

DEPARTMENT OF INDUSTRIAL RELATIONS

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April 10, 2003

Katherine S. Poole, Esq.
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651 Gateway Boulevard
South San Francisco, CA 94080

Re: Public Works Case No. 2002-043
Salton Sea 6 Geothermal Power Plant Project
Imperial County

Dear Ms. Poole:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-named project under the public works laws and is made pursuant to 8 California Code of Regulations ("CCR") section 16001(a). Based upon my review of the documents submitted and the applicable laws and regulations pertaining to public works, it is my determination that construction of the Salton Sea 6 Geothermal Power Plant is a public work within the meaning of the California Labor Code if the project receives public funding.

Background

On July 29, 2002, CE Obsidian Energy LLC ("CalEnergy") filed an Application for Certification with the California Energy Commission ("Energy Commission") for site certification of a proposed 185 megawatt net geothermal energy facility, known as Salton Sea 6 ("SS6" or "Project"), in Imperial County. The Energy Commission must certify the proposed SS6 facility before construction can begin. The Energy Commission has found CalEnergy's application to contain the information necessary for review under the Energy Commission's 12-month review process.

Under the Public Utilities Code, CalEnergy may seek funds from the New Renewable Resources Account ("Account") administered by the Energy Commission. The Account is part of the Renewable Energy Program ("Program"),¹ which provides \$540 million for the support of emerging renewable electricity generation technologies. These funds are collected through a non-bypassable public goods charge to the ratepayers of the three largest investor-owned utilities in California: Pacific Gas & Electric Company ("PG&E"), Southern California Edison Company ("Edison")

¹ The Legislature established the Program in Assembly Bill 1890, enacted in 1996, and Senate Bill 90, enacted in 1997, and codified at Public Utilities Code sections 381, 383, 383.5 and 445. The Program and its funding were extended in Public Utilities Code section 399.8.

000627

and San Diego Gas & Electric Company ("SDG&E"). The funds are deposited into the Renewable Resource Trust Fund ("Trust Fund") in the State Treasury. The money in the Trust Fund is appropriated, either annually or continuously, to the Energy Commission for statutorily defined purposes, including the development of new in-state renewable electricity generation technology facilities. The 30 percent allocation of the funds devoted to fostering new renewable resource development is placed in the Account of the Trust Fund.

The Energy Commission holds competitive auctions to award funds from the Account. During the auctions, project proponents submit bids for production incentives along with their estimated generation for the first five years of program participation. Winning bidders are awarded conditional grant funding in the form of production incentives, which are paid at the incentive level bid for a maximum of five years from the date the facility comes on line and starts generating electricity.

On July 9, 2002, the State Building and Construction Trades Council ("SBCTC") submitted a request to this Department pursuant to 8 CCR 16001(a)(1) for a public works coverage determination as to whether SS6 is a public work if CalEnergy obtains an award from the Account for the Project.

Positions of the Parties

As a threshold matter, CalEnergy and the Energy Commission argue that the construction of the Project is not covered by the prevailing wage laws because SBCTC's request for an "advisory opinion" is premature and speculative.²

These parties assert that various events must take place before any payments on the Account would be made to CalEnergy. Those events include: CalEnergy's obtaining certification to construct SS6; completion of construction; bringing the unit on line and producing geothermal power; CalEnergy's application for energy credits pursuant to the Energy Commission's auction; the promulgation of rules under which funding would be awarded; Energy Commission's award and CalEnergy's acceptance and use of the energy credits; and CalEnergy's accomplishment of the requisite renewable energy output and sale of electricity.

² Initially these parties represented that, because the California appropriation enabling the Energy Commission to offer renewable energy credits was fully committed, there was no renewable energy credit auction to which SS6 could apply. Subsequent to the submission of these good faith representations Senate Bill 1038 reauthorized funding for the Program.

SBCTC defends its request for a public works coverage determination on the basis of the authority of the Director set forth in 8 CCR 16001(a)(1), the existence of funding for the Program, and the absence of prejudice to CalEnergy by the issuance of a determination.

CalEnergy also asserts that, even if it does apply for and receive post-construction renewable energy credits, there is a lack of connection between the hypothetical receipt of those credits and the construction of SS6. CalEnergy argues that the energy credits are not paying and will never pay for construction of SS6.

Similarly, the Energy Commission asserts that the Project is not a public work because the purpose of the Program is not to fund construction but rather to subsidize the production of eligible renewable electricity generation. Citing *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, the Energy Commission characterizes its payments under the Account as payments for later services in the form of the production of renewable energy.

In response, SBCTC argues that the funds would be payment for construction because the stated purpose of awards from the Account is as an incentive to foster the development of new in-state renewable electricity generation technology facilities. It references an e-mail from CalEnergy officer Jonathan Weisgall, which reflects the view that receipt of a renewable energy award provides CalEnergy with an incentive to build the Project. Citing several precedential public works coverage determinations of this Department, SBCTC further argues that it makes no difference whether the Energy Commission disburses the funds before or, as here, incrementally after the construction.

In the midst of the parties' briefing over whether an award of credits to CalEnergy would cause the construction of SS6 to be a public work, Governor Gray Davis signed Senate Bill 1078 into law on September 12, 2002. The Bill, which amended the Public Utilities Code ("PUC"), provides in section 399.14, subdivision (h):

Construction, alteration, demolition, installation and repair work on an eligible renewable energy resource that receives production incentives or supplemental energy payments pursuant to section 383.5, including, but not limited to work performed to qualify (sic), receive, or maintain production incentives or supplemental energy payment is "public works" for the purposes of Chapter 1

(commencing with Section 1720) of Part 7 of
Division 2 of the Labor Code.

On September 23, 2002, this Department solicited the parties' positions as to what, if any, effect this amendment to the PUC has on the public works status of SS6.

In its submission, SBCTC asserts that the plain language and legislative analysis and testimony concerning SB 1078 put to rest the argument that the timing of the energy credit payments are evidence that they subsidize operation and not construction. Under the new law, if a developer is awarded energy credits, the construction of the Project is a public work for which prevailing wages must be paid.

In response to the Department's request, CalEnergy reiterates its previous argument that a public works coverage determination is premature because the proposed Project is currently not eligible for and has not requested any production incentives or energy payments.

The Energy Commission's submission states that the amendment "raises more questions than it answers," including the question of the liability for prevailing wages on the construction of the Project before CalEnergy has applied for and received payments from the Account.³

At the request of this Department, the parties met on November 12, 2002 with counsel for the Director to discuss the Director's tentative analysis and remaining questions concerning the public works coverage status and enforcement of any prevailing wage obligations concerning SS6. At the close of the meeting, the parties were allowed to submit final briefing, which all parties did by December 20, 2002.

CalEnergy's submissions note that Labor Code section 1741 authorizes the Labor Commissioner to serve on a contractor a civil wage and penalty assessment ("CWAPA") within 180 days of

³ The Energy Commission also noted in its submission that PUC section 383.5(d)(2)(D) requires generators to sell the electricity from their facilities to the rate-paying customers of PG&E, Edison, and SDG&E in order to be eligible to compete for or receive the energy credits from the Account. CalEnergy has mentioned that it may sell its generation from SS6 to the Imperial Irrigation District. As with the finding that CalEnergy must receive public funding in order for SS6 to be considered a public work, if CalEnergy does not sell its output to customers of PG&E, Edison and SDG&E, it will be ineligible to compete for or receive funds from the Account. In that case, it would appear that the Project would not be a public work under PUC section 399.14(h).

the filing of a valid notice of completion of a project. CalEnergy contends that, even if PUC section 399.14(h) requires the payment of prevailing wages on SS6, such obligations are unenforceable if the credits are awarded and/or received after the 180-day statute of limitation has expired. CalEnergy therefore urges this Department to abstain from issuing a coverage determination because there would be no remedy available at this time.

In its submission, the Energy Commission also requests the Department to refrain from providing advice regarding enforcement at this time because of current uncertainty concerning the operational design of the Program.

SBCTC's submission addresses, among other issues, the meaning of PUC section 399.14(h) and the enforcement of prevailing wages under it. With regard to the first issue, SBCTC argues that the plain language of the section eliminates the need for an inquiry whether the productive incentive payments will pay for construction. So long as the construction is "on" a covered project, including before the receipt of any payments, prevailing wages are required. There is, according to SBCTC, no requirement under PUC section 399.14(h) that the funds even be used for construction.

Concerning enforcement of prevailing wages, SBCTC argues that the background and language of PUC section 399.14(h) should be interpreted to mean that prevailing wages are required on projects after a developer has been awarded production incentives, even though that will necessarily occur before any payments are received.

Discussion

1. Whether a Public Works Coverage Determination Should Issue at This Time.

8 CCR 16001(a)(1) provides, in relevant part, that any interested party may file with the Director a request to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed, which that interested party believes may be subject to or excluded from coverage as public work under the California Labor Code. By the use of the words, "to be performed," this regulation makes clear that the Director's authority extends to the issuance of coverage determinations that provide parties with advice whether a future project would be a public work. Indeed, such determinations are good practice in that they notify interested parties of their potential liabilities and allow them to plan accordingly.

In this case it is neither speculative nor premature to issue a public works coverage determination for SS6. The specific nature of the Project, including the identity of the generator and the potential source of public funding, are known. The previously enumerated events that have yet to take place do not preclude this determination, which is premised upon CalEnergy constructing SS6 and receiving funds from the Account for the Project.⁴

2. Whether the Project is a Public Work.

What is now Labor Code section 1720(a)(1) (as amended by statutes of 2001, chapter 938, section 2 (Senate Bill 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."

Here, it can be assumed that the construction of the Project will be done under contract between CalEnergy and a construction contractor, and that some type of contract will exist between CalEnergy and the Energy Commission concerning the receipt of any award from the Account. Further, an award from the Account is the payment of public funds because the money is held in the State Treasury. The central issue raised by the parties is whether the receipt of such funds would constitute payment for construction.

The task of reaching a conclusion on this issue was simplified by the passage of SB 1078. Under the language of PUC section 399.14(h), all that is required for a project to be deemed a public work under the Labor Code is that (1) a developer engage in one of the enumerated types of work (construction, alteration, demolition, installation and repair);⁵ (2) on an eligible renewable energy resource; and (3) that receives PUC section 383.5 production incentives or supplemental energy payments. Here, the parties do not dispute that SS6 would be construction. As a geothermal power plant that generates electricity, it constitutes an eligible renewable energy resource. Finally, if CalEnergy receives PUC section 383.5 payments, it will fulfill the third requirement. For these reasons, the Project is a public work.

⁴ Note that SBCTC's July 9, 2002 request specifically asks the Director to determine whether the Project is a public work if CalEnergy obtains an award from the Account.

⁵ PUC section 399.14(h) further defines the eligible work as including but not limited to "work performed to qualify (*sic*), receive, or maintain production incentives of supplemental energy payments."

3. Whether Prevailing Wage Obligations May Be Enforced on the Project.

While we are sympathetic to the Energy Commission's request that we refrain from opining on the enforcement aspects of this Project until the Energy Commission has promulgated regulations concerning the Program, it is nevertheless the responsibility of this Department to enforce prevailing wage obligations on public works projects in relation to which complaints are filed.

Under Labor Code section 1741, the Labor Commissioner generally has 180 days from the filing of a notice of completion to issue a CWAPA against a contractor who has failed to comply with prevailing wage obligations. The particular issue in this case is whether the receipt of any payments from the Account after 180 days from the filing of a notice of completion of the construction of SS6 renders the prevailing wage obligations on the Project unenforceable. For the following reasons, we find that it does not.⁶

The language in PUC section 399.14(h), which includes within the type of work for which prevailing wages must be paid, "work performed to qualify [for][or]receive...production incentives" anticipates that public work is deemed to occur before any production incentive payments are received. Accordingly, this section is interpreted to require prevailing wages on work enumerated in this section after production incentives have been awarded, not only after they are paid. In addition to being a well-reasoned interpretation of the language of the statute, such an approach is consistent with the way public works projects commonly take place. In the case of a developer, for example, who has contracted with an awarding body for the construction of a public works project, the fact that the awarding body may not pay the developer until after the completion of the project does not insulate the project from prevailing wage obligations because the public funds have not yet been paid to the developer. As here, that the developer has the expectation of the payment of public funds pursuant to agreement with the awarding body is sufficient to trigger prevailing wage obligations.

Conclusion

In summary, a public works coverage determination regarding SS6 may properly be issued at this time. The Project is a public work for which prevailing wages must be paid should CalEnergy be awarded energy credits under the PUC. Finally, prevailing wage

⁶ This determination does not address any recourse a worker may have to enforce prevailing wages independent of the Labor Commissioner's enforcement mechanism.

Letter to Katherine S. Poole, Esq.
Re: Public Works Case No. 2002-043
Page 8

obligations attach and may be enforced on the Project upon the award of such credits.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Chuck Cake

Chuck Cake
Acting Director

000634