a sewer lift station at Peach and Nees Avenues. The design and construction plans for the Project were supplied by Buchanan and approved by City. Buchanan contracted with Wathen Castanos, Inc. to perform the requisite work. Wathen Castanos, Inc. subcontracted with George Drakovich and Sons, Inc. for the work required in conjunction with the abandonment of the lift station.

City and Buchanan entered into a Reimbursable Agreement ("Agreement") on May 1, 2001. Under the terms of the Agreement, Buchanan is responsible for the procurement of all materials as well as for the construction and installation of the Project according to the approved plans; City is obligated to reimburse Buchanan for the costs of construction and materials. Buchanan is required to receive written approval of awarded bids from City prior to construction of the Project and to complete them within 90 days of the date of the Agreement. The Agreement specifies liquidated damages in the amount of \$250 per day be deducted from the sum due under the Agreement for each calendar day of delay in

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the Project's delivery. The Project will become City property upon the City's acceptance of the Project. City is obligated to reimburse Buchanan within 30 days of receipt of invoice and after its final acceptance of the Project. The funds for the reimbursement derive from a City sewer fund, which contains user fees earmarked for City capital improvement projects.

What is now Labor Code¹ section 1720(a)(1) (as amended by Statutes of 2001, Chapter 938, section 2, SB 975) defines "public works" in relevant part as construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds. What is now section (a)(3), in relevant part, defines public works also as "street, sewer or other improvement work done under the direction or supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof..."

The Project falls within the definition of a public work under section 1720(a)(1). It is construction, alteration and demolition, and performed under contracts between Buchanan and Wathen Castanos, Inc. or George Drakovich and Sons, Inc. The Project is paid for from a City sewer fund, which are public funds. Prior precedential public works coverage determinations have held that a public entity's reimbursement of a private developer for construction constitutes the payment of public funds. Precedential Public Works Coverage Determination Case No. 93-054, *Tustin Fire Station Agency* (June 28, 1994).

City argues that the funds used to reimburse Buchanan are private funds. (October 3, 2001 letter from attorney Thomas J. Riggs to the City Council.) It asserts that the Project is funded by private developer impact fees, City's collection of which is authorized under Government Code section 66000 et seq. This statute allows local entities to charge impact fees to private developers to cover the cost of capital facilities needed to serve growth. The statute and related case law require that entities levying fees demonstrate a reasonable relationship between the new development in relation to which the impact fees are paid and the facilities that the fees will fund. The fees charged must not exceed the cost of the planned facilities, and must be used solely for that purpose or for the building of additional new facilities or to reimburse the local entity for facilities already constructed. City reasons that the funds are private because the Legislature designed in the statute a

¹ Unless otherwise indicated, all statutory section references are to the Labor Code.

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mechanism by which local government could spread private developer obligations among all benefiting developers. City notes that such fees must be expended solely for the purpose for which they were collected, with City refunding to the developers any fees not expended. City further asserts that the City has customarily viewed the developer fees as developer-owned monies, with City acting only as a "fiscal agent."

City's argument is not persuasive for two principal reasons. As a factual matter, official City records pertaining to the Project appear to indicate that City sewer funds for capital improvements, not developer impact fees under Government Code section 66000 et seq., were used to meet the reimbursement obligations arising out of the Agreement.

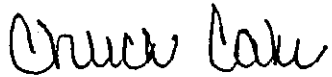
Even if developer impact funds, however, were used to reimburse Buchanan for the construction of the Project, such funds are still public funds. Title 8, California Code of Regulations, section 16000 defines "public funds" as "...state, local and/or federal monies." The regulation makes no distinction between monies raised by a government by means of taxes and money received by a government entity or agency by other means. Funds placed in the public coffers under the direct control and disposal of a public entity constitute public funds. See, *Tustin Fire Station Agency, supra*.

In addition to its public works status under section 1720(a)(1), the Project is also a public work under section 1720(a)(3), which requires only that a sewer improvement project be done under the direction or supervision of a city. As evidenced by the Agreement, City has approved the construction plans and requires its approval of all awarded bids prior to commencing construction. The Agreement also requires that the Project be completed within 90 days of the Agreement and provides for liquidated damages payments by Buchanan in the event of delay. City will take ownership of the Project after completion. Under these circumstances, the Project is done under the direction of the City, and is therefore also a public work under section 1720(a)(3).

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I hope this determination satisfactorily answers your inquiry.

Sincerely,



Chuck Cake
Acting Director