

## DEPARTMENT OF INDUSTRIAL RELATIONS

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May 24, 2004

Stu Helfer  
Business Representative  
Teamsters Local 853  
2100 Merced Street, Suite B  
San Leandro, CA 94577

Re: Public Works Case No. 2003-041  
Installation of Underground Substructures  
City of Alameda

Dear Mr. Helfer:

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 construction in the City of Alameda ("City") of underground substructures for the installation of utilities ("Project") and work done in execution of the Project is public work. City's chartered city status, however, exempts the work from the requirement to pay prevailing wages.

**Factual Background**

Electric power for City residents is furnished by a city-owned electric utility service founded in 1887. The utility is a department of the City and administered by Alameda Power & Telecom ("AP&T") through City's Public Utilities Board.

AP&T obtains electric power from over transmission lines that are part of the California power grid. AP&T's electricity flows into City's two submarine cables, with each cable connected to a substation. The two substations are owned and operated by PG&E. From there, the power is conveyed by distribution and transmission lines to 32,850 metered locations.

City determined in 1984 that overhead utility equipment should be located underground to improve the visual appearance of City's neighborhoods. To that end, City adopted a series of resolutions establishing 28 Underground Utility Districts. Your request for a coverage determination pertains to the construction work done within Underground Utility District No. 21, pursuant to City's Resolution No. 12726, adopted December 19, 1995.

AP&T entered into a construction contract for \$697,044 with Ranger Pipelines, Inc. ("Contractor") on December 15, 2003. The scope of work encompasses labor and material to provide trenching, sidewalk and street saw cutting, sidewalk and street removal and replacement, and the installation of underground substructures. In addition to housing AP&T's electric power facilities, SBC's telephone lines and Comcast's cable lines are being installed in the underground substructures. In connection with the Project, Contractor is to arrange for off-site disposal of garbage and refuse. Presumably Contractor will employ workers to haul material in the execution of the Project.

The \$510,799 public funds to the Project are municipal funds paid out of City's set-aside of 2 percent of its annual sales revenue from both residential and commercial customers.<sup>1</sup> The construction services were rendered entirely within City limits.

### Discussion

Labor Code section 1720(a)(1)<sup>2</sup> generally defines public works to mean: "Construction, alteration, demolition, installation or repair work performed under contract and paid for in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority."<sup>3</sup> Section 1772 provides that workers employed by contractors or sub-contractors in the execution of any contract for public work are deemed to be employed upon public work.

City does not dispute that the work being performed by Contractor is construction done under contract and paid for with public funds. Consequently, the Project is a public works under Section 1720(a) subject to the payment of prevailing wages. Workers hired by the Contractor or a subcontractor to haul or dispose of materials would also be deemed employed upon public work.

The primary issue presented, however, is whether the public work Project is a municipal affair such that City's charter exempts it from prevailing wage obligations. Under Article XI, section 5 of the California Constitution, a city "may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be

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<sup>1</sup> City is charging SBC \$161,745 in connection with the conversion of their facilities, while Comcast is similarly being charged \$24,499.

<sup>2</sup> Unless otherwise indicated, all section references are to the Labor Code.

<sup>3</sup> As a municipally owned electric utility, AP&T does not come within the purview of the Public Utilities Commission, so the exemption within Labor Code section 1720(a) does not apply.

subject to general laws."<sup>4</sup> City has, by operation of Article I of its charter, availed itself of the power to make and enforce all laws and regulations in respect to municipal affairs. In an addendum to its solicitation for bids, AP&T specifically stated that prevailing wages would not be applicable to the Project.

Insofar as a chartered city legislates with regard to municipal affairs, its charter prevails over general state law.<sup>5</sup> The prevailing wage law, a general law, does not apply to the public works projects of a chartered city so long as the projects in question are within the realm of municipal affairs.<sup>6</sup> In general, the term is defined as a matter that affects the local citizens rather than the people of the state generally, whereas a matter of statewide concern extends beyond the local interests at stake.<sup>7</sup>

In *Southern California Roads Co. v. McGuire* (1934) 2 Cal.2d 115, 39 P.2d 412, the California Supreme Court set forth the following factors for determining whether a project was exclusively a municipal affair subject to the chartered city exemption: (1) the extent of non-municipal control over the project; (2) the source and control of the funds used for the project; and (3) the nature and geographic scope of the project. Application of these factors to the present case is appropriate.

1. The Extent of Non-Municipal Control Over the Project.

City has sole control over the Project. City operates the electric utility for which the construction is being done. The contract was let by City and approved by the City Attorney. No state, county or federal agency is involved in the inspection, management, or approval of the work performed under the contract.

2. The Source and Control of Funds Used for the Project.

The only public funds used to finance the Project are from AP&T. The contract provides that payments to the contractor will be drawn on City's treasury.

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<sup>4</sup> Article XI, section 9(a) of the California Constitution provides: "A municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication."

<sup>5</sup> *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 315, 152 Cal.Rptr. 903, 914.

<sup>6</sup> *City of Pasadena v. Charleville* (1934) 215 Cal. 384, 10 P.2d 745; *Vial v. City of San Diego* (1981) 122 Cal.App.3d 346, 175 Cal.Rptr. 647.

<sup>7</sup> 66 Ops.Cal.Atty.Gen. 266, 271-72.

3. The Nature and Purpose of the Project.

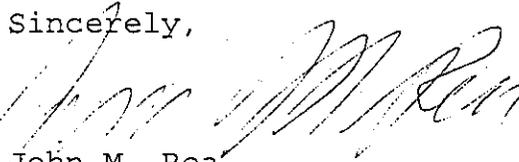
All construction work on the Project is being done entirely within City.<sup>8</sup> Although AP&T purchases electric power on the open market, rather than generating power from its own sources, electricity is consumed locally by residents and businesses within City.<sup>9</sup> AP&T does not sell power to consumers outside City. According to functional criteria embodied in regulations issued by the Federal Energy Regulatory Commission, AP&T is a local, rather than regional, utility system.

As a municipal utility, AP&T's rates, charges and services are controlled exclusively by City's Public Utilities Board. Although electrical power is conveyed to City on power lines that are part of the national power grid, the only beneficiaries of this Project appear to be the citizens of City. A power outage due to equipment failure in facilities owned and operated by AP&T would only affect AP&T customers within City.

Conclusion

Based on the above, I find that this public works project falls within the ambit of a municipal affair of City and does not involve a matter of statewide concern within the domain and regulations of the general laws of the state.<sup>10</sup> Accordingly, the Project is not subject to prevailing wage requirements.

Sincerely,



John M. Rea  
Acting Director

<sup>8</sup> Although the Project specifications require the hauling of excess soil and material to destinations outside City, this minor and incidental aspect of the work does not detract from the municipal nature of the Project, with all permanent improvements being installed within the boundaries of City.

<sup>9</sup> AP&T's purchase of power from sources outside the City must be considered incidental to its primary municipal purpose, following *City of South Pasadena v. Pasadena Land and Water Co.* (1908) 152 Cal. 579, 93 P. 490.

<sup>10</sup> In *City of Long Beach v. Dept. of Industrial Relations*, (Case No. B159333, review granted) the California Court of Appeal held that the prevailing wage law addresses matters of statewide concern. The consequence of that decision is that chartered cities can never assert their constitutional exemption from the payment of prevailing wages in purely municipal affairs. The California Supreme Court has, however, granted review of the decision (Case No. S118450), and its ruling will only be enforced prospectively on other projects.