

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL
RE: PUBLIC WORKS CASE NO. 2002-096

REQUEST FOR PROPOSALS: PLANTING, OPERATION, MAINTENANCE AND
MONITORING OF OWENS LAKE SOUTHERN ZONES MANAGED VEGETATION
PROJECT

LOS ANGELES DEPARTMENT OF WATER AND POWER

I. INTRODUCTION

The undersigned, having reviewed the administrative appeal filed by Barnard Construction Company, Inc./Owens Lake Farm Management Team ("OLFMT"), said appeal is granted only as to one issue concerning the inspection, testing and monitoring work, as explained below. Said appeal is otherwise hereby denied for the reasons set forth in the initial coverage determination ("Determination") dated June 1, 2005, which is incorporated by reference herein, and for the additional reasons set forth below.

II. FACTS

The facts as set forth in the Determination are incorporated by reference herein. Additional facts are provided only to address the arguments raised on appeal concerning the inspection, testing and monitoring work, as well as the repair and maintenance work.

During the soil reclamation work, OLFMT is required to monitor and inspect the irrigation of the planting beds and the moisture of the soil and to assess bed compaction and water movement. Soil analysis is performed to monitor the salinity and nutrient content of the soil. (Task Orders 3.04, 3.04.03.)

During the transplantation of the salt grass plugs, OLFMT is required to monitor and inspect the location of the salt grass plugs in relation to the drip tubes, the depth of the planted salt grass plugs, and plant mortality. Soil analysis is performed to monitor soil nutrient levels. (Request for Proposals, November 5, 2001 - Attachment F; Task Orders 2.00, 2.04.01, 2.04.02.) This monitoring and inspection work is required because the transplanted salt grass plugs have a high mortality rate. Many of the plugs had to be replanted by hand.

After the soil reclamation and transplantation work is completed, OLFMT is required to do the following: periodic plant monitoring for mortality rates, pests and disease; periodic plant nutrient analysis; annual soil analysis including fertility, nutrient and toxic chemical levels; periodic root depth analysis; monitoring of irrigation and water quality including water flow, ground water levels, surface water levels, drain and irrigation flows; salinity and chemical analysis of all ground, surface and drain water; monitoring of soil settling, berms, roads and turnouts; monitoring of irrigation system controls; environmental monitoring for rare plants, exotic pest plants and plant health; piezometer readings for well depth; and inspection of eye wash stations. (Request for Proposals, November 5, 2001 - Attachment F; Task Orders 3.06, 3.06(a), 3.06.02, 3.13.)

OLFMT is required generally to maintain and/or repair the Owens Lake Southern Zones Managed Vegetation Project facilities, which include the managed vegetation fields; shallow flooding, drainage, drip and irrigation systems; pipelines; pumping stations; eye wash stations; water storage ponds; access roads and berms; and utilities. (See

Request for Proposals, November 5, 2001 - Section 2, Facilities Description, p. 2-1; Task Orders 3.03.03, 3.04(a), 3.07, 3.12.) Robert Wheatley, a member of OLFMT's personnel, is specifically assigned to "serve as the irrigation and drainage mechanic" for the purpose of "maintaining the system and provide [sic] technical expertise as required for repairs and enhancements to the system." (Task Order 3.12, p. 3.) In addition to the above periodic maintenance and repair, OLFMT is required to perform emergency repairs or provide temporary measures when necessary "to maintain an operational irrigation system and avoid loss of plants." (Task Order 3.07, p. 1.)

III. DISCUSSION

A. TRANSPLANTATION OF THE SALT GRASS PLUGS AT THE LAKEBED, INCLUDING SOIL RECLAMATION, IS ALTERATION WITHIN THE MEANING OF LABOR CODE SECTION 1720(a)(1)^[1].

OLMFT contends that the transplantation of the salt grass plugs is not alteration under section 1720(a)(1). As stated on page four of the Determination, this work involves the following: "preparation of the planting area, including shaping, tillage, scalping and compaction, as well as digging of the soil in the planting of the salt grass plugs."

"To 'alter' is merely to modify without changing into something else," and that term applies "to a changed condition of the surface or the below-surface." *Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 756. "Alter" as defined by Webster's Third New International Dictionary (2002) at page 63 is "to cause to become different in some particular characteristic (as measure, dimension, course,

^[1] Unless otherwise indicated, all statutory section references are to the Labor Code.

arrangement, or inclination) without changing into something else." Thus, with regard to land, under these definitions to alter under section 1720(a)(1) is to modify a particular characteristic of the land. Here, the soil of the dry lakebed is being shaped, tilled and scalped to form a planting area. Then, the salt grass plugs are machine- and hand-planted into the planting area. The transplantation of the salt grass plugs will modify the land, creating an area of vegetation where previously there was none. A particular characteristic - the salt grass plugs - will be added so that the land no longer is a dry lakebed and a constant source of dust pollution. Therefore, the transplantation of the salt grass plugs, including soil reclamation, constitutes alteration within the meaning of section 1720(a)(1).

OLFMT argues that the transplantation of the salt grass plugs is not alteration under section 1720(a)(1) because it is not being done as part of a construction-related activity, citing *Priest v. Housing Authority of Oxnard*, *supra*, 275 Cal.App.2d 751. OLFMT misreads *Priest*. OLFMT's argument is explicitly rejected by *Priest*, which states the following:

While, in connection with a building, one ordinarily thinks of "alteration" as being a modification or addition to it, such a limited meaning has not been here provided by the Legislature. The section does not refer to alteration of a "building" or "structure"; for aught that appears the term may, as well as not, apply to a changed condition of the surface or the below-surface.

(*Id.* at p. 756 (emphasis added).)

Consistent with *Priest*, the Attorney General has also interpreted the word "alteration" in section 1720(a)(1) to

include work performed outside the context of construction. In 1981, the Attorney General found that the dumping and spreading of refuse in a landfill constituted alteration of land, and thus a public work. (64 Ops.Cal.Atty.Gen. 234 (1981).)

Therefore, under the authority cited, there is no requirement in the definition of alteration that limits coverage of alteration work to construction. Here, as explained above, the transplantation of the salt grass plugs, including soil reclamation, involves a "changed condition of the surface or the below-surface" and although there is no construction involved, it nonetheless meets the definition of "alteration" within the meaning of section 1720(a)(1).

B. INSPECTION, MONITORING AND TESTING WORK PERFORMED IN THE EXECUTION OF THE PUBLIC WORK OF ALTERATION IS ALSO PUBLIC WORK WITHIN THE MEANING OF SECTIONS 1771, 1772 AND 1774.

OLMFT argues that coverage of inspection under section 1720(a)(1) is limited to work performed during the design and preconstruction phases of construction. Because none of the inspection work in this matter occurs during the design or preconstruction phases of construction, OLFMT argues that this work does not meet the definition of public work. The merits of OLMFT's argument under section 1720(a)(1) need not be addressed because this inspection and monitoring work is directly related to the prosecution of the public work of alteration and is necessary for its completion, and thus prevailing wages are required under sections 1771, 1772 and 1774.

Section 1771 generally requires the payment of prevailing wages to all workers employed on public works. Section 1720(a)(1) defines a public work in pertinent part as: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds" Section 1772 states that "[w]orkers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." Finally, under section 1774 such contractors or subcontractors "shall pay not less than the specified prevailing rates of wages to all work[ers] employed in the execution of the contract."

As explained above, the transplantation of the salt grass plugs, including soil reclamation, is alteration and therefore public work under section 1720(a)(1). In performing the alteration, OLMFT is required to inspect, test and monitor the soil, the irrigation system, the planting beds and the planted salt grass plugs. This is done because the plant mortality rate is high. The inspection, testing and monitoring work occurs during the transplantation of the salt grass plugs, including soil reclamation. Therefore this inspection and monitoring work is directly related to the prosecution of the public work of alteration and necessary for its completion. Thus, said inspection, testing and monitoring work is performed in the execution of a public work of alteration and requires the payment of prevailing wages.

C. INSPECTION, TESTING AND MONITORING WORK PERFORMED AFTER THE COMPLETION OF THE PUBLIC WORK OF ALTERATION IS NOT PUBLIC WORK WITHIN THE MEANING OF EITHER SECTION 1720(a)(1) OR SECTIONS 1771, 1772 AND 1774.

The inspection, testing and monitoring work that occurs after completion of the alteration is not a public work under sections 1720(a)(1), 1771, 1772 and 1774.

Whether section 1720(a)(1) only covers inspection during the design and preconstruction phases of construction, as OLFMT argues, or also covers inspection during the construction phase is irrelevant. Section 1720(a)(1), by its plain meaning, does not cover inspection that occurs after the public works undertaking is completed. In other words, section 1720(a)(1) does not cover stand-alone inspection. Accordingly, under the facts of this case, the inspection, testing and monitoring work that occurs after the completion of the public work of alteration does not meet the definition of public work under section 1720(a)(1).

Furthermore, because the inspection, testing and monitoring work at issue here occurs after completion of the alteration, it is not directly related to the prosecution of the public work of alteration and necessary for its completion. Therefore, the inspection, testing and monitoring work is not performed in the execution of a public work under sections 1771, 1772 and 1774.

In sum, the inspection, testing and monitoring work that occurs after completion of the alteration is not subject to the payment of prevailing wages.

D. COVERAGE UNDER CALIFORNIA PREVAILING WAGE LAW IS NOT DEFEATED BY LABELING AS "OPERATIONAL" WORK THAT OTHERWISE MEETS THE DEFINITION OF PUBLIC WORK.

Work that meets the definition of public work and does not fall within a statutory exemption is covered under California prevailing wage law. OLFMT argues generally that none of the work here is covered because it constitutes "ongoing operational work" relying on *Reclamation District No. 684 v. State Department of Industrial Relations* (2005) 125 Cal.App.4th 1000. OLFMT's reliance is misplaced. The district in *Reclamation District* made a similar argument, which was rejected by the court. The court held that the rehabilitation of the Natali levee was "maintenance" and therefore public work, and not operations.

OLFMT specifically objects to the finding of coverage for repair and maintenance work in the Determination, arguing that this work is merely "incidental" to operations. Applying the court's reasoning in *Reclamation District*, "operations" does not subsume work that otherwise meets the definition of public work, either as repair under section 1720(a)(1) or as maintenance under section 1771 and California Code of Regulations, title 8, section 16000. And, there is no exception under California prevailing wage law for "incidental" repair or maintenance work. Moreover, that the Task Orders require the employment of a dedicated mechanic for ongoing periodic and emergency repair and maintenance belies the suggestion that this work is merely incidental.

Finally, OLFMT argues that the exception from coverage found in section 1720(a)(2) applies. Section 1720(a)(2) provides as follows:

"Public works" means: ... Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" does not include the operation of the irrigation or drainage system of any irrigation or reclamation district

The exception contained in this section is not available to OLFMT because the Department of Water and Power is not an irrigation or reclamation district. Even if the Department of Water and Power were an eligible district, section 1720(a)(2) would still not apply because operations is limited to the day-to-day running of the irrigation and drainage system, such as turning valves, which is frequently done by employees of the public entity, as explicitly stated in *Reclamation District No. 684 v. State Department of Industrial Relations, supra*, 125 Cal.App.4th 1000, 1006. To the extent there is work involved here that solely entails the turning of valves, that type of work is exempt as operations. And, consistent with this, the Determination found that operation of the drainage and irrigation systems is not public work.

E. THE REQUEST FOR HEARING IS DENIED.

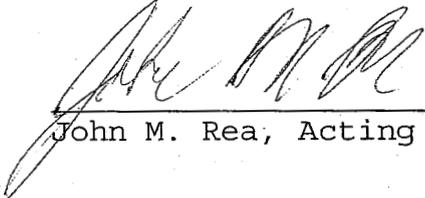
In its appeal, OLFMT requests a hearing. California Code of Regulations, title 8, section 16002.5(b) provides that the decision to hold a hearing is within the Director's sole discretion. Because the issues raised in the appeal are purely legal ones and the material facts are undisputed, no factual issues need to be decided and no hearing is necessary. This appeal is, therefore, decided on the basis of the evidence submitted, and the request for hearing is denied.

IV. CONCLUSION

For the foregoing reasons, with the exception noted herein, the initial Determination is affirmed. The portion of the Determination finding all inspection, testing and monitoring to be public work is reversed. The inspection, monitoring and testing work described herein as performed in the execution of the public work of alteration is public work within the meaning of section 1772. But the inspection, testing and monitoring work performed after the completion of the alteration is not public work within the meaning of either section 1720(a)(1) or 1772.

This decision constitutes the final administrative action in this matter.

DATED: 16 Dec 84



John M. Rea, Acting Director