STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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May 15, 2008

Sarah Farley
Farley & Associates
3145 Geary Boulevard, Suite 440
San Francisco, CA 94118

Re: Public Works Case No. 2007-012
Sand City Design Center
Sand City Redevelopment Agency

Dear Ms. Farley:

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 Sand City Design Center ("Project") in the City of Sand City ("City") is not a public work subject to prevailing wage requirements.

Facts

The Project, located on what is referred to by the interested parties as the Robinette Site, consists of a four-story mixed-use building with retail shops and offices on the first and second floors and residential units on the third and fourth floors. It also includes surface-level parking, landscaping and a plaza area. The total Project cost is $21,893,329.55.

On July 28, 2003, the Sand City Redevelopment Agency ("Agency") entered into an Exclusive Negotiating Agreement with Design Center, LLC ("Developer") concerning the disposition and development of the Robinette Site. In September 2003, City obtained an appraisal of the Robinette Site from Hannah and Associates,[1] a professional real estate appraisal firm ("Hannah appraisal"). The fair market value of the property, including water rights/credits, was determined to be $1.885 million. On May 17, 2005, Agency and Developer entered into a Development and Disposition Agreement ("DDA").[2] Under the DDA, Agency agreed to transfer the Robinette Site to Developer for $1.885 million.[3]

[1] John Hanna is a Certified General Real Estate Appraiser and a member of the Appraisal Institute.

[2] The DDA contains a prevailing wage provision. The issue addressed herein, however, is whether the Project is a public work *as a statutory matter*. The potential contractual obligations of the parties are outside the scope of this Determination.

[3] The Hannah appraisal, upon which the purchase price was based, was 18 months old when the DDA was executed in May 2005. To verify that the purchase price reflected the fair market value of the Robinette Site at the time of transfer, an interested party, a group of employees of a subcontractor on the Project, obtained as part of the coverage determination process an independent appraisal from Stuart Wolf, a Certified General Real Estate Appraiser. Wolf appraised the fair market value of the property, including water rights/credits, at the time of transfer at $1.7 million ("Wolf appraisal").

The DDA requires Developer to set aside 10 residential units for very low, low and moderate income households ("affordable units") for a period of 55 years. The DDA provides as follows: "The Agency shall provide a subsidy for five (5) of the Affordable Rental Units in the form of a loan to Design Center in the sum of TWO HUNDRED TWO THOUSAND ONE HUNDRED TEN DOLLARS ($202,110). Said subsidy shall be made in the form of a credit against the Purchase Price at closing."[4]

Agency further agreed to waive approximately $27,720.80 in permit fees, to reimburse Developer $50,000 for undergrounding utility lines, and to contribute up to half of the $75,000 total cost for public art that will be placed on a public easement.

Developer entered into a contract for construction of the Project with Saroyan Builders.

Discussion

Labor Code section 1720(a)(1)[5] generally defines "public works" to mean: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds ... ." Section 1720(b) defines "paid for in whole or in part out of public funds" to mean the following: "[t]he payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer" (§ 1720(b)(1)); a "[t]ransfer by the state or political subdivision of an asset of value for less than fair market price" (§ 1720(b)(3)); "[f]ees ... loans ... 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" (§ 1720(b)(4)); and "[c]redits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision" (§ 1720(b)(6)). Lastly, section 1720(c)(3), sets forth the following exemption:

> (c) Notwithstanding subdivision (b): ....
>
> (3) If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

[4]A report by Freitas and Freitas, Engineering and Planning Consultants ("Freitas") determined that the difference between the income stream for market rents and affordable rents of $1,368 per month will equal or exceed the amount of the $202,110 subsidy over the 55-year period of affordability ("Freitas report"). Freitas recommended that Agency provide the subsidy in the form of a "silent second" loan. According to Freitas: "The silent second deed of trust is a no interest, deferred loan with no monthly payments required. At the end of the required affordability period (55 years), the loan is totally forgiven. So, in essence, the silent second loan becomes a grant at the end of the affordability period."

[5]All section references are to the Labor Code, unless otherwise provided.

It is undisputed that the Project involves construction done under contract. The issues are whether the above-described Agency contributions constitute payments of public funds as defined by section 1720(b) and, if so, whether the Project is exempt from prevailing wage requirements under the exemption provided in section 1720(c)(3).

Agency's $50,000 reimbursement to Developer for the undergrounding of utility lines and Agency's contribution of $37,500 for artwork are "[t]he payment of money ... by the state or political subdivision directly to or on behalf of the ... developer" within the meaning of section 1720(b)(1)). Developer's argument that the $37,500 Agency contribution for artwork is not a payment of public funds because the artwork will be owned by Agency and displayed on a public easement within Project is unpersuasive given the plain language of this section. Agency's waiver of $27,720.80 in permit fees is an additional payment of public funds under section 1720(b)(4) as "fees ... waived by the state or political subdivision." The requesting party views the water rights/credits, which were included in the transfer of the Robinette Site, as an additional payment of public funds. Given that the purchase price included the value of the water rights/credits as part of the fair market valuation of the property, the water rights/credits does not appear to be a payment of public funds under any statutory provision.

Regarding Agency's $202,110 subsidy, it is characterized as a forgiven loan in the Freitas report and a credit against the purchase price in the DDA. The subsidy allowed Developer to pay $1,682,890 for the Robinette Site, which is less than its appraised fair market value under the Hannah and Wolf appraisals. Arguably, therefore, the $202,110 subsidy could fall under one or more of the following provisions: (1) a transfer of an asset for less than fair market price under section 1720(b)(3); (2) a loan that is forgiven under section 1720(b)(4); and/or (3) a credit applied against repayment obligations under section 1720(b)(6). Developer contends that the determination of fair market price under section 1720(b)(3) should take into consideration the difference in income stream from the loss of five market-rate units for 55 years. Developer concludes that the $202,110 subsidy does not render the transfer below fair market price under section 1720(b)(3); it merely reflects the diminution in the value of the property.

It is, however, unnecessary to decide this issue because the aggregate sum of Agency contributions, including the $202,110 subsidy, is $317,330.80, which represents only 1.4 percent of the total Project cost of $21,893,329.55. The total subsidy from Agency is proportionately small enough in relation to the overall cost of the Project, such that the availability of the subsidy does not significantly affect the economic viability of the Project. As such, under section 1720(c)(3), the public subsidy is considered de minimis in the context of the "otherwise private development project" and therefore, the Project is exempt from prevailing wage requirements.[6]

For the foregoing reasons, the public subsidy to the Project is de minimis and therefore does not render this otherwise private development project a public work subject to prevailing wage requirements.

[6]This is consistent with PW 2004-024, *New Mitsubishi Auto Dealership, Victorville Redevelopment Agency* (March 18, 2005) [a public subsidy representing 1.64 percent of the total project costs was found to be de minimis].

I hope this determination satisfactorily answers your inquiry.

Sincerely,

John C. Duncan
Director