

DEPARTMENT OF INDUSTRIAL RELATIONS

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



October 21, 2002

John W. Francis, Esq.
2600 East Nutwood Avenue, Suite 260
Fullerton, CA 92831-3106

Re: Public Works Case No. 2002-012
California State University, San Marcos
Student Housing Project

RECEIVED
Department of Industrial Relations

OCT 22 2002

Div. of Labor Statistics & Research
Chief's Office

Dear Mr. Francis:

This constitutes the determination of the Director of the Department 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 upon my review of the facts of this case and an analysis of the applicable law, it is my determination that construction of Student Housing at California State University, San Marcos ("Project") is a public work subject to the payment of prevailing wages.

Factual Background

The Project involves construction of apartment-style residential units, which will serve approximately 475 students of California State University, San Marcos ("University"). The Project also includes construction of a Community Building, within which will be a classroom, a student government meeting room and other related amenities. The building configurations and exterior elevations specifically are designed to conform to the University's architecture. The Project is sited on campus in a geographical area encompassing approximately 6.11 acres of University property within the City of San Marcos, County of San Diego ("Site").

The Project was formalized in a series of three contracts entered into on March 1, 2002. First, a Ground Lease was entered into between the Board of Trustees of the California State University ("Board") and the San Marcos University Corporation ("Corporation"), a California non-profit public benefit corporation. In that Ground Lease, the Corporation agreed to design, finance, construct and manage the Project, and the Board agreed to lease the Site to the Corporation for \$10. The term of the Ground Lease commenced on the earlier of the date of recordation of a memorandum of the Ground Lease with the County

Recorder of San Diego County, or March 1, 2002, and will terminate on July 1, 2037, unless extended or sooner terminated as provided under the terms of the lease.

The Corporation in turn entered into a Development Agreement with Allen & O'Hara Education Services, LLC ("Developer") to undertake the design, construction, furnishing and equipping of the Project consistent with the Ground Lease. The Developer then hired the Ellias Construction Company, Inc. to act as the general contractor. Construction began on April 1, 2002. The anticipated completion date is July 1, 2003.

The Corporation also entered into an Indenture with First Union National Bank for the issuance of bonds, designated the San Marcos University Corporation Auxiliary Organization Student Housing Revenue Bonds ("Bonds"), in an aggregate principal amount not exceeding \$27,990,000.

The Project cost is anticipated to be \$27,990,000, which is to be funded by the Bonds. The Bonds will be retired using net revenue from the student housing.

Analysis

What is now Labor Code¹ section 1720(b) (as amended by statutes of 2001, chapter 938, section 2) is the applicable law. On projects such as this, the amended statute applies where the project formation documents were entered into on or after the effective date of the amendment. This amendment took effect on January 1, 2002. The relevant project formation documents - the Ground Lease, the Development Agreement and the Indenture - were entered into on March 1, 2002.

Section 1720(a)(1) defines public works to mean: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds...." The Project is construction done under contract. The issue presented here is whether the Project is being paid for in whole or in part out of public funds.

Labor Code section 1720(b) specifies that, "'paid for in whole or in part out of public funds' means ... fees, costs, rents, ... or other obligations that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value, waived or forgiven."

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

Letter to John W. Francis, Esq.
Re: Public Works Case No. 2002-012
Page 3

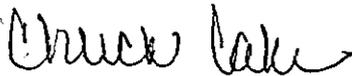
Under the Ground Lease, the Board has leased to the Corporation, for 35 years, for \$10, an area of approximately 6.11 acres of property within the City of San Marcos, County of San Diego. A lease for \$10 for 6.11 acres of land within San Diego County constitutes rent that is paid for at patently less than fair market value and consequently, a payment of public funds for construction under Labor Code section 1720(b).²

Conclusion

Based on the above analysis, I find that the Project is a public work for which prevailing wages must be paid.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Chuck Cake
Acting Director

² As discussed above, I find the Project to be a public work based on the below-market value rent constituting a payment of public funds for construction. I therefore need not address whether the Project would also be covered on the alternative grounds that the Corporation is the alter ego and/or agent of the Board for public works purposes. Similarly, I need not address whether Education Code section 89911, under which any obligation of the Corporation authorized by the Board is an obligation of the State of California, creates prevailing wage liability for this Project.