STATE OF CALIFORNIA GRAY DAVIS, *GOVERNOR*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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March 4, 2003

Robert E. Jesinger, Esq.
Wylie, McBride, Jesinger, Sure & Platten
2125 Canoas Garden Avenue, Suite 120
San Jose, California 95125

Re: Public Works Case No. 2002-064
Off-Site Fabrication by Helix Electric
City of San Jose/SJSU Joint Library Project

Dear Mr. Jesinger:

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 workers employed by Helix Electric ("Helix") to perform off-site fabrication for the San Jose State University Joint Library Project ("Project") are deemed to be employed upon public work. This determination, however, shall not be enforced retroactively on this or other applicable projects advertised for bid prior to the date this determination is posted on the Department's web site.

Facts

The City of San Jose and San Jose State University have entered into an arrangement to jointly construct and operate the Dr. Martin Luther King, Jr. Library. The Library, hailed as the first of its kind in the United States, will be a 475,000+ square-foot building, consisting of eight floors plus a mezzanine and a lower level. The total cost of the Project is $177.5 million, to be paid by multiple funding sources. The City is contributing $70 million, the State $86 million and the University $5 million, leaving $16.5 million to be contributed by private sources.

The prime contractor for the Project is Hensel Phelps Construction Co. ("Hensel"), which awarded the electrical subcontract to Helix. The subcontract includes "Section E Special Provisions for San Jose Joint Library Project and California Public Works Projects," which incorporates the provisions of California Labor Code sections 1771, 1775, 1776, 1777.5, 1813 and 1815 into the Subcontract Agreement. (*Id.*, para. 45.) It further requires Helix, prior to receiving final

payment, to sign an affidavit that it has paid the specified prevailing wages to its employees on the Project (*Id.*, para. 46) and to indemnify the contractor for any violations by Helix of the Labor Code's prevailing wage requirements. (*Id.*, para. 47.) Thus it is undisputed that the Project is a public work.[1]

The dispute in this case concerns the off-site work done by Helix on the Project. There is substantial disagreement regarding the nature and scope of this work, as well as general industry practices. According to Local 332, International Brotherhood of Electrical Workers ("IBEW"), the standard work process used by 99 percent of electrical contractors over the last 50 years entails assembly of purchased conduit, wire, transformers, lights and associated materials at a project site:

> For instance, a panel must be assembled so that the wires leading into and out of the panel all eventually run to the appropriate locations in the structure. Thus, the panel itself, as well as the wires going to and from it, would be assembled at the site of construction, the wires each cut and connected at the site, and the wires then run to a prescribed length and cut at their next connection point in the structure. In addition, in a typical construction project such as this, the conduit supports are measured and cut to the size in the field - the switches and receptacles are wired in the field, etc. (Wylie, McBride, Jesinger, Sure & Platten letter of August 14, 2002 ("IBEW Request"), p. 2.)

IBEW contends, however, that the work process utilized by Helix on the Project differs substantially from the practices of other electrical contractors:

> Instead, Helix Electric is taking work that has invariably been performed at the site of construction, and having such work transferred to its shop in San Diego to maximize to a degree that has never been reached before the amount of off-site work. This off-site activity is in no way the production of generic components of an electrical system which could be used in any given project.

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[1] As construction done under contract and paid for with public funds, the Project also constitutes a public work under what is now Labor Code section 1720(a)(1).

> Instead, the "production" processes utilized by Helix in its San Diego shop involve taking directly from the architectural plans of this project, the precise specifics of each and every component of the electrical system that must be fabricated in order to fit into the project, measuring how each such component will be assembled . . ., and having each point of assembly of panels, pipe bends, raceway trapezes, raceway ceiling rack supports, receptacle plates, fixture whips, and even down to the lengths of wire, precut and specially fashioned and assembled for installation at this project only. (*Ibid.*)

Helix disputes IBEW's characterization of the off-site work on the Project. Helix submitted a declaration by Dan Zupp, Vice President of its Buildings Division. According to Zupp, that division has been in business for over seven years and has fabricated and sold electrical systems for dozens of customers over that period. (Zupp Declaration, p. 2, para. 5.) Zupp adds:

> The Division has a permanent staff of mechanics and welders and numerous machines and a machine shop that creates fabricated electrical systems. It has a catalogue of products that it creates in the normal course of business. . . . Contrary to the union's assertions . . . the components assembled at the Division could be used for virtually any Helix project as is or, in a few instances, with slight modification. The products are generic and interchangeable with other projects. Less than five percent of the labor for the Project is performed at the Prefabrication Facility. (*Id.*, para. 6.)

IBEW submitted a declaration by Jay James, an IBEW organizer. James declares:

> Helix Electric supervisors keep a binder on the site with all of their prefabrication order sheets. A Helix supervisor would use the plan specifications to draw the item which was to be fabricated, along with its dimensions, on to a fabrication order form. This form would then be faxed to the Helix fabrication facility in San Diego. (James Declaration, p. 3, para. 7.)

Zupp responds, "Helix supervisors may very well have a catalogue of generic products which the Division makes." (Zupp Declaration, p. 8, para. 13.) He declares that in fact his division does have "a catalogue of products that it creates in the normal course of business. Enclosed are a few sample pages from its product catalogue . . .." (Zupp Declaration, p. 2, para. 6.)

The sample pages provided by Zupp are all headed: "Fabrication Order Form." Each contains a diagram of a specific product and blanks to be filled in, specifying such things as quantity, date needed and budgeted hours. Some of the sheets, for items such as kick-in box brackets and prefab panels, have additional blanks to be filled in specifying dimensions and/or special features. (Attachment 2 to Zupp Declaration.) Attachment 1 to the James Declaration consists of similar "Fabrication Order Forms." However, these forms are not pre-printed for particular products, but rather have a blank space in the center where apparently the person ordering the product has provided a drawing with dimensions and specifications for the product to be fabricated.

Zupp declares that sophisticated electrical contractors, both union and non-union, have for many years utilized permanent prefabrication yards to assemble many electrical components to be shipped to construction projects. (*Id.*, para. 7.) He further states that identical types of electrical components are assembled by "non-contractor electrical component prefabricators," and provides brochures from several of them. (*Id.*)

Zupp states:

> All products, whether pre-assembled by a contractor and/or by a prefabrication off-site company . . . must meet the design criteria of the plans and specifications. Most electrical specifications, if not all, are fairly generic by nature and require that all materials incorporated into the project be in accordance with UL Standards and National Electrical Code . . .. As such, a component either assembled by a contractor and/or by an industry leader in prefabricated systems . . . is essentially a "generic component" which can be incorporated on any project whether public or private. (*Id.*, p. 6, para. 10.)

The parties differ with regard to the scope of the off-site work on the Project. IBEW contends that "a very substantial portion of the work, perhaps more than 50 percent of the total work involved"

is being done off-site. (IBEW Request, p. 2.) Helix responds that "less than five percent of the total work on any given project, including [this] Project, incorporates prefabricated and/or pre-assembled products. (Zupp Declaration, p. 7, para. 11.)

Despite the disputed facts discussed above, certain facts appear to be undisputed. First, Helix does off-site fabrication of products for use in its own construction projects, and not for sale in the general market. Second, personnel at the public works job site fill out "Fabrication Order Forms," in at least some cases inserting specifications for the product being ordered. Third, Helix acknowledges that some labor for the Project was performed at its Prefabrication Facility. (Zupp Declaration, para. 6.)

Positions of the Parties

IBEW argues that the off-site fabrication work for this Project is covered by Labor Code section 1772,[2] which provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon the public work." IBEW contends:

> The language of [section 1772], combined with the utter absence of any requirement in the California Labor Code that the prevailing wage laws apply only to *on-site* work, strongly suggests that if a contractor or subcontractor is itself engaged in a public works project, then any of its employees who are engaged "in the execution" of that contract are "deemed to be employed upon public work." Although we do not argue that section 1772 means that any such employee must be deemed to be employed upon a public work, the language of this statute clearly suggests that the location of where the work is actually performed is not determinative of whether prevailing wage laws apply. (IBEW Request, pp. 3-4.)

Helix responds that, "California courts have consistently turned to the federal Davis-Bacon Act for guidance in interpreting California's prevailing wage law. This is established legal doctrine." (Shepard, Mullin, Richter & Hampton LLP letter of

[2] Subsequent statutory references are to the Labor Code unless otherwise indicated.

November 1, 2002 ("Helix Response"), p. 3.) The only court case cited by Helix is *O.G. Sansone v. Department of Transportation* (1976) 55 Cal.App.3d 434 ("*Sansone*").[3] Helix asserts that under the *Sansone* analysis, prefabrication work done at permanent off-site facilities of contractors is not covered under California's prevailing wage law.

Helix asserts that IBEW wants to redefine the scope of public works to include permanent fabrication facilities, and that "[t]his would throw the public works construction industry into practical chaos as well as legal chaos." (Helix Response, p. 4.)

Discussion

Section 1720(a) generally defines "public works" to include construction "done under contract and paid for in whole or in part out of public funds." As stated above, 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." A threshold issue in this case is whether the *Sansone* decision limits the coverage of off-site fabrication under section 1772. For the reasons discussed below, it does not.

In *Sansone*, trucking companies hauled sub-base material to a state highway construction project from locations adjacent to and established exclusively for the highway project. The material was purchased by the prime contractor, which then contracted with trucking firms to haul the sub-base to the project. The material was dumped directly onto a roadbed, where workers on the project incorporated the material into the roadbed. The trucking companies were found to be subcontractors for two principal reasons. First, the materials they delivered were acquired from third party locations adjacent to and established exclusively for the project site, and, second, the trucking companies were hired

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[3] Helix also cites several coverage determinations that cited *Sansone* in drawing a distinction between temporary and permanent off-site fabrication facilities. However, none of these cases is precedential, and Helix therefore may not rely upon them. Helix does cite two installation cases that are precedential. However, these cases also provide no support for Helix because the question presented therein was simply whether installation of prefabricated products was covered, and not whether the fabrication itself was covered. (*Lozano Caseworks, Inc./Installation of Prefabricated Cabinets*, PW 99-069 (June 26, 2000); *Valley View Elementary School/Installation of Signage by Marketshare, Inc.*, PW 99-034 (September 29, 1999).)

by the prime contractor to perform an integral part of the prime contractor's obligation under the prime contract.

In analyzing whether the trucking company was a subcontractor, the court adopted the United States Secretary of Labor's administrative interpretations of the Davis-Bacon Act's exclusion of material suppliers from statutory coverage. The court set forth three principal criteria for the denomination of material supplier. First, a material supplier must be in the business of selling supplies to the general public. Second, the plant from which the material is obtained must not be established specially for the particular contract. Third, the plant may not be located at the site of the work. Additionally, the court quoted with approval a Wisconsin case: "However, if the materials hauled were immediately utilized on the improvement, the drivers were covered regardless of the source of the material." (55 Cal.App.3d at 444, quoting *Green v. Jones*, 128 N.W.2d 1, 6.)

In *Sansone,* the issue decided was whether the trucking company was a material supplier. In this case, however, the fabrication work is done by a company that also does on-site work on the Project and is clearly a subcontractor. Additionally, *Sansone* relies on federal cases construing the Davis-Bacon Act, which has language not found in the Labor Code expressly limiting its application to the construction site. Since *Sansone* held the work in question to be covered under the more restrictive federal standard, it was unnecessary for the court to address the differences in language of the federal and state statutes. For similar reasons, the Department has occasionally followed *Sansone* in finding off-site fabrication covered.[4] However, neither *Sansone* nor Department determinations constitute precedent for the proposition that off-site fabrication by an acknowledged subcontractor is not covered unless done in a temporary or specially set up facility. Indeed, a recent precedential determination extended coverage to off-site work in a permanent general-use facility, although the work did not entail fabrication.[5]

The question whether state prevailing wage laws, particularly concerning language similar to section 1772, must be construed in conformity with the Davis-Bacon Act has not been directly

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[4] *San Diego City Schools/Construction of Portable Classrooms*, PW 99-032 (June 23, 2000).

[5] *Sacramento State Capitol Exterior Painting Project/Restoration and Hauling of Decorative Cast Iron Elements*, PW 2002-034 (July 18, 2002).

addressed by the California courts, but has been decided in several other states. For example, *Sharifi v. Young Brothers, Inc.* (Tex.App. 1992) 835 S.W.2d 221 ("*Sharifi*"), held that the Texas prevailing wage law covered truck drivers delivering materials from a contractor's storage facility to a highway construction site. The case is particularly instructive because the relevant statute, Tex. Rev. Civ. Stat. Ann. Art. 5159a, section 1, contains language virtually identical to California Labor Code sections 1771 and 1772:

> Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed, and not less than the general prevailing rate of per diem wages for legal holiday and overtime work, shall be paid to all laborers, workmen and mechanics . . . engaged in the construction of public works, exclusive of maintenance work. *Laborers, workmen, and mechanics employed by contractors or subcontractors in the execution of any contract or contracts for public works . . . shall be deemed to be employed upon public works.* (Emphasis added).

The court rejected the contractor's argument that the state statute should be interpreted in the same manner as the Davis-Bacon Act:

> The intention of the Legislature must be ascertained from the language of the statute, if possible. . . .
>
> The problem lies in the Legislature's failure to define the phrase "in the execution of any contract," which is the provision limiting the statute's coverage. Because it did not define the term "execution," a word of common usage, we must give it its ordinary and common meaning. [Citation omitted.] Black's Law Dictionary defines "execution" as "the completion, fulfillment, or perfecting of anything, or carrying it into operation and effect." Black's Law Dictionary p. 510 (5th ed. 1979). Based on this definition, we conclude that the Legislature intended that employees delivering materials to a Texas public-works construction site be included within the coverage of the Act. Young Brothers' construction contracts could not have been completed without

> materials being delivered to the work site. *Sharifi's* work was as directly related to and as essential to completion and fulfillment of the contracts as the work of employees using the materials at the job site.
>
> Young Brothers asserts, however, that article 5159a should be construed in the same manner as the federal Davis-Bacon Act, which requires contractors to pay prevailing wage rates to employees "employed directly upon the site of the work." See 40 U.S.C. § 276a (West 1986). . . .
>
> When a federal statute is adopted in a statute of this state, a presumption arises that the Legislature knew and intended to adopt the construction placed on the federal statute by federal courts. [Citation omitted.] This rule of construction is applicable, however, only if the state and federal acts are substantially similar and the state statute does not reflect a contrary legislative intent. [Citations omitted.]
>
> After comparing the two statutes, we conclude that their coverage provisions are not substantially similar and that the Legislature clearly intended to broaden the coverage of article 5159a when it selected the phrase "in the execution of any contract" rather than the phrase "employed directly upon the site of the work" found in the federal Act. The federal Act is by its plain language more restrictive in its coverage than the Texas Act. Under the circumstances, we must determine and follow the intent of the legislature when it adopted a statute with obviously broader coverage. (*Sharifi, supra,* 835 S.W.2d at 222-223.)

In *Everett Concrete Products, Inc. v. Department of Labor and Industries* (1988) 748 P.2d 1112, 109 Wn.2d ("*Everett Concrete*"), the Washington Supreme Court used a similar analysis in holding that its state's prevailing wage law applied to off-site fabrication of products "specially made" for a particular public works project. The project in question was the construction of a tunnel for an interstate highway in Seattle. Because the earth at the tunnel site was loose and could not be excavated by traditional methods, the prime contractor designed and utilized concrete tunnel liners to provide a supportive ring in the tunnel

during excavation. The prime contractor contracted Everett Concrete Products ("ECP") to manufacture the tunnel liners. ECP agreed to manufacture 30,000 lineal feet of liners in accordance with measurements specified by the prime contractor and the Department of Transportation. ECP manufactured the liners on special forms built to meet the size and measurement requirements of the tunnel. The liners were manufactured at ECP's plant in Everett, and were delivered to the project site by trucking companies contracted by the prime contractor. (*Everett Concrete, supra,* 748 P.2d at 1112-1113.)

Upon inquiry by a labor organization, the Department of Labor and Industries determined that the prevailing wage law applied to the work done by ECP. ECP challenged the determination, which was upheld by an administrative law judge. ECP appealed directly to the State Supreme Court. The Court engaged in *de novo* review, while according substantial weight to the agency interpretation. (*Id.* at 1113.)

The relevant statute, RCW 39.12.020, provided in part that: "The hourly wages to be paid to laborers, workmen or mechanics, *upon all public works* . . . shall be not less than the prevailing rate of wage . . . .." (Emphasis supplied.) The Court began its analysis by recognizing that the prevailing wage law was remedial and should be construed liberally to carry into effect the purpose of the statute. The Court found, as with the Davis-Bacon Act, that purpose was "to provide protection to local craftsmen who were losing work because contractors engaged in the practice of recruiting labor from distant cheap labor areas." (*Everett Concrete, supra,* 748 P.2d. at 1114, quoting *Southeastern Washington Building & Construction Trades Council v. Dept. of Labor & Industry* (1978) 586 P.2d 486, 91 Wash.2d 411, 415.) The Court held that, "This purpose will be served by extending the application of RCW 39.12 to off-site manufacturers involved in public works by preventing contractors from parceling out portions of the work to various off-site manufacturers as a means of avoiding the prevailing wage requirement." (*Ibid.*)

The Court also recognized the cannon of statutory construction that "when the legislature of a state adopts a statute which is identical or similar to one in effect in another state or country, the courts of the adopting state usually adopt the construction placed on the statute in the jurisdiction in which it originated." (*Ibid.*, quoting 2A N. Singer, *Statutory Construction* 52.02 (4th ed. 1984).) While noting that Washington's prevailing wage law is based on the Davis-Bacon Act,

the Court also noted that the state law was not identical to Davis-Bacon in that it did not contain the phrase "mechanics and laborers employed *directly* upon the site of the work" found in 40 U.S.C. 276a." (*Everett Concrete, supra*, 748 P.2d at 1115, emphasis provided by the Court.) The Court therefore concluded that it "need not adopt the construction placed on a similar statute in another state if the language of the statute in the adopting state is substantially different from the language in the original statute." (*Ibid.*, citing Singer, *supra*.) "[A] provision of the federal statute cannot be engrafted onto the state statute where the Legislature saw fit not to include such provision." (*Ibid.*, quoting *Nucleonics Alliance, Local 1-269 v. WPPSS* (1984) 677 P.2d 108, 101 Wn.2d 24, 34.) The Court held that the omission of the word "directly" from the state statute "leads to the conclusion that the Legislature intended the scope of the state prevailing wage law to be broader than that of the Davis-Bacon Act." (*Ibid.*)

The Court quoted with approval a 1967 Attorney General's Opinion, which states:

> The requirement of chapter 39.12 RCW that the "prevailing rate of wage" be paid to laborers, workmen or mechanics upon all public works of the state, or any county, municipality or political subdivision, is applicable to labor performed in an off-the-job-site prefabrication by employees of the prime contractor, subcontractor, or other persons doing or contracting to do the whole or any part of the work contemplated by the contract, provided that the prefabricated "item or member" is produced specially for the particular public works project and not merely as a standard item for sale on the general market. (*Ibid., quoting* AGO 15, at 10.)

The Court concluded:

> RCW 39.12.020 provides that prevailing wages must be paid to workers "upon all public works." This language must be construed to require application of the prevailing wage requirement to off-site manufacturers, when they are producing nonstandard items specifically for a public works project. In this way the use of cheap labor from distant areas is avoided and the purpose of RCW 39.12 is not circumvented. (*Everett Concrete, supra*, 748 P.2d. at 1118.)

The Montana Attorney General has similarly concluded that off-site fabrication is covered by that state's prevailing wage law. The Montana Commissioner of Labor and Industry had determined that "the Montana prevailing wage statute has the same geographical scope of work coverage as the Secretary of Labor's regulations defining the term 'site of the work' under the Davis-Bacon Act." (47 Opinions of the Montana Attorney General, Opinion No. 12 (March 31, 1998).) In its opinion, the Attorney General rejected that interpretation:

> The 1931 Montana statute was comparable to the Davis-Bacon Act in its original form insofar as the state law used the terms "construction, repair and maintenance" in describing the general scope of the public contracts covered and did not limit the employees covered to those performing work directly on the project site. The legislature has never adopted the "employed directly upon the site of the work" language added to the federal act in 1935. A 1975 amendment to the Montana statute does require employers to post statements of prevailing wages "in a prominent and accessible site on the project or work area," but, as the disjunctive "or" suggests, the term "work area" may include areas other than a construction project itself. 1975 Mont. Laws ch. 531, § 1 (codified at Mont. Code Ann. § 18-2-406).
> . . .
>
> As presently codified in § 18-2-403(2), the prevailing wage requirement extends to any "public works contract" without the limiting site-specific language of the Davis-Bacon Act. Although the 1931 legislature may have intended the state statute to have the same general scope as the federal act, both laws have undergone substantial modification over the nearly 70 years since their enactments and now bear little resemblance to one another except to the extent each is directed at requiring that certain minimum wage levels be paid for work under particular classes of government contracts. . . .
>
> I recognize that the Commissioner of Labor and Industry has concluded the prevailing wage requirement extends only to construction services performed at the job site or nearby property. The Commissioner's interpretation of a statute

> committed to her agency's enforcement often is entitled to substantial deference. . . . Nevertheless, here a literal reading of § 18-2-403(2) does not support a job-situs limitation, and I therefore decline to defer to the Commissioner's construction of § 18-2-403(2)(b). . . . I cannot supply a restriction unsupported by the language of the law itself. . . .
>
> Finally, no reasonable dispute exists that a contractor's off-site fabrication of items for on-site installation constitutes "construction" within the scope of the term "construction services." Even on the most basic definitional level, such activity involves "[t]he process or art of constructing; the act of building; erection; the act of devising and forming; fabrication; composition." Webster's II: New Riverside Univ. Dictionary (1988) <http://www.nbc-med.org/dictionary.html>. (*Id.*)

For these reasons, the opinion concluded that:

> The prevailing wage requirements in Mont. Code Ann. § 18-2-403(2)(b) apply to fabrication of materials performed off-site by a contractor for installation or use at the site of construction under a public works contract. The prevailing wage district with respect to such off-site services is the district where the on-site construction occurs. (*Id.*)[6]

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[6] There is also a federal case in accord with the above state opinions. In *Griffin v. Reich* (D.R.I. 1997) 956 F.Supp. 98 ("*Griffin*"), the court addressed the scope of coverage under the Housing Act of 1937, 42 U.S.C. sections 1437 *et seq.* 42 U.S.C. section 1437j provides that Davis-Bacon prevailing wages "shall be paid to all laborers and mechanics *employed in the development of the project.*" (Emphasis supplied.) The Housing Act thus does not expressly limit coverage to work directly on the site of the public work, as does Davis-Bacon.

In *Griffin*, Phoenix-Griffin Group II, Ltd. and the Providence Housing Authority entered into a contract for the construction of 92 units of scattered site, low-income housing. Phoenix-Griffin contracted with a subcontractor, who used an off-site facility to construct sections of the housing units being built, which were then transported to the scattered sites for installation. The Housing Authority, on the advice of HUD, took the view that the off-site work was not covered so long as it was not performed at "a temporary plant set up elsewhere to supply the needs of the project and dedicated exclusively, or nearly so, to the performance of the contract or project." (*Id.* at 101.)

Sharifi, *Everett Concrete* and the Montana Attorney General Opinion provide persuasive authority for the proposition that coverage of off-site fabrication under California law cannot be limited to the scope of the Davis-Bacon Act. All three adhere to the literal language of their states' prevailing wage laws in concluding that coverage is not limited to the site of the public works project. All conclude that the state law cannot be limited to the scope of Davis-Bacon when the state language is more inclusive. The Montana Attorney General went so far as to reject the interpretation of the Commissioner of Labor and Industry, even while acknowledging that her interpretation of a statute committed to her agency's enforcement was entitled to substantial deference, because he could not supply a restriction not supported by the language of the statute.

California courts have similarly recognized that they must accord substantial deference to the Director of DIR in interpreting the California prevailing wage law. *See International Brotherhood of Electrical Workers v. Aubry* (1996) 41 Cal.4th 1632, 1638, 49 Cal.Rptr.2d 759. However, here as in Montana, such deference does not extend to importing into the statute an on site restriction that is not supported by its language. California law, like that of Texas, Washington and Montana, does not limit coverage to the site of the public works project, and it would be

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Subsequently the Wage and Hour Division of the Department of Labor determined that prevailing wages should have been paid for the off-site work and issued findings of violations, which were the subject of a hearing before an administrative law judge ("ALJ"). The ALJ upheld the Wage and Hour Division's determinations, finding that the off-site work was subject to prevailing wages, in part because the workers were "employed in the development of the project" within the meaning of the statute. The Wage Appeals Board later affirmed that part of the ALJ's decision. The matter was appealed to the federal district court, which held that:

> [B]y statute, the Department of Labor is the final arbiter of the Housing Act's interpretation with respect to Davis-Bacon coverage. See Reorg. Plan No. 12 of 1950; 42 U.S.C. 1437(j) (1994). The interpretation of the Department of Labor, which is based on the plain language of the Housing Act, does not contravene clear Congressional intent. Moreover, even if the statute were viewed as somehow unclear, such an interpretation is not "impermissible." Therefore, the interpretation set forth by the Department of Labor is the controlling one. (*Id.* at 105.)

erroneous to construe it as doing so.[7] Here, as in Texas, under Section 1772, coverage extends to workers employed by contractors or subcontractors in the execution of a contract for public work, and is not limited to the site of the public works project.

Here as in Washington, one of the purposes of the prevailing wage law is to "protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas." *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987, 4 Cal.Rptr.2d 837. Here as in Washington, that purpose is served by requiring payment of prevailing wages for off-site fabrication performed in the execution of a contract for public work.

Everett Concrete articulated a reasonable test for coverage of off-site fabrication: The work is covered if the prefabricated item or member is produced specially for the public works project; it is not covered if the item fabricated is merely a standard product for sale on the general market. Such a test fits well with the language of Section 1772.

Accordingly, the following test for coverage of off-site fabrication under Section 1772 is adopted: Workers employed by contractors or subcontractors are employed in the execution of a contract for public work when they are engaged in the off-site fabrication of items produced specially for the public works project and not for sale on the general market. In this case, there is no question that the items prefabricated by Helix employees are produced specially for the Project because Helix does not produce items for sale on the general market. Indeed, Helix pointedly differentiated electrical contractors such as itself that prefabricate items for their own projects from "non-contractor electrical component fabricators" that produce items for sale on the general market.[8]

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[7] Additionally, in 2000, the Legislature amended Section 1720(a) to provide that: "For purposes of this subdivision, 'construction' includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work." This amendment is further evidence of a legislative intent that the state prevailing wage law be broader in its coverage than the federal Davis-Bacon Act.

[8] A scenario not present here is if Helix were producing items both for its own projects and for sale on the general market. Under such circumstances, the test for whether a prefabricated item is specially made for the public works project would turn on factors such as whether the item was produced in accordance with the plans and specifications of the architects and/or engineers for that project and/or the shop drawings such that the item differs

When off-site workers specially produce fabricated or prefabricated products for use in a public works project, Section 1772 requires that they be paid prevailing wages. This is in accord with the proposition recognized in California that prevailing wage laws are to be liberally construed in furtherance of their purposes. (*Walker v. County of Los Angeles* (1961) 55 Cal.2d 626, 634-635; *Cassaretto v. San Francisco* (1936) 18 Cal.App.2d 8, 10.)

While this determination clarifies the test for whether off-site fabrication is covered by California prevailing wage law, it will not be enforced retrospectively to this or other applicable projects advertised for bid prior to the date the determination is posted on the Department's web site. Accordingly, Helix will not be liable for prevailing wages or penalties for workers engaged in off-site fabrication for this Project.

Conclusion

For the foregoing reasons, prevailing wages must be paid employees of contractors and subcontractors engaged in the off-site fabrication or prefabrication of items specially produced for public works projects advertised for bid after the date that this determination is posted on the Department's web site.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Chuck Cake

Chuck Cake
Acting Director

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from a standard, generic item. Even such a standard, generic item would be considered to be produced specially for the public works project if it was modified to meet the specific requirements of that project.