

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR

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January 10, 2006

Lynette M. Frediani
Assistant City Attorney
City of Redding
777 Cypress Avenue
Redding, CA 96001-2718Re: Public Works Case No. 2005-021
Emergency Repair Work to Barnes and Noble Bookstore
City of Redding

Dear Ms. Frediani:

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 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 reconstruction and repairs to the Barnes and Noble bookstore, including the removal and replacement of sheetrock, cabinetry, baseboards and tile as a result of the City of Redding's sewer system failure is a public work subject to the payment of prevailing wages.

Factual Background

According to the documents submitted with your request, on or about March 29, 2002, a main line sewage backup occurred behind the Barnes and Noble bookstore on Churn Creek Road in the City of Redding ("City"). A grease plug apparently caused the City's 10-inch main sewer line to overflow resulting in sewage seepage into the store. Approximately one half of the total area of the bookstore was affected, including, but not limited to, the bathrooms, hallway, kitchen and serving areas. The sewage also contaminated about forty percent of the book storage areas. The glue-down carpeting was also damaged by the sewage.

The repair work included the removal and replacement of all sheetrock and baseboards up to approximately one foot. In the kitchen area, the tile base had to be removed and replaced as the sheetrock behind it was wet. The complete cafeteria structure area needed to be removed and replaced due to exposure to the wood by heavy sewage. This included all cabinetry and countertops. Furthermore, the bookshelves were also destroyed as they soaked up a significant amount of sewage moisture. Painting and wallpapering were also required as well as new carpet.

Barnes and Noble contracted with Purofirst, a licensed general contractor, for the reconstruction of its store. In 2002, City, a self-insured public entity, made three payments totaling \$87,082.74 to Purofirst for cleanup, construction and repair work at the Barnes and Noble site. In 2003, City paid an additional \$245,772.00 directly to Barnes and Noble for business interruption costs, carpet replacement costs, lost inventory and administrative costs that resulted from the sewer backup. The checks list the payor as, "City of Redding, Liability Account."

Analysis

Labor Code Section 1720(a)¹ generally defines "public work" to mean: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds"

The work performed at Barnes and Noble constitutes construction as it involved the removal and replacement of sheetrock, cabinetry, baseboards and tile which were damaged when the City's sewer system failed. The work also constitutes repair work as it included repainting, rewallpapering and recarpeting the store as well as the above mentioned construction. Public funds paid for the construction and repair work as the City, from its liability account, issued checks to Purofirst for approximately \$87,000 for construction and repair work Purofirst performed for Barnes and Noble. The work was performed under the contract between Barnes and Noble and Purofirst.

City claims that since the construction work occurred on private property, it is not a public work. This is incorrect. In PW 2000-036, *Carlson Property Site Lead Affected Soil Removal and Disposal Project* (May 31, 2000), the Director determined that whether a project is a public work for which prevailing wages must be paid is not determined by whether the work is performed on private or public land. There is no reference to private versus public in the Labor Code. Section 1720 only requires a finding that construction, done under contract, is being paid for out of public funds (see also PW 2004-050, *Howe Creek Ranch Habitat Restoration Project* (October 19, 2005)).

It appears from the documents you submitted that City also contends that because the work at Barnes and Noble was emergency repair work, the project is not a public work. This is inaccurate as "repair" work is specifically included in section 1720 (see also PW 96-008, *Metal Roofing Replacement Job for the Water Treatment Plant Rehabilitation/City of Vacaville* (July 17, 1996)).

¹ All statutory section references are to the Labor Code.

Furthermore, there is no exception in the Labor Code for work performed for emergencies.²

City also maintains that the work performed at Barnes and Noble was emergency repair work and thus was not a public work as it was not a "work of improvement." City seems to rely on section 1720(a)(3) which states in pertinent part: "Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof ..." is a public work. City's contention that the project must be a work of improvement is incorrect. There is no such requirement under section 1720(a)(1). Whether the work inside the bookstore would be covered by section 1720(a)(3) does not affect the fact that the project is still a public work under section 1720(a)(1).

City further argues that the project was not a public work because its payment of approximately \$335,000 in public funds to or for Barnes and Noble was a "settlement" of disputed claims. As previously stated, section 1720(a)(1) only requires a finding that construction, done under contract, is being paid for out of public funds. Here, the City's payment of approximately \$87,000 directly to Purofirst for the construction and repair of the Barnes and Noble bookstore satisfies the requirements of section 1720. In addition, the public entity need not contract directly with Purofirst for the project to be a public work. Section 1720's definition of public work does not require that a public agency be a party to the actual construction contract (see PW 98-005, *Goleta Amtrak Station* (November 23, 1998)).

Finally, City contends that other cities across the state performing similar work are not paying prevailing wages. These projects are not before the Director, and necessarily will involve different facts, circumstances and applicable law. The nonpayment of prevailing wages on other projects does not determine whether prevailing wages must be paid on this one; each project must be examined on a case-by-case basis.³

² Statutes may be suspended but only in a declared state of emergency by the governor under the California Emergency Services Act (Gov. Code § 8550 et seq.), and not by any city or other public entity.

³ Because the facts of those projects in other cities are not before the Director, it is unknown whether those cities are chartered cities generally exempt from state law on purely municipal affairs or whether they have approved labor compliance programs under section 1771.5 with higher monetary thresholds for payment of prevailing wages. Absent such exemption or approved program, it should be noted that when a city does not advise a contractor that a project is a public work, the city may be subject to liability for increased labor costs and penalties resulting from the contractor's inadvertent failure to comply with prevailing wage requirements, as set forth in either section 1726(c) or 1781.

Letter to Lynette M. Frediani
Re: Public Works Case No. 2005-021
Page 4

Conclusion

For the foregoing reasons, under the facts of this case, the project is a public work requiring the payment of prevailing wages.

Sincerely,



John M. Rea
Acting Director