

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR

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May 5, 2008

Mario Salinas, Investigator
Center for Contract Compliance
1300 Chester Avenue
Bakersfield, CA 93301

Re: Public Works Case No. 2007-009
Wasco Union High School District/JTS Modular, Inc.
Off-site Manufacture of Modular Classrooms

Dear Mr. Salinas:

This constitutes the determination of the Director of Industrial Relations 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 off-site manufacture of modular classrooms for the Wasco Union High School District is not subject to prevailing wage requirements.

JTS Modular, Inc. ("JTS") is a California corporation that manufactures and sells relocatable modular buildings. The Wasco Union High School District ("District") in Kern County purchased nine modular classrooms and one modular restroom from JTS pursuant to a Deferred Purchase Order ("Purchase Order") dated July 13, 2006, and a Deferred Purchase Agreement between JTS and the Kern County Superintendent of Schools. These buildings were manufactured according to designs pre-approved by the Department of State Architect (DSA).¹ The buildings, like all other JTS products, were manufactured at a permanent, nine-acre facility in Bakersfield that JTS has operated since 2000. During the past seven years, JTS has sold products manufactured at that facility to more than 1,000 customers throughout California, including school districts, medical clinics, government agencies and retail companies, among others.

Labor Code section 1720(a)(1)² 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" 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

¹Certain architectural improvements beyond the standard specifications were added to the modular buildings. These improvements included a roof upgrade and mission style columns. The work was done on-site, and prevailing wages were paid for it.

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

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."

The statutory term "execution" recently was interpreted by the First District Court of Appeal in *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, 749-750:

In determining legislative intent, courts are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. [Citations and quotation marks omitted.] The familiar meaning of "execution" is "the action of carrying into effect (a plan, design, purpose, command, decree, task, etc.); accomplishment" (5 Oxford English Dict. (2d ed.1989) p. 521); "the act of carrying out or putting into effect," (Black's Law Dict. (8th ed.2004) p. 405, col. 1); "the act of carrying out fully or putting completely into effect, doing what is provided or required." (Webster's 10th New Collegiate Dict. (2001) p. 405.) Therefore, the use of "execution" in the phrase "in the execution of any contract for public work," plainly means the carrying out and completion of all provisions of the contract.

The analysis in *O.G. Sansone Co. v. Department of Transportation* [1976] 55 Cal.App.3d 434, 127 Cal.Rptr. 799 (*Sansone*) of who is, and who is not, a subcontractor obligated to comply with the state's prevailing wage law also informs our assessment of the intended reach of the prevailing wage law to "[w]orkers employed ... in the execution of any contract for public work." (§ 1772.)

Williams and *Sansone* recognized an exemption for material suppliers, basing their analyses in part on *H. B. Zachry Company v. United States* (1965) 344 F.2d 352, 170 Ct.Cl. 115, a federal case that applied to truck drivers a long-standing interpretation of the Davis-Bacon Act generally exempting material suppliers from coverage. In *Zachry*, the court explained that:

Beginning as early as 1942 [fn. omitted], the Solicitor [of the Department of Labor] has excluded from statutory coverage the employees of bona fide materialmen who sell to a contractor engaged in construction contracts covered by the Davis-Bacon Act. The exemption has been qualified to the extent that the materialman 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. [Fn. omitted:] The Solicitor has always held that truck drivers employed by materialmen (exempt from statutory coverage) to transport supplies to the jobsite are no more subject to the provisions of the Davis-Bacon Act and the Eight-Hour Laws than are other employees of the materialmen. [Fn. omitted.]

Ibid, 344 F.2d, at p. 359, quoted in *Sansone*, *supra*, 55 Cal.App.3d at p. 442.

In construing the CPWL, California courts have been guided by federal interpretations of Davis-Bacon where there is no conflict. [Cites] Here there is no conflict because the exemption for material suppliers also applies under California law. By its terms, section 1772 requires prevailing wages only for “[w]orkers employed by contractors or subcontractors in the execution of any contract for public work ...” (Emphasis supplied.) Therefore, here as in *Sansone* and *Williams*, it is appropriate to follow *Zachry*.

The Center for Contract Compliance (“CCC”) cites a previous coverage determination by the Department as support for its position that the work at issue here should be subject to prevailing wage requirements. PW 99-012, *San Diego City Schools, Construction of Portable Classrooms* (June 23, 2000) applied the *Sansone* analysis and concluded that under the facts of that case, the assembly of portable classrooms was subject to prevailing wage requirements. A critical factor in that decision was the fact that the work took place at a dedicated site leased solely for the assembly of the classrooms, and closed upon completion of that work. Accordingly, the contractor did not satisfy *Sansone*'s requirements for the material supplier exemption.

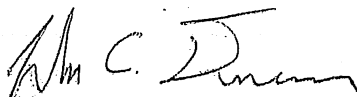
Here, in contrast, the work was done not at a dedicated site, but rather at a permanent, general use, off-site facility not integrally connected to the project site, where items for sale to the general public are manufactured.³ Thus, JTS is a material supplier under *Sansone* and *Williams*.

CCC additionally contends that the work should be covered because the buildings are built to specific plans and specifications of the District, and JTS does not order or commence the work until there is a signed contract. As JTS qualifies as a material supplier under *Sansone*, such considerations are immaterial as to whether the off-site manufacturing work is subject to prevailing wage requirements.

For the foregoing reasons, the off-site manufacture of modular classrooms by JTS is not a subject to the prevailing wage requirements of the California Labor Code.

I hope this letter satisfactorily responds to your inquiry.

Sincerely,


John C. Duncan
Director

³For the same reason, the facts of this case differ from those in the other previous determination cited by CCC, PW 92-036, *Imperial Prison II, South* (April 5, 1994).