

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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July 11, 2006

Dennis Cook, Esq.
Cook Brown, LLP
555 Capitol Mall, Suite 425
Sacramento, CA 95814

Re: Public Works Case No. 2006-006
Tracy Place Senior Apartments
City of Tracy

Dear Mr. Cook:

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 Tracy Place Senior Apartments Project ("Project") is not a public work and therefore is not subject to prevailing wage requirements.

Facts

The Project entails construction of 50 units of housing for low-income seniors. Pursuant to a Regulatory Agreement and Declaration of Restrictive Covenants between Tracy Place Associates ("Owner") and the Community Development Agency of the City of Tracy ("Agency"), for a period of 55 years 30 percent of the available units will be set aside for seniors whose gross annual income does not exceed 50 percent of the area median income, and 70 percent of the available units will be set aside for seniors whose gross annual income does not exceed 60 percent of the area median income.

Owner is a California limited partnership whose managing general partner is Community Revitalization and Development Corporation (a California non-profit corporation). Other general partners are Egis Group, Inc. and Cyrus Youssefi, an individual. WNC Holding LLC ("WNC"), the limited partner, obtained a 99.99 percent ownership interest in the Project in exchange for an equity investment of \$2,582,692. Along with its ownership interest, WNC will acquire a like percentage of the federal tax credits reserved for the Project by the California Tax Credit Allocation Committee ("CTCAC"). These credits amount to \$258,295 for each of 10 years, for a total of \$2,582,950.

The total Project costs are estimated to be \$8,768,950. There are several sources of construction financing. First, WNC has earmarked for construction activities approximately \$1,011,225 of its total investment. Second, Agency is loaning Owner approximately \$4,350,000, of which \$1,795,134 will be used for construction financing. Third, Union Bank of California ("Bank") is providing a loan to Owner in the amount of \$5,000,000. During the construction phase, the applicable interest rate for this loan is the LIBOR base rate plus 1.10 percent. The funds for this loan are derived from the proceeds of tax-exempt bonds issued by the California Statewide Communities Development Authority ("CSCDA") and purchased by Bank. These bonds were authorized for distribution by the California Debt Limit Allocation Committee ("CDLAC") out of the 2005 State Ceiling on Qualified Private Activity Bonds under section 146 of the Internal Revenue Code of 1986, as amended. Additionally, Tracy Place Associates, LLC ("Developer") is deferring its fee of \$962,591 during the construction phase.¹

There are also multiple sources of permanent financing. First, the remaining portion of WNC's equity contribution is allocated for permanent financing. Second, Agency's loan of \$4,350,000 also provides part of the permanent financing. The loan agreement provides that the loan shall bear an interest rate of one percent (1%) per annum payable out of residual receipts of Project over a period of 55 years. Payments are scheduled to begin on April 15, 2008. Third, approximately \$1,938,690 of the Bank loan is allocated to permanent financing, with an interest rate of 6 percent. The permanent phase portion of the Bank loan is to be repaid over a period of 15 years. Finally, approximately \$881,548 of Developer's fee will be paid at the close of construction, and the remaining \$81,043 of that fee will be deferred and paid with interest from Project's cash flow over a period of approximately 10 years.

Discussion

Labor Code section 1771² generally requires the payment of prevailing wages to workers employed on public works. Section 1720(a)(1) defines public works to include: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds"

¹This fee is included in the estimated total Project costs stated above. CTCAC guidelines provide that the developer's fee should be no more than 15 percent of a project's eligible basis.

²Subsequent statutory references are to the Labor Code unless otherwise indicated.

The phrase "paid for in whole or in part out of public funds" is defined in detail in section 1720(b), with certain exceptions and exclusions set forth in subdivisions (c) and (d). Section 1720(b)(1) provides that "payment of money or the equivalent of money by the state or political subdivision" constitutes payment out of public funds. Section 1720(b)(4) defines payment out of public funds also to include:

Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.

Here, Project involves construction done under contract. The funding sources that appear to require scrutiny for possible status as public funds include the tax-exempt bonds (the proceeds of which are funding the Bank loan), the federal tax credits and the Agency loan.

Tax-exempt bond financing such as that involved here is widely used for multifamily housing projects. There are two basic structures for multifamily housing revenue bonds: publicly-offered and privately-placed.³ A private placement, such as the one at issue here, is in substance a real estate loan by the bondholder, here, Bank: "The Borrower/Developer essentially borrows money from a bank or other lender, just as it would if no bonds were issued, but the debt takes the form of a bond transaction in which the lender holds the bonds."⁴ The bonds are issued by a governmental issuer (here, CSCDA), and the proceeds are loaned by the bondholder to Borrower/Developer.⁵ Borrower/Developer repays the bondholder pursuant to a loan document.

In such a private placement, the issuer never has possession of either the bond proceeds or the loan repayments that are made by the borrower to the bondholder.⁶ This Department has previously determined that money collected for, or in the coffers of, a

³J. Cooper, *Multifamily Rental Housing: Financing with Tax-Exempt Bonds* (Orrick, Herrington & Sutcliffe LLP, 2003) at 13. Publicly-offered "conduit" bond financing was addressed in PW 2004-016, *Rancho Santa Fe Village Senior Affordable Housing Project* (February 25, 2005).

⁴Cooper, *supra*, at 21.

⁵*Id.* at 22.

⁶*Ibid.* In PW 2004-016, *supra*, the same conclusion was reached with respect to publicly-offered "conduit" bonds. While there are structural differences in the two types of bond issues, they are essentially similar insofar as the public entity has no involvement in the cash flow.

public entity are "public funds" within the meaning of section 1720. PW 93-054, *Tustin Fire Station* (June 28, 1994). Here, neither the bond revenues nor the loan repayments ever enter the coffers of a public entity, nor are they collected for the public entity. Since none of the money flows into or out of public coffers, the bond financing is not "the payment of money or the equivalent of money by the state or political subdivision" within the meaning of section 1720(b)(1).⁷

The federal tax credits do not entail any action by the state or a political subdivision under section 1720(b)(4). While they may reduce the limited partner's federal income tax obligations, these are not "obligations that would normally be required in the execution of the contract." The execution of the contract entails expenditures by, not income to, the limited partner. The tax credits therefore would reduce tax obligations, if any, on income derived from activities other than construction of the housing.⁸

As discussed above, section 1720(b)(1) provides that "payment of money or the equivalent of money by the state or political subdivision" constitutes payment out of public funds. Here, the federal tax credits do not entail any payment by either the state or a political subdivision. Moreover, a tax credit "involves no expenditure of public moneys received or held ... but merely reduces the taxpayer's liability for total tax due." *Center for Public Interest Law v. Fair Political Practices Commission* (1989) 210 Cal.App.3d 1476. Accordingly, the allocation of federal tax credits is not a payment of money or the equivalent of money within the meaning of section 1720(b)(1). As no other provision of section 1720(b) is applicable, the federal tax credits do not constitute payment in whole or in part out of public funds.⁹

The Agency loan entails an interest rate "charged at less than fair market value," which in other circumstances could constitute payment of public funds within the meaning of section 1720(b)(4). However, section 1720(c)(6)(E) provides an exemption for such a loan for a "project in which occupancy of at least 40 percent of the units is restricted for at least 20 years, by deed or regulatory agreement, to individuals or families earning no more than 80 percent of the area median income." Here, a regulatory agreement imposes occupancy restrictions well in excess of the

⁷If bond proceeds in the coffers of a public entity were used to finance construction, such financing could fall within the language of section 1720(b). Even in that event, however, section 1720(c)(6)(E) would exempt such financing for the reasons discussed *infra*.

⁸PW 2004-016, *supra*.

⁹*Ibid*.

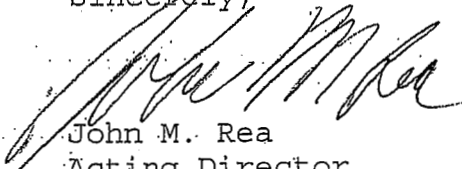
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requirements of section 1720(c)(6)(E), and the exemption set forth therein applies.¹⁰

For the foregoing reasons, construction of the Project is not paid for in whole or in part out of public funds within the meaning of section 1720, and accordingly is not subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John M. Rea
Acting Director

¹⁰PW 2004-016; *supra*. Owner asserts the applicability of section 1720(c)(4), which provides that the construction or rehabilitation of certain affordable housing units paid for with moneys from a Low and Moderate Income Housing Fund established pursuant to the Health and Safety Code "do not constitute a project that is paid for in whole or in part out of public funds." Since the exemption set forth in section 1720(c)(6)(E) clearly applies, it is unnecessary to determine whether section 1720(c)(4) also applies.