STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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Arnold Schwarzenegger, *Governor*

January 6, 2005

Patrick Whitnell
Assistant City Attorney
City of San Leandro
Meyers, Nave, Riback, Silver & Wilson
555 12th Street, Suite 1500
Oakland, CA 94607

Re: Public Works Case No. 2003-049
Williams Street Widening Project/Off-Hauling of Road Grindings
City of San Leandro

Dear Mr. Whitnell:

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).[1] Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that (1) the owner-operator truckers performing public work on the Williams Street Widening Project ("Project") are required to be paid prevailing wages; and (2) the off-hauling performed in connection with the Project is not public work.

The City of San Leandro ("City") has undertaken a road widening project on Williams Street within City. In order to construct the project, Redgwick Construction ("Contractor") was required to grind off the existing roadway surface. The grindings were hauled away by Royal Trucking, a subcontractor under Redgwick, using owner-operator truckers. Royal hauled the material to Vulcan Materials, an asphalt recycler, where it was recycled and used as fill on the roads around the Vulcan plant. City's specifications for the Project provide: "Grinding residue/excavated material from the roadway shall become the property of the Contractor and shall

[1] In discussing the provisions of the California prevailing wage law, the California Supreme Court held, "These statutes establish a legislative intent to give the Director plenary authority to promulgate rules to enforce the Labor Code. Although no statute expressly gives the Director the authority to make regulations governing coverage, such authority is implied." *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [4 Cal.Rptr.2d 837].

be removed and legally disposed of by the Contractor" (Contract Book, § 300-2.1.1).

The questions raised by this request are: (1) whether the owner-operator truckers on the Project are covered by the California prevailing wage law; and (2) whether off-hauling of material under the facts of this case constitutes public work.

1. Owner-operator Entitlement to Prevailing Wages

Under Labor Code section 1771,[2] all workers who perform work on a public works project are required to be paid the prevailing wage rates as determined by the Director. In *Lusardi, supra,* 1 Cal.4th at 987, the Court held: "By its express language, this statutory requirement is not limited to those workers whose employers have contractually agreed to pay the prevailing wage; it applies to '*all* workers employed on public works'." Section 1723 states that "worker" includes laborer, workman or mechanic. 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." "Employ" is generally defined as: (1) to use or engage the services of; (2) to provide with a job that pays wages or a salary (Webster's Ninth New Collegiate Dict. (1989), p. 408). These citations suggest a broad statutory scheme covering all workers who perform work on a public works project regardless of their status as employees or independent contractors.

Although there is no published California opinion specifically stating that owner-operator truckers are included in Section 1771, the federal government and most states that have addressed this or similar issues have construed their prevailing wage laws to find independent contractors, supervisors and corporate officers covered for purposes of their respective statutory schemes.

In *State, ex rel. Laszewski v. R.L. Persons Construction* (2004) 136 S.W.3d 863 (Mo.App.S.D.), the Court reviewed an award of prevailing wages to an individual who held himself out as an independent contractor and acted in conformity with that status. Missouri law defines the obligation to pay prevailing wages to "all workmen employed by [contractors or subcontractors] ..." (V.A.M.S. § 290.250). Looking at a statutory scheme similar to California's, the Court upheld the award and found that "[t]he controlling element in the case was not that Laszewski may have been an independent contractor but the fact that he performed the work of a laborer or mechanic." *Laszewski, supra,* at 871.

[2] All further statutory references are to the Labor Code unless otherwise specified.

In *Tenalp Construction Corporation v. Roberts* (1989) 141 A.D.2d 81 532 [N.Y.S.2d 801], the Court reviewed an administrative decision by the New York Labor Commissioner ordering a contractor to pay a supervisor prevailing wages for the hours he worked as a carpenter. New York has a constitutional provision providing that "no laborer, workman, or mechanic in the employ of a contractor or subcontractor in the performance of a public work may be paid less than the rate of wages prevailing ..." (N.Y. Const., art. I, § 17). New York has conforming legislation with language similar to Labor Code section 1774. See, N.Y. Labor Law, § 220(3). In an effort to prohibit contractors from trying to "avoid or circumvent the protection afforded to workers," the Court rejected job titles as a controlling factor in determining who was entitled to prevailing wages, looking more to "the nature of the work actually performed." *Tenalp, supra*, 141 A.D.2d at 85.

In *Department of Labor v. Titan Construction Company* (1985) 102 N.J. 1 [504 A.2d 7], a contractor defended the New Jersey Labor Commissioner's debarment efforts by arguing that the individuals to whom prevailing wages were not paid were principals not entitled to such payment. The New Jersey Supreme Court held that New Jersey's prevailing wage law applied to stockholders or principles that performed actual work on a public work. As in the New York case, the Court's concern was that accepting the contractor's focus on the individual's capacity would "invite stock ownership schemes devised to frustrate the Act's purpose and defeat the uniform application intended by the Legislature." Id., 102 N.J. at 9.[3]

The California prevailing wage law was patterned after the federal Davis-Bacon Act. Thus, the Director can look for guidance to federal law, which supports the view that a determination whether particular individuals must be paid prevailing wages must focus on the work performed, not on the label placed on the person doing the work. The Davis-Bacon Act specifically uses the phrase "the contractor or subcontractor shall pay all mechanics and laborers...the full amounts accrued at the time of payment...regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics." 40 U.S.C. § 3142(c)(1). This language

[3] The one applicable case that did not allow an independent contractor to recover is *International Union of Operating Engineers v. Dan Wannemacher Masonry* (1988) 36 Ohio St.3d 74 [521 N.E.2d 809] ("Wannemacher"). In this case, the independent contractor was not allowed to recover because the applicable state statute creating a private right of action was limited to suits by "employees." The California Labor Code has no such express limitation, therefore this case is not persuasive.

was added to the Davis-Bacon Act in 1935 after Congressional hearings in 1932, 1934 and 1935 found evidence of widespread abuse by those claiming to be partners bidding for work as a single subcontractor for a fixed price below what would be required were the workmen paid individually.

The California prevailing wage law appears to have been enacted with a similar intent. For example, Section 1774 was originally proposed to read " ... it shall be mandatory upon the contractor to whom the contract is awarded, and upon any subcontractor under him, to pay not less than the said prevailing wage rates of wages to all laborers, workmen and mechanics employed by them in the execution of the contract." However, the final version of Section 1774, enacted in 1937, removed the reference to direct employment ("[t]he contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract"). This provision was passed two years after the Davis-Bacon Act was amended to include all workers on a federal public works site, not just employees.

In interpreting the Davis-Bacon Act, the U.S. Attorney General concluded that owner-operators of trucks engaged in highway construction were employed as laborers or mechanics and are subject to the Davis-Bacon Act. 41 U.S. Ops.Atty.Gen. 448, 500 (1960). In *United States v. Landis & Young*, 16 F.Supp. 832 (W.D. La. 1935), the Court held that a sole proprietor who subcontracted for and performed the work himself was subject to the Davis-Bacon Act.

To exempt self-employed individuals from coverage under the California prevailing wage law would frustrate the purpose of the law and defeat the uniform application intended by the Legislature.

As noted in *Lusardi*:

> The Legislature has declared that it is the public policy of California "to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (*Lusardi, supra*, 1 Cal.4th at 985.)

As such, owner-operators performing trucking in connection with the Project must be paid prevailing wages.[4]

2. Off-Hauling Of Road Grindings

Consistent with Department's longstanding view,[5] off-hauling from a public works site does not generally require the payment of prevailing wages, except under certain circumstances. Section 1720.3 states: "For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including, the California State University and the University of California, or any political subdivision of the state." This Section requires all public entities in California to pay prevailing wages for construction refuse hauling to an outside disposal location.

Additionally, for example, where material is hauled to another part of a public works site or to another public works site; where there is a specification in a contract that the hauling be accomplished in a specific manner or to a specific location; or where the hauling is to return such things as tools, equipment or materials to a contractor's facility, under Section 1772, such hauling is in the execution of any contract for public work and the individuals performing such hauling will be deemed to be employed upon public work and entitled to the payment of prevailing wages.

None of the fact scenarios in these exceptions are present in this case, however. Here, the road grindings became the property of the contractor, who was required only to remove and legally dispose of them in any manner he chose. Further, the material was recycled and reused at a non-public works location. As such, the truck drivers hauling the grindings were not, under Section 1772, employed in the execution of the public work contract and are not entitled to prevailing wages.

[4] This determination should not be interpreted to apply to laws other than the California prevailing wage law.

[5] To avoid confusion regarding the Department's off-hauling policy, PW Case No. 99-081, *Granite Construction* (March 16, 2000) is hereby de-designated.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

John M. Rea
Acting Director