

DEPARTMENT OF INDUSTRIAL RELATIONS

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July 18, 2002

Gregory Jeffress
ABC Painting, Inc.
P.O. Box 2015
Vallejo, CA 94592

RECEIVED
Department of Industrial Relations

JUL 30 2002

Div. of Labor Statistics & Research
Chief's Office

Re: Public Works Case No. 2002-034
Sacramento State Capitol Exterior Painting Project
Restoration and Hauling of Decorative Cast Iron Elements

Dear Mr. Jeffress:

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 restoration and hauling of architectural decorative cast iron elements from the State Capitol in Sacramento is a public work subject to the payment of prevailing wages.

In December 2001, the California Department of General Services ("DGS") published in newspapers a notice titled, "Advertisement for Pre-qualification to Bid a Project, Capitol Exterior Painting." The notice stated in part:

The Department of General Services, Real Estate Services Division, Project Management Branch, announces that it is pre-qualifying prime contractors to bid on the Capitol Exterior Painting project for construction.

. . .

The Project Management Branch will pre-qualify prime contractors to bid the project who respond to its Pre-qualification Form Package (PFP) and receive an "approved" on all items in the PFP. Qualifications to be evaluated will include the firm's experience in successfully completing historic renovation and/or painting projects similar to the California State Capitol. Note that the West Wing of the Capitol was constructed in 1869, and is listed in the Historic Registry. In particular, work will involve removal, treatment

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and reinstallation of cast iron decorative elements; application of multi-coat polyurethane and spray paint systems; and full scaffolding for access to work areas. The building will be occupied during project duration and is a high profile site, with sensitive security issues. Qualifications will also be evaluated based on licensing, bonding and financial ability, history of litigation and experience in performing public works projects of similar size and value.

Three potential bidders submitted pre-qualification packages, and DGS invited two of them to bid on the project. In February 2002, DGS published an Invitation to Bid, which described the project as follows:

Project comprises labor, material and services necessary for: removal of column capitals, refurbishment and reinstallation; cleaning and painting of plaster and concrete surfaces; patching cement plaster and woodwork restoration; scaffolding as needed to access work areas; membrane walking surfaces and related work. Work also includes lead materials abatement in affected areas.

The Invitation to Bid also included the following statement:

Pursuant to section 1770 of the Labor Code, the Department of Industrial Relations has ascertained general prevailing wages in the county in which the work is to be done, to be listed in the Real Estate Services Division's booklet entitled, "General Prevailing Wage Rates," dated as set forth on the Bid Form.

The successful bidder was River City Painting, Inc. ("River City"). The Bid Form submitted by River City sets forth the following statements immediately above the bid price:

The undersigned hereby proposes and agrees to furnish all labor, materials and equipment, and to perform all work required for the above-named project in the manner and time prescribed in the Drawings and Project Manual dated February 2002 and such addenda thereto as may be issued prior to bid

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opening date and in accordance with prevailing wage rates ascertained by the Department of Industrial Relations and set forth in the Real Estate Services Division's booklet entitled, "General Prevailing Wage Rates," dated August 2001, available upon request. The Bid Price, set forth below in clear legible figures, includes the cost of bonds, insurance, sales tax and every other item of expense, direct or indirect, incidental to the Bid Price.

The Bid Form also included in Article 10 a requirement that the bidder list the name and location of each subcontractor who would perform work or labor or render service to the bidder in an amount in excess of one-half of one percent of the total bid. Vendors and "suppliers of materials only" were excluded from this requirement. River City listed five subcontractors. The first subcontractor listed was R&B Coatings ("R&B") of Linden, California. The "Kind of Work" indicated for R&B was "Cast Iron Restoration."

On or about April 8, 2002, DGS entered into a contract with River City. The work described in the contract includes work on architectural cast iron elements of the building, as detailed in section 05700 of the project specifications. The section includes:

- A. Repair and clean architectural cast iron including but not limited to columns and capitols, pilaster capitals and bases, window surrounds, balustrades and cornice elements.
- B. Catalog, remove, repair and reinstall selected cast iron elements as shown on drawings.
- C. Coat or re-coat existing cast iron. (*Id.*, paragraph 1.01.)

The specifications include detailed requirements for samples and field testing (*Id.*, paragraph 1.03), contractor qualifications (*Id.*, paragraph 1.04), manufacturer of paint and patching compound (*Id.*, paragraph 2.01), brands and product specifications of materials to be used (*Ibid.*), sequence of work (*Id.*, paragraph 3.01) and methods of preparation, cleaning, and application and repair (*Id.*, paragraphs 3.02, 3.03, 3.04).

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The contract calls for the cast iron elements to be removed from the Capitol and transported to a different location for the restoration work to be done. The original invitation for bids included an alternative for painting of the ironwork in place. However, DGS subsequently eliminated this alternative.

As indicated on its Bid Form, River City initially subcontracted the cast iron restoration work to R&B. However, shortly after the work began, ABC Painting, Inc. ("ABC") succeeded R&B as the subcontractor for this work. On May 3, 2002, DGS sent a letter to River City stating: "On May 1, 2002, the Project Management Branch approved your request to substitute ABC Company for the cast iron restoration portion of your contract in lieu of the current listed subcontractor, R&B Protective Coatings, Inc."

The cast iron elements consist of approximately 3,000 to 4,000 pieces. They are removed from the Capitol by ironworkers employed by River City's cast iron installation subcontractor. They are numbered and loaded onto trucks operated by employees of J's Trucking, Inc. ("J's Trucking"), who then transport the pieces to ABC's shop in Vallejo. ABC employees then strip, sandblast and repaint the pieces according to DGS's specifications. The finished pieces are then loaded back on J's trucks and transported back to the Capitol, where the ironworkers reinstall them.

Labor Code¹ section 1720(a)(1) defines "public works" to include: "Construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds" There are three elements to this definition, all of which are met in the larger State Capitol exterior painting project performed by River City. First, the work is being done under a contract awarded by DGS. Second, the work is being paid for out of state public funds. Third, the painting project is construction, alteration, demolition and/or repair work within the meaning of section 1720(a)(1). In fact, the DGS contract documents use the terms "construction," "alteration," "demolition," "installation" and "repair" with reference to the project.

Similarly, the restoration of the decorative cast iron elements falls within the definition of a public work under section 1720(a)(1). The work is done under a contract between River

¹ All statutory references are to the Labor Code.

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City, ABC and J's Trucking.² It is paid for with state public funds. It also fits within the enumerated types of covered work of repair and alteration. Among the common definitions of "repair" is "to renew; restore; revive." (*Webster's New World Dictionary of American English* (3d College Ed. 1988) at 1137.) Here, the restoration of the cast iron elements is just that. In fact, section 05700 of the project specifications describes the work as "repair." Additionally, the term "alteration" is broad enough to encompass the work performed on the cast iron elements. (See *Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 756.)

DGS, however, contends that the work done by R&B, ABC and J's Trucking is not subject to prevailing wage requirements. Without specific analysis, DGS references several precedential public works coverage determinations of this Department that distinguish between subcontractors and material suppliers on the basis of factors similar to those discussed in *O.G. Sansone v. Department of Transportation* (1976) 55 Cal.App.3d 434.³ (DGS letter of May 23, 2002, citing, *inter alia*, Precedential Public Works Coverage Determination Case No. 92-036, Imperial Prison II, South (April 5, 1994) ("Imperial II") and Precedential Public Works Coverage Determination Case No. 99-037, Alameda Corridor Project, A&A Ready Mix (April 10, 2000) ("Alameda Corridor").) In particular, DGS quotes the following excerpts from Imperial II:

Sansone distinguished subcontractors from independent material men. The drivers held covered in *Sansone* were taking material from a "borrow pit" which was opened exclusively for and exclusively served the building of a road for the California Department of Transportation. The material was delivered to the site and positioned as needed. The exclusivity of the borrow pit as a second construction activity site, and transport between that and the road, was held sufficient, together with a close integration of the material delivered into the road, to make the drivers covered as working for a "subcontractor."

. . . .

² We understand that, while there may be no formal written subcontract between these parties, ABC and J's Trucking submit invoices for their work. Such an arrangement constitutes a contract for purposes of section 1720(a)(1).

³ R&B also asserts that it is a material supplier and not a subcontractor.

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In line with *Sansone*, past coverage determinations have consistently held that off-site fabrication of materials for a public works site, is a public works itself.

As noted by DGS, the Alameda Corridor decision stated that the delivery of concrete mix to the construction site "is not, as a matter of law, an integrated aspect of and functionally related to the construction work on the project." Under the facts of that case, the workers in question were determined to be employed by a material supplier, rather than a subcontractor.

In this case, however, the facts do not support the characterization of ABC, R&B and J's Trucking as material suppliers. They are not supplying materials; they are supplying essential labor and services on cast iron pieces that are part and parcel of the architecture of the Capitol Building. Unlike newly manufactured products delivered to a construction site, the pieces have always been, and remain, public property. The restoration work is therefore performed in the execution of the contract between River City and DGS, and is "an integrated aspect of and functionally related to the construction work on the project."

Moreover, the contract documents allow for no doubt that ABC and R&B are subcontractors and not material suppliers. DGS's Advertisement for Pre-qualification to Bid a Project and Invitation to Bid both prominently mention the cast iron restoration as an integral part of the project. River City's completed Bid Form listed R&B as a subcontractor, while the form instructed that material suppliers did not need to be listed. DGS's letter of May 3, 2002, approved River City's request to substitute ABC "in lieu of the current listed subcontractor, R&B Protective Coatings, Inc." If ABC and R&B were merely material suppliers, there would be no need for DGS to approve the change, since material suppliers did not have to be listed.

Section 1772 provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." Where the elements of section 1772 are met, there is no additional statutory requirement that the work be done "on-site." (See Precedential Public Works Coverage Determination Case No. 99-066, Oakley Union High School District/RGW Construction, Inc. (December 13, 1999) ("Oakley")); Precedential Public Works Coverage Determination Case

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No. 91-017, Concrete Recycling Plant for Highway 12 Interchange at Stoney Point Project, City of Santa Rosa (November 26, 1994).)

For the foregoing reasons, and consistent with past determinations, the restoration of the cast iron elements is a public work in and of itself under section 1720(a)(1). In addition, it is covered under section 1772 because it is being done in the execution of the larger exterior painting public works contract. Accordingly, prevailing wages must be paid to the employees of R&B and ABC performing the restoration work.

For similar reasons, J's Trucking is also a subcontractor whose workers are employed in the execution of a public works contract within the meaning of section 1772. Unlike the truck drivers in *Alameda Corridor*, the drivers here are not employed by a material supplier to simply deliver construction materials to the work site. Therefore, J's Trucking does also not enjoy the material supplier exemption from prevailing wage obligations.

In *Sansone, supra*, the employees of a trucking company that hauled materials under a subcontract with the general contractor were deemed under section 1772 to be employed upon a public work. Here, J's Trucking is a subcontractor to River City, to whom it submits invoices for its services.⁴ Its employees play an integral role in the execution of the public works contract by transporting the cast iron elements between the Capitol and ABC's shop. Essential performance of the public works contract occurs at both locations, and what are being transported are not simply construction materials, but existing pieces of the Capitol being restored. For these reasons, the J's Trucking workers are employed by a subcontractor in the execution of the contract for public work within the meaning of section 1772, and they must be paid prevailing wages. (See *Oakley, supra*.)

Finally, River City agreed in its bid, which was incorporated into its contract with DGS, to "perform all work required for the above-named project...in accordance with prevailing wage rates ascertained by the Department of Industrial Relations" When a contractor and a public agency agree that employees of contractors will be paid prevailing wages, the employees are third-party beneficiaries and may maintain a breach of contract action if prevailing wages are not paid. *Tippett v. Terich* (1995) 37 Cal.Appp.4th 1517. Accordingly, the workers performing

⁴ If J's Trucking were deemed to be a subcontractor to ABC, itself a subcontractor to River City, the result would be the same.

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the restoration and hauling work may have a civil contract cause of action for the payment of prevailing wages.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Stephen J. Smith
Director