

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR
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May 7, 2003

Larry Adams
Compliance Officer
Local Union No. 428
International Brotherhood of Electrical Workers
911 20th Street
Bakersfield, CA 93301

Re: Public Works Case No. 2003-008
Office Quarters Project - Department of Corrections
Bakersfield, California

Dear Mr. Adams:

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 documents submitted and an analysis of the relevant facts, it is my determination that the construction of 3400 Sillect Offices, Building A ("Project") in Bakersfield, California, is a public work subject to the payment of prevailing wages.

3416 Partners, a California General Partnership ("Owner"), owns the improved property at 3400 Sillect Avenue, Bakersfield, California.

On April 19, 2002 Owner entered into a lease agreement with the Department of General Services, State of California ("DGS") on behalf of the Department of Corrections ("Corrections") to lease approximately 13,342 square feet of Building A at 3400 Sillect Avenue, Bakersfield, California.¹ The lease was to begin November 1, 2002 and extend through October 31, 2012, with a monthly rent of \$23,665 for the first six years and \$21,348 for the second six years of the lease. The lease was amended to start February 5, 2003. The building had not been constructed at the time the lease agreement was signed.

¹ The lease states DGS is leasing approximately 13,342 square feet "on the first floor of the building located at 3400 Sillect Avenue, Bakersfield, California." The plans and specifications as well as the lease exhibits make it clear, though, that DGS is leasing Building A, and this building is a one-story building that contains approximately 13,342 square feet of office space.

According to Owner, DGS provided a space program outlining the number of offices, closets and tenant improvements to be built for occupancy by Corrections. Exhibits A, B and C to the lease set forth the DGS's required tenant improvements to be constructed by Owner's contractor.

On May 2, 2002 Owner entered into a time and materials contract with Altimus Construction ("Contractor") to construct "a new office building" at 3400 Sillect Avenue.

Prior to entering into the lease, Owner had a site plan prepared by its architect for 3400 Sillect Avenue, which shows two buildings to be built - Building A with approximately 3,142 square feet and Building B, a two-story structure, with approximately 14,000 square feet. The plans and specifications submitted by Owner show that only Building A is being built. The construction contract supports this conclusion as well as Owner's admission that it is currently seeking a loan to build Building B.

The total cost of construction was \$1,498,919. Contractor is one of the partners of Owner. A loan for \$1.5 million was obtained by Owner for construction of the building and has recently been paid.

Labor Code section 1720.2² states that:

'Public works' also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but upon completion of the construction contract, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

(c) Either of the following conditions exists:

² Unless otherwise indicated, all statutory references are to the Labor Code.

(1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

(2) The construction contract is performed according to plans, specifications or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction contract.

Applying Section 1720.2 to this case, the construction contract is between private persons - Owner and Contractor. In addition, the property (Building A) subject to the contract is privately owned by Owner, and DGS has agreed to lease 100 percent of the assignable square feet in Building A. As to the last requirement, although only one condition needs to be met, in this case both are present: the lease was entered into prior to the construction contract (Section 1720.2(b)(1)), and DGS submitted a space program as well as specifications setting forth its criteria for the build-out of the leased space as well as the surrounding landscaping and parking areas (Section 1720.2(b)(2)).

Owner argues that the Project is not a public work because it is not being paid for with public funds. It also argues that Section 1720.2 does not apply to the Project because (1) Owner is also the Contractor and therefore there is no contract between two private individuals; (2) less than 50 percent of the assignable square feet is being leased to the state; and (3) the plans and specifications were developed and drawn by a private architect hired and paid for by Owner. Owner's arguments are incorrect.

It is true that since the construction of the Project is not being paid for with public funds, it is not a public work under Section 1720(a)(1). However, it is a public work under Section 1720.2

Here the contract is between two separate entities. Owner is a partnership, and Contractor is a separate business organization. The fact that Contractor is also a general partner of Owner does not change the fact that the construction contract is between two separate legal entities under Section 1720.2. Therefore, subdivision (a) of Section 1720.2 is met.

Letter to Larry Adams
Re: Public Works Case No. 2003-008
Page 4

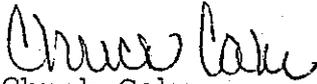
In addition, Owner argues that less than 50 percent of the assignable square footage of Buildings A and B is being leased to the state. Owner argues that the construction contract is for both buildings. This raises a factual question whether the contract was to build one or two office buildings. The time and materials contract submitted by Owner references only one building at a cost of approximately \$1.5 million. The loan obtained for construction of the Project is for \$1.5 million. In addition, Owner advises the Department that it needs to obtain a second loan to build Building B. Finally, the lease refers to Project No. 110510, which is the only project referenced in the plans and specifications drawn up by Owner's architect. Indeed, as mentioned above, the plans and specifications apply only to Building A. The combination of these facts make it clear that the contract for construction was for Building A only, and DGS is leasing 100 percent of this property. Because the facts do not support a claim that the contract was for both buildings, the assignable square footage of both buildings cannot be used in calculating the percentage of assignable square feet leased to DGS.

Finally, although the plans and specifications were drawn by a private architect paid for by the Owner, these plans and specifications incorporate the tenant improvements and criteria submitted and required by DGS under the lease (see Exhibits A, B and C to the lease). Besides, since the lease was signed prior to the construction contract, the condition under Section 1720(c)(1) is also met.

For the above reasons, the above Project is a public work under Section 1720.2, and prevailing wages must be paid.

I hope this determination satisfactorily answers your inquiry.

Sincerely,


Chuck Cake
Acting Director

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