

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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June 26, 2007

Robert Fried, Esq.
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Re: Public Works Case No. 2007-005
Erection and Removal of Portable Fencing System
Peninsula Camp Ground
Folsom Lake State Recreation Area

Dear Mr. Fried:

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 erection and removal of a portable fencing system at the Peninsula Camp Ground construction site is public work subject to prevailing wage requirements.

Facts

The California Department of Parks & Recreation awarded a contract to L.M. Combs Construction, Inc. ("General Contractor") to construct comfort stations consisting of toilet and shower facilities for the Peninsula Camp Ground at the Folsom Lake State Recreation Area ("Project"). On March 12, 2007, General Contractor entered into an agreement with Security Contractor Services, Inc. ("Subcontractor") to provide temporary portable fencing at the Project site ("Fencing Agreement").

Under the Fencing Agreement, Subcontractor is furnishing fifty-one 12.5 by 7 foot free-standing panels of metal link fencing; each panel consists of a metal pipe frame with wire inserts and fittings to make the panels interlocking. Subcontractor is also furnishing 49 concrete, metal, or wooden blocks and 49 clamps required for erecting the fence. The blocks serve as footings for the fence panels. The fence panels have posts that fit into corresponding cavities in the blocks. The blocks are placed upon the surface of the ground. No surface preparation, digging or excavation is required in that the blocks rest on the ground, the fence panels rest on the blocks, and the panels are then connected with the clamps and interlocking fittings. The fence was erected on the perimeter of the Project site before groundbreaking while the General Contractor was on-site to mark and measure the area.

Under the Fencing Agreement, Subcontractor is charging General Contractor \$2.65 per linear foot of fencing erected. The fencing is to remain for the duration of the Project, estimated to be from March 12, 2007, to July 12, 2007. Subcontractor has invoiced General Contractor \$1,739.38 for

this four-month period. An additional charge will accrue if the fencing is needed for an extended period of time. The contract price includes both the erection and removal of the fencing.

Discussion

Labor Code section 1720(a) (1)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 For purposes of this paragraph, 'construction' includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work."

Section 1771 generally requires the payment of prevailing wages to workers employed on public work. Section 1772 provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public works are deemed to be employed upon public work." Finally, under section 1774 such contractors or subcontractors "shall pay not less than the specified prevailing rates of wages to all work[ers] employed in the execution of the contract." Work falls within the scope of sections 1771, 1772, and 1774 when it is "functionally related to the process of construction" and "an integrated aspect of the 'flow' process of construction." (See *O.G. Sansone Co. v. Dept. of Transportation* (1976) 55 Cal.App.3d 434, 444, quoting *Green v. Jones* (1964) 23 Wis.2d 551, 128 N.W.2d 1, 7.)

The parties do not dispute that the Project involves construction done under contract and paid for in whole or in part out of public funds, and therefore a public work subject to prevailing wage requirements. Subcontractor is requesting a determination as to whether the erection and removal of the portable fencing system under the Fencing Agreement is also subject to prevailing wage requirements. The only issue presented here is whether such work falls within one or more of the types of covered work enumerated in section 1720(a)(1) or is otherwise "functionally related to the process of construction" and "an integrated aspect of the 'flow' process of construction" within the meaning of sections 1771, 1772 and 1774.

Section 1720(a)(1) was amended in 2000 to expand the definition of public works to include work performed during the "preconstruction" phase of construction. (Stats. 2000, Chap. 881 (SB 1999), section 1, effective January 1, 2001.) Section 1720(a)(1) was amended again in 2001 to include "installation" as an enumerated type of covered public work. (Stats. 2001, Chap. 938 (SB 975), section 2, effective January 1, 2002.)

"Installation" has been defined as work involving the bolting, securing or mounting of fixtures to realty. (See, e.g., PW 2005-039, *Kiwi Substation, Orange County Water District* (April 25, 2007).) Here, none of the component parts of the portable fencing is affixed to realty. The fence posts are inserted into block footings that simply rest on the surface of the ground. The fencing is not bolted, secured or mounted to the realty in any manner. Thus, the erection of the temporary portable fencing under the specific facts of this case cannot be regarded as installation. This is in contrast to the type of work involved in the erection of temporary fencing in PW 2005-018,

¹ Subsequent statutory references are to the Labor Code unless otherwise indicated.

Installation and Removal of Temporary Fencing and Power Communications Facilities/Eastside High School, Antelope Valley Union High School District (February 28, 2006), which was found to be installation. In that case, the fencing contractor erected a temporary fence by digging holes around the perimeter of the construction site and sinking the fence posts into the ground. That work constituted installation precisely because the temporary fencing was affixed to the ground in dug-out holes.

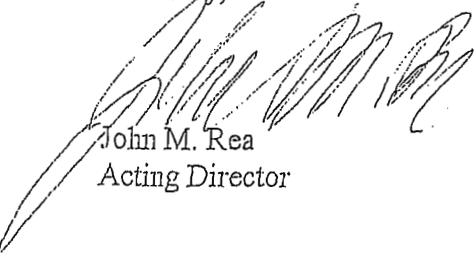
The definition of "public works" also includes work performed during the preconstruction phase of construction. Here, the erection of the temporary portable fencing occurred before ground was broken when General Contractor was in the process of taking measurements and marking the site. Thus, the fencing was erected during the preconstruction phase of the Project, bringing it within the definition of public works set forth in section 1720(a)(1). This is consistent with *Eastside High School, supra*, wherein the erection of temporary perimeter fencing was found to be a preconstruction activity.

In addition, work that is functionally related to, and integrated with, the process of construction is subject to prevailing wage requirements under sections 1771, 1772 and 1774. Here, the temporary fencing stands on the perimeter of the Project site and serves to surround and enclose the construction activities. It was erected during the preconstruction phase of construction and will be removed only when the Project is completed. The erection of the fencing was coordinated with General Contractor's measurement and marking of the site. As perimeter fencing, it was configured to conform to the physical scope and layout of the Project. Under these facts, both the erection and removal of the temporary fencing is functionally related to, and integrated with, the process of construction. This analysis is consistent with *Eastside High School, supra*, wherein the temporary fencing work was found to be a part of the construction process.

For the foregoing reasons, consistent with precedential public works coverage determinations, the erection and removal of the temporary portable fencing under the Fencing Agreement is public work subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John M. Rea
Acting Director