

DEPARTMENT OF INDUSTRIAL RELATIONS
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August 08, 2007

Hannah Choi, Program Manager
Office of Contract Compliance
City of Los Angeles
600 South Spring Street, Suite 1300
Los Angeles, CA 90014

Re: Public Works Case No. 2002-010
Production of Recycled Asphalt Concrete from Reclaimed Asphalt Pavement and Related
Off-hauling and On-hauling
Street Resurfacing and Reconstruction Program
City of Los Angeles

Dear Ms. Choi:

This constitutes the determination of the Director of the Department 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). I have reviewed the facts of this case and the applicable law. This is in response to your questions concerning the above-referenced project.

Facts

The City of Los Angeles, Bureau of Street Services ("City") maintains approximately 7,200 miles of streets and alleys. City resurfaces and/or reconstructs approximately 250 miles of asphalt streets per year using City force account labor, two asphalt plants ("batch plants") and a fleet of trucks and other equipment for this work.

City requires several hundred thousand tons of asphalt a year for street maintenance. It uses the entire production of its asphalt batch plants and also purchases asphalt from several private vendors to satisfy its asphalt requirements. In 1987, City began contracting for recycled asphalt in order to comply with a statutory mandate to save landfill space.¹ City awarded All-American Asphalt ("All-American") the current contract for asphalt recycling, effective March 25, 2002 ("Contract").² Under the Contract, City requires a minimum production capacity of 1,200 tons of recycled asphalt concrete ("RAC") per day for City resurfacing jobs. City estimates a production requirement of approximately 320,000 tons of RAC annually in Fiscal Year 2001-02. Actual

¹Under the California Integrated Waste Management Act of 1989, Public Resources Code sections 40000-49620 (AB 939, Chapter 1095, statutes of 1989), all waste generators are required to reduce refuse placed in California landfills.

²All-American is in the business of providing asphalt for sale to the public in Riverside, Orange, San Bernardino and Los Angeles Counties. All-American has five asphalt plants located in Westminster, Corona, Anaheim, Irvine and Irwindale, along with an aggregate production facility in Corona.

production requirements depend upon the resurfacing program authorized by the Mayor and City Council in any given year.

Pursuant to the Contract, All-American elected to erect its own asphalt recycling plant on a designated parcel of City land. City leases the land to All-American at 60 cents per square foot, which, according to City, exceeds market rate. The maximum production output of the plant is determined by permits from the Southern California Air Quality Management District. City is entitled to use the plant's full production capacity. All-American is allowed to recycle asphalt removed from existing roadways of other entities in this plant, but may only do so if City's recycled asphalt requirements are met. Should the plant's production be limited by the environmental permits to less than City's requirements for recycled asphalt concrete, the plant could be utilized solely to satisfy City's needs for RAC.

The street resurfacing and reconstruction jobs require City to grind and remove asphalt bits, called "grindings," from existing roadways. All-American may use only City grindings for City-recycled asphalt needs. City will sell any grindings that exceed its needs. All-American is responsible for disposal of residual waste grindings if any are generated from the recycling process.

City force account workers both operate the equipment that grinds the asphalt and lay the recycled and/or new ("virgin") asphalt on the road.³ The recycling process requires the reclaimed asphalt pavement grindings to be combined with fresh sand, rock and oil at the recycling plant, resulting in recycled asphalt concrete. Virgin asphalt also is used in the process because the recycling alone is insufficient for City's asphalt needs. The RAC is then delivered to the job site hot and ready to be spread.

The Contract allows for the reclaimed asphalt pavement and recycled asphalt concrete to be hauled to and from the job sites by City force account workers, City contract truckers, the asphalt contractor's truckers or subcontractor truckers or a combination thereof.

City crews will pour the grindings into the trucks that transport the grindings to the recycling plant. The truck drivers will not physically remove the grindings from the streets and will not perform the spreading of recycled/new asphalt.

The Contract allows for a per-ton transportation and haul charge to City for pick-up of the grindings and delivery of the RAC. The Contract provides that the transportation charges to City shall include Contractor payment of prevailing wages to the drivers.⁴

³Prior to 1987, the grindings were taken to landfills and dumped.

⁴Section 2.12 provides: "Transportation Haul Rate" which provides, in pertinent part: "The CONTRACTOR delivered price shall include Prevailing Wage for Off-site Hauling." A Contract addendum also provides for payment pursuant to the City Living Wage Ordinance; if Prevailing Wage exceeds Living Wage, Prevailing Wage must be paid under the Addendum.

On delivery, the truck drivers will dump the RAC into a spreading machine. City workers operating the spreading machines then immediately spread the asphalt, in the process of street resurfacing or reconstruction.

Discussion

Labor Code section 1720(a)(1)⁵ defines "public works" as "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds" Additionally, section 1720(a)(3) defines "public works" to include: "Street, sewer, or other improvement work done under the direction and supervision or by the authority of . . . any political subdivision or district [of the state], whether the political subdivision or district operates under a freeholder's charter or not." Moreover, under section 1720.3, "'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 . . . or any political subdivision of the state."

Section 1771 provides:

Except for public works projects of one thousand dollars (\$1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

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." Section 1774 provides that: "The 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."

Work is within the execution of a contract for public work when it is "functionally related to the process of construction" and "an integrated aspect of the 'flow' process of construction." *O. G. Sansone Co. v. Dept. of Transportation* (1976) 55 Cal.App.3d 434, 444, quoting *Green v. Jones* (1964) 128 N.W.2d 1, 7. Production employees of bona fide material suppliers to a public work are exempt from the application of prevailing wages because they do not perform work in the execution of a public works contract. *Id.* at p. 442. For this exemption to apply, however, the material supplier "must be selling supplies to the general public, the plant must not be established specially for the particular contract, and the plant is not located at the site of the work." *Ibid.*

⁵Subsequent statutory references are to the Labor Code unless otherwise indicated.

In *Sansone*, a contractor obtained aggregate subbase materials for highway construction not from an established independent material supplier, but rather "from locations not on the project site but located adjacent to and established exclusively to serve the project pursuant to private borrow agreements between plaintiffs and third parties." *Id.* at p. 439. The court held that the hauling of materials from these borrow sites was subject to prevailing wage requirements. *Id.* at p. 445. In reaching this conclusion, the court quoted with approval *Green v. Jones, supra*, 128 N.W.2d at p. 6: "If certain materials were stockpiled at the site, then coverage depended upon whether the materials were hauled from a commercial pit operating continuously, in which event there would be no coverage, or whether the materials were hauled from a pit opened solely for the purpose of supplying materials, in which event there would be coverage." *Sansone, supra*, 55 Cal.App.3d at p. 444. The *Sansone* court also relied upon *H.B. Zachary Company v. United States* (1965) 344 F.2d 352. In *Zachary*, plaintiff contracted with Glover Distributing Company to deliver "standard commercial materials ... not specially designed for this project." *Id.* at p. 354. The court held that Glover was not subject to prevailing wage requirements, stating: "The suppliers from which the material for the contracts in suit were obtained were in the business of selling such materials to the general public and were not established specifically to furnish materials for plaintiff's contracts." *Id.* at pp. 360-361.

Sansone thus distinguishes hauling from a material supplier, which is exempt from prevailing wage requirements, from hauling performed as part of the public work. *Sansone* establishes two different bases for finding that on-haul truckers are deemed to be employed on public work construction. The first basis pertains to the source of the materials hauled. On-haul truckers, by whomever employed, who haul material from material suppliers are not required to be paid prevailing wages because such delivery to a public works site is a function that is performed independently of the contract construction activities.

Conversely, truckers on-hauling materials from a source dedicated to the public work site would be deemed employed on a public work and require the payment of prevailing wages. *Sansone* supports the proposition that the dedicated site must be adjacent to the public work construction site for the hauling of materials from the dedicated site to be deemed part of the construction. A strict definition of the term, "adjacent," which provides a specific distance limitation is, however, impractical and inadvisable. Adjacency should be governed by a "a practical analysis," as the Administrative Review Board ("ARB") within the DOL noted in *Bechtel Contractors Corporation, Rogers Construction Company, Ball, Ball, and Brosamer, Inc., and the Tanner Companies (Bechtel II)*, ARB Case No. 97-149 (98 WL 168939) (March 25, 1998). The ARB found that batch plants situated within one-half mile of pumping stations that were part of the Central Arizona Project, a 330 mile-long aqueduct and series of pumping stations, were "virtually adjacent" to the project even though drivers would travel up to 15 miles along the aqueduct to deliver concrete to where it was incorporated into the project. ARB reasoned that there was no "principled basis" to exclude the workers because aerial photographs clearly showed that the batch plants were virtually adjacent to the aqueduct.

The second basis concerns whether the material delivered is immediately incorporated by the truckers into the public work site or stockpiled for later re-handling. On-haul truckers who participate in the immediate incorporation into the public work site of the material they haul are

deemed to be employed on the public work contract and must be paid prevailing wages. Immediate incorporation by the hauler is clearly covered work for the time on-site. The on-site incorporation work must therefore be direct, immediate, or virtually so, more than de minimis, and involve construction related activity. In other words, when the hauler leaves the pure hauling role and participates in the on-site construction activity of incorporation of the material hauled, the worker is entitled to prevailing wages.

By contrast, truckers who haul to the public work site material that is stockpiled for later use are not deemed to be employed on public work and therefore not required to be paid prevailing wages. The mere delivery to a public work of material that is rehandled or incorporated by other on-site workers, or the haulers' incidental placement on the public work site of the materials hauled is not covered work.

City has asked the Director several detailed questions. These questions are paraphrased below and answered on the basis of the facts City supplied and the legal principles articulated above.⁶

1. Question: Is the street resurfacing and reconstruction work involving the grinding of the asphalt pavement and/or the placement of new or recycled asphalt concrete performed by City force account "public works" as defined by section 1720?

Answer: The grinding of the asphalt pavement and the placement of new or recycled asphalt concrete constitutes construction or repair work within the meaning of section 1720(a)(1), but since this work is done by force account labor, it is not done under contract and therefore does not meet that subdivision's definition of "public works." The work is nonetheless "[s]treet ... improvement work done under the direction and supervision or by the authority of ... any political subdivision," within the meaning of section 1720(a)(3), which lacks a requirement that the work be done "under contract." Therefore this work would constitute public works under this definition even though it is performed by force account labor. Under section 1771, however, prevailing wages must be paid only for work done under contract, so City is not required to pay its own workers prevailing wages.

⁶Prior public works coverage determinations involving similar facts were analyzed consistently based on these same general principles concerning what constitutes work performed in the execution of a contract for public work, such as PW 2003-026, *Advisory Opinion on DSA Project Inspectors* (October 7, 2003) (Project Inspectors actively and continuously monitoring contractor's work through on-site physical presence whenever there was construction activity were a vital and integral part of construction projects); PW 2004-013, *Dry Creek Joint Elementary School District, Coyote Ridge Elementary School - On-site Heavy Equipment Upkeep* (December 16, 2005) (on-site heavy equipment upkeep by contractor's shop employees was directly related to the prosecution of the public work and necessary for its completion); PW 2005-018, *Installation and Removal of Temporary Fencing and Power and Communications Facilities, Eastside High School, Antelope Valley Union High School District* (February 28, 2006) (removal of temporary fencing and power and communications facilities was performed as part of construction process); and PW 2004-023, *Prevailing Wage Rates, Richmond-San Rafael Bridge/Benicia-Martinez Bridge/San Francisco-Oakland Bay Bridge, California Department of Transportation* and PW 2003-046, *Public Works Coverage, West Mission Bay Drive Bridge Retrofit Project, City of San Diego* (January 23, 2006) (only towboat operators who haul materials from dedicated sites or who are involved in the immediate incorporation of materials into bridge projects are performing work functionally related to and integrated with the process of construction).

2. Question: Are the private vendors from whom City purchases asphalt exempt from prevailing wage requirements as material suppliers?

Answer: Consistent with the above discussion, to be material suppliers, such vendors must be in the business of selling asphalt to the general public and the plant from which the asphalt is obtained must not have been established specially for the City contract. If the vendors meet the criteria for material suppliers, they are not required to pay prevailing wages to their production workers.

If such material suppliers (or any contractor) employ truckers to haul the asphalt to public work job sites, the truckers would be entitled to prevailing wages for any time they spend on site in the immediate incorporation into the public work sites of the material they haul because the truckers have left the pure hauling role and are participating in the on-site construction activity of incorporating the material hauled. Conversely, truckers who haul from a material supplier to the public work job sites material that is stockpiled for later use would not be entitled to prevailing wages because such delivery is a function that is performed independently of the construction activities.

3. Question: Is All-American exempt from prevailing wage requirements as a material supplier? Does it matter if they haul recycled or new asphalt from a City-owned batch plant?

Answer: No. Given the facts presented by City,⁷ All-American is not a bona fide material supplier under the *Sansone test* because, rather than providing materials from an existing, continuously operating facility, it has established a plant specially for the contract and City is entitled to use the plant's full production capacity.⁸ Thus, that plant is integral to and a secondary site of the public works project. Moreover, All-American is not merely supplying new material, but is providing the service of recycling City-owned material for the public work of street improvements. Therefore, All-American is not a material supplier and must pay prevailing wages to its production employees and to its truckers for the time spent in hauling.⁹

⁷The analysis herein is necessarily based upon the specific facts relating to the contract in question. If this plant takes on characteristics of a general use facility, the result could change with respect to future contracts. In such a situation, an interested party may request a new coverage determination addressing the changed facts.

⁸In this context, special means "[a]rranged for a particular occasion or purpose." *The American Heritage Dictionary of the English Language* (New College Ed. 1979) at p. 1240. "Special and specially are always the choice when the desired sense is merely in opposition to what is general . . ." *Ibid.* Here, All-American has established a plant on City property for the particular purpose of supplying City's needs under the contract in question. The possibility that All-American may, if production capacity exceeds City's needs, make incidental sales to third parties does not detract from the fact that the plant was, in the language of *Sansone*, "established specially" for this project.

⁹A prior public works coverage determination in PW 2002-034, *Sacramento State Capitol Exterior Painting Project, Restoration and Hauling of Decorative Cast Iron Elements* (July 18, 2002) analyzed a similar closed loop arrangement. In that case, the hauling of and off-site restoration of decorative cast iron elements from the State Capitol were found to be subject to prevailing wage requirements. The cast iron elements were removed from the Capitol by ironworkers, loaded into trucks operated by a trucking subcontractor and transported to the restoration shop where shop employees sandblasted and repainted the pieces according to the awarding body's specifications. The restored

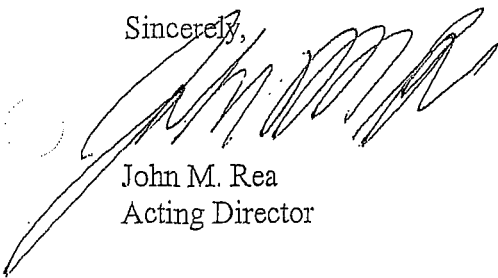
The result would be no different if material were hauled from a City-owned batch plant because such a plant also would have been established specially to supply City's needs, and would not be a general-use facility. Subcontracting the hauling would not change the result.¹⁰

4. Question: If City utilized contract truckers to deliver the grindings to the recycler instead of to a landfill, would City need to pay prevailing wage?

Answer: Prevailing wage requirements would apply in either case. Contract drivers delivering the grindings to the recycler would be deemed to be employed upon public work under sections 1771, 1772 and 1774 because the hauling in this context is to a dedicated site that is functionally related to the public work street improvements site. If the same drivers delivered the grindings to a landfill, they would be employed on public work as defined in section 1720.3 because they would be hauling refuse from a public work site to an outside disposal location.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John M. Rea
Acting Director

pieces were then loaded into the trucks and transported back to the Capitol, where they were reinstalled. The process was thus a closed loop. The off-hauling and on-hauling of the cast iron elements were found to be done in the execution of the public works contract because the truck drivers performed an integral role in the execution of that contract by transporting the cast iron elements between the Capitol and the restoration shop. The restoration work was found to be done in the execution of the public works contract because the restoration workers were supplying essential labor and services on cast iron elements that were part and parcel of the architecture of the Capitol Building; they were not supplying materials. Unlike newly manufactured products delivered to a construction site, the cast iron elements were public property. Therefore, both the truck drivers and the restoration shop employees were entitled to prevailing wages. The same logic applies here; the recycling and resurfacing process is a similar closed loop. The hauling of grindings from the public work site to the recycling plant, the processing of the grindings at the recycling plant and the hauling of RAC to the public work site from the recycling plant is functionally related to, and an integrated aspect of the "flow" process of, the street improvement work within the meaning of sections 1771, 1772 and 1774.

¹⁰As explained above, a dedicated site must be adjacent to the public work construction site for the hauling of materials from it to be deemed part of the construction; however, adjacency is not a fixed concept, but depends on the nature of the project. At issue here is an ongoing project of resurfacing and/or reconstructing a network of 7,200 miles of streets and alleys spread over a broad geographic area. Inevitably, some of the streets and alleys will be in close proximity to the dedicated facility, while others will be more distant. The essential point is that the primary public work site is the entire network of City streets. Here, the dedicated facility is deemed to be "virtually adjacent" to the primary public work site. See *Bechtel II, supra*.