

STATE OF CALIFORNIA

Arnold Schwarzenegger, Governor

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December 16, 2005

Brent L. Kringle
Vice President, Operations
Western Contract Services
11455 Folsom Blvd.
Rancho Cordova, CA 95742

Re: Public Works Case No. 2005-017
Western Contract Services
Assembly and Disassembly of Free-Standing Modular Furniture

Dear Mr. Kringle:

This constitutes the determination of the Director of the Department of Industrial Relations ("Department") regarding coverage of the above-referenced work under California's prevailing wage laws and is made pursuant to California Code of Regulations, title 8, 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 assembly and disassembly of free-standing modular furniture performed by Western Contract Services ("WCS") for the California Franchise Tax Board ("FTB") under the Department of General Services ("DGS") master contract is not a public work subject to the payment of prevailing wages under the California prevailing wage law ("CPWL").¹

Factual Background

Under DGS State Contract 1-01-71-51, WCS performs moving, assembly and disassembly of Haworth Unigroup monolithic panel systems furniture at various FTB Buildings ("Project") in connection with renovation work. The assembly involves both relocated and new modular furniture. According to WCS, the work on the Project does not require any affixing of the furniture to the floor, ceiling, or wall. Some of the disassembled furniture will be moved to a warehouse for storage.

¹ It should be noted that Government Code section 14920 provides that every contract in excess of \$2,500, the principal purpose of which is to furnish commercial moving services to relocate state offices, facilities and institutions, shall require the contractor to pay prevailing wage rates to all employees engaged in the moving or handling of the goods being relocated. In connection with this provision, the Department issues a prevailing wage determination for Furniture Mover and Related Classifications, SAC-2003-1. As moving is not ordinarily public work, the Department does not enforce prevailing wage requirements under Government Code section 14920.

The term of the contract is April 23, 2001 through April 22, 2006, with possible term extensions. It is anticipated that WCS will perform the work through October 2006 after contract renegotiations in April 2006.

You have requested both a public works coverage determination for the work of the Project, as well as the appropriate wage rate for such work.

Discussion

1. The Nature of the WCS Request.

As a threshold matter, the California Conference of Carpenters ("CCC") asserts that WCS's April 27, 2005 letter requests only a prevailing wage rate determination for the work, and not a public works coverage determination. Not only does WCS's letter appear to request a public works coverage determination and a prevailing wage rate, but in a telephone conversation with the Department prior to the Department's invitation to various interested parties² to submit written positions, WCS indicated its interest in obtaining a coverage determination for the work at issue. Independent of these facts, however, the Director of the Department has broad quasi-legislative authority to "carry out and effect all purposes vested by law in the department" *Lusardi Construction Company v. Aubry* (1992) 1 Cal.4th 976, 988. This would include the authority to consider, *sua sponte*, a matter for a coverage determination. The coverage determination has been found to be "an essential step in the wage determination process and a rate cannot be fixed without such a determination." *Winzler v. Kelly* (1981) 121 Cal.App.3d 120, 128. Further, this Determination is necessary to address the heretofore unresolved issue whether the assembly and disassembly of free-standing modular furniture, as opposed to the affixing of such furniture to realty, constitutes a public work under CPWL.³

2. Public Works Coverage under Labor Code Section 1720.⁴

Under the applicable version of Labor Code section 1720(a)(1), "public work" means . . . "[c]onstruction, alteration, demolition,

² The interested parties are the following: Carpenters, Local 46 ("Carpenters"); CCC; the Chauffeurs, Teamsters and Helpers, Local 150; FTB; DGS; the California Moving and Storage Association and the Modular Installers Association.

³ In its September 28, 2005 submission, Carpenters asserts that the issuance of a public works coverage determination here would constitute retaliation in connection with a lawsuit it recently filed (*Carpenters, Local 46 v. State of California, et al., Sacramento County Superior Court Case No. 05AS01613*). This allegation is both unfounded and outside the scope of this Determination and, as such, will not be further addressed.

⁴ All section references are to the Labor Code, unless otherwise provided.

or repair work done under contract and paid for in whole or in part out of public funds" "Installation" was added to section 1720 effective January 1, 2002, by Senate Bill 975 ("SB 975"). The bid advertisement date is the benchmark date for determining the applicable version of section 1720. Here, that date is April 2, 2001. The applicable statutory law, then, is that which was in effect prior to SB 975, which statutory law did not include "installation" as a covered type of work.

The Project here was done under contract and paid for out of public funds. Therefore, the only issue under the applicable version of section 1720 is whether assembly or disassembly of free-standing modular furniture rises to the level of construction such that the Project is a public work.⁵

At the time of the benchmark date, April 2, 2001, the only related precedential public works coverage determination concerning modular furniture was PW 2002-052, *Installation of Modular Furniture/Department of General Services* (August 18, 2000) ("Keene Determination"). That determination held that the securing of components to each other and to the floor, ceiling or wall constituted installation that rose to the level of construction. The Keene Determination relied on three precedential determinations, PW 99-034, *Valley View Elementary School* (September 29, 1999), PW 99-061, *Toilet Partition/Bathroom Accessories Installation/Zanker Elementary School* (November 10, 1999), and PW 99-060, *Metal Workers and Metal Storage Shelving* (November 30, 1999). All of these determinations have in common the bolting, securing, or mounting of fixtures to the realty.

Carpenters' reliance on the Keene Determination is therefore misplaced because the modular furniture in this case is free-standing, not bolted down, secured, or mounted to the realty. As such, the work amounts to mere assembly of furniture, neither rising to the level of construction, as in the Keene Determination, nor constituting "installation" under the present language in section 1720.

⁵ Here, the relevant distinction between the pre-SB 975 and post-SB 975 versions of section 1720 are immaterial. Whether the work is installation rising to the level of construction under the pre-SB 975 version of section 1720 or "installation" under the post-SB 975 version of section 1720 produces the same result. This is borne out by the legislative history of SB 975, which indicates that the insertion of "installation" as a type of covered work in section 1720, among other changes, was meant to conform to "several precedential coverage decisions made by the Department of Industrial Relations." Senate 3d Reading, Senate Bill 975 (2001-2002 Reg. Sess.) as amended August 30, 2001, p. 4; Senate Rules Committee, Office of Senate Floor Analyses, Unfinished Business of Senate Bill 975 (2001-2002 Reg. Sess.) August 30, 2001, p. 5.

3. Public Work Coverage Under Sections 1771, 1772 and 1774.

Section 1771 provides that prevailing wages must be paid to all workers employed on public works. Sections 1772 and 1774 essentially provide that workers employed by contractors or subcontractors in the execution of a public work are deemed to be employed upon public work and must be paid prevailing wages. A portion of the assembly or disassembly work is being performed before and after FTB building renovations. If these renovations constitute a public work under section 1720, the issue is whether workers performing the assembly or disassembly must be paid prevailing wages under sections 1771, 1772 and 1774. The answer to the inquiry depends upon whether the assembly or disassembly of the free-standing modular furniture is directly related to the renovation work and is necessary for its completion. The furnishing of offices with free-standing modular furniture is an activity quite independent of the construction of those offices. Neither section 1771, 1772 nor 1774 require the payment of prevailing wages to workers performing the assembly or disassembly of the free-standing modular furniture because this work is neither directly related to the renovation work nor necessary for its completion.

4. Administrative Procedures Act ("APA").

In its September 28, 2005 written submission, Carpenters asserts that the Department cannot issue a coverage determination in this matter "without risking the challenge of such an action being challenged as an underground regulation" as governed by the APA.⁶ The APA establishes procedures that state agencies must follow in adopting a regulation. Public works coverage determinations are quasi-legislative administrative rules that interpret statutes that the Department is responsible for enforcing. Coverage determinations are addressed to specific persons and are meant to resolve fact-specific issues. They are not subject to formal APA rule-making requirements and, therefore, are not void as underground regulations. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571. Moreover, coverage determinations, even were they to be considered regulations, would nonetheless be exempt from formal rulemaking under Government Code section 11340.9 subdivision (g) (rate calculation orders) or 11340.9 subdivision (i) (case-specific applications of a statute).

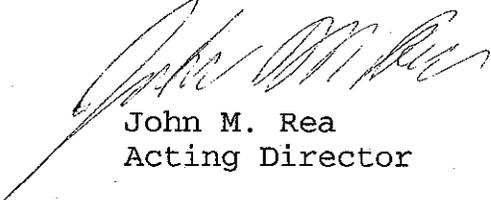
⁶ It is interesting to note that, while Carpenters asserts that issuance of a coverage determination in this case would be an underground regulation, Carpenters does not make such assertions as to the *Keene Determination* on which it relies.

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Conclusion

Based on the foregoing, the assembly and disassembly of free-standing modular furniture is not a public work subject to the payment of prevailing wages under CPWL.

Sincerely,



John M. Rea
Acting Director