

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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San Francisco, CA 94102
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August 31, 2009

Michael Lindeman
Valley Aggregate Transport, Inc.
753 N. George Washington Blvd.
Yuba City, CA 95993

Re: Public Works Case No. 2009-019
Hauling of Fill Material from Bryan Ranch to State Highway 99 Roadway Project
California Department of Transportation

Dear Mr. Lindeman:

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 hauling of fill material by employees of an independent trucking company from a private farm to a public works roadway construction project is subject to prevailing wage requirements.

Facts

On May 12, 2008, the State of California Department of Transportation ("Caltrans") advertised for bid the construction of an expressway, which entailed the placement of asphalt concrete over aggregate base, in the County of Sutter ("Project"). The Project, estimated to cost \$55 million, widens State Highway 99 to four lanes with a continuous left turn lane and median, creating a new alignment bypassing the Town of Tudor and adding two signalized intersections. The Project is being funded through Caltrans' State Transportation Improvement Program authorized by Proposition 1B.¹ Caltrans' Notice to Contractors and Special Provisions for Contract No. 03-1A4614, adopted as the prime contract, requires, among other things, that the contractor provide an estimated 354,000 cubic meters (463,014 cubic yards) of "mineral material including rock, sand, gravel or earth."

On July 24, 2008, Caltrans awarded the contract to DeSilva Gates ("DeSilva"), a general contractor. On September 17, 2008, DeSilva contracted with A&G Montna Properties, L.P. ("Montna") to supply the fill material for the Project from Montna's 500-acre property known as

¹The Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006, approved by the voters as Proposition 1B on November 7, 2006, includes an authorization of \$1 billion to Caltrans, for safety, operational enhancements, rehabilitation, or capacity improvements necessary to improve the State Route 99 Corridor in the San Joaquin and Sacramento Valleys.

Bryan Ranch ("Montna agreement"). The Montna agreement provides that the material may be used on the "Highway 99 Tudor Bypass Project and certain other construction contracts." Bryan Ranch is located in the Sutter Bypass area approximately seven to eight miles from the Project site. Montna thinks it might have sold fill material from Bryan Ranch on one or more isolated occasions in the 1980s, but DeSilva acknowledges that historically Bryan Ranch has always been used as farmland. Bryan Ranch is now a rice farm and Montna is not a commercial supplier of construction materials.

The Montna agreement gives DeSilva the exclusive right to remove all the fill material needed for the Project from Bryan Ranch. The Montna agreement specifies that:

"Material" is defined as unclassified fill material. Material will be removed from the Property to a depth of not more than 0.75 feet below ground surface, as necessary to excavate and remove not more than 600,000 cubic yards (CY) of Material.

On January 1, 2009, DeSilva entered into an agreement with Valley Aggregate Transport ("VAT"), an independent trucking company, for the on-haul of materials to the Project site. Asphalt concrete is to be hauled from Dantoni Plant, aggregate base from Western Aggregates, and fill material from Montna's Bryan Ranch.² Both Dantoni Plant and Western Aggregates are commercial material suppliers.

Discussion

Labor Code³ section 1720(a)(1) 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 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.

....

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

²VAT initially indicated that two private farms would be supplying fill material for the Project. The Department's investigation confirms, however, that DeSilva's only source of fill material is Montna's Bryan Ranch.

³All further statutory references are to the California Labor Code unless otherwise indicated.

him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.”

O.G. Sansone Co. v. Department of Transportation (1976) 55 Cal.App.3d 434, 127 Cal.Rptr. 799 (“*Sansone*”) provides the pertinent authority with respect to coverage of on-hauling. In *Sansone*, a contractor obtained aggregate subbase materials for a highway construction project not from an established 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 by employees of an independent trucking company was subject to prevailing wage requirements. (*Id.* at p. 445.) In reaching this conclusion, the court quoted with approval *Green v. Jones* (1964) 128 N.W.2d 1, 6 (“*Green*”): “If certain materials were stockpiled at the site, then coverage depended on 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. Zachry Company v. United States* (1965) 344 F.2d 352, 354 (“*Zachry*”). In *Zachry*, the court found that prevailing wages were not required for the delivery of materials because 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.)

Under *Sansone*, on-hauling is in 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.” (*Sansone, supra*, 55 Cal.App.3d at p. 127 quoting *Green, supra*, 128 N.W.2d at p. 7.) *Sansone* distinguished hauling from a material supplier, which is exempt from prevailing wage requirements, from hauling performed as part of the public work. On-hauling from a bona fide material supplier is exempt because it is performed independently of the contract construction activities. Conversely, truck drivers on-hauling material from a source dedicated to the public works site would be deemed employed on public work. (*Sansone, supra*, 55 Cal.App.3d at p. 442.) For the material supplier exemption to apply, 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.” (*Sansone, supra*, 55 Cal.App.3d at p. 442, quoting *Zachry, supra*, 344 F.2d at p. 359.)

Here, it is undisputed that the Project is a public work under section 1720(a)(1) as it involves construction work done under contract and paid for with public funds. The sole issue presented is whether the hauling of fill material by employee drivers of VAT from Montna’s Bryan Ranch to the Project site is subject to prevailing wage requirements. The resolution of that issue turns on whether Montna, a rice farmer, is a bona fide material supplier under the holding in *Sansone*. Caltrans takes the position that Montna does not qualify for the material supplier exemption. VAT and DeSilva hold the contrary view. For the reasons explained below, Caltrans is correct.

To qualify as a bona fide material supplier, Montna must satisfy all three factors set forth in *Sansone*. Under the first factor, Montna must be in the business of selling supplies to the general public. (*Sansone, supra*, 55 Cal.App.3d at p. 444, citing *Green, supra*, 128 N.W. 2d at p. 6 and *Zachry, supra*, 344 F.2d at p. 359 [“... suppliers from which the material for the contracts in suit were obtained were in the business of selling such materials to the general public ...”].) It is undisputed that Montna operates a rice farm and is not a commercial supplier of construction materials. There is no evidence that Montna supplies materials for commercial construction projects with any frequency or consistency such that an argument could be made that material supply is even a small but regular part of its business. Under the second factor, the supply of fill material from Bryan Ranch must not have been established for this Project. *Sansone* distinguished continuously operating commercial pits from borrow pits opened for the purpose of supplying materials to a project. (*Sansone, supra*, 55 Cal.App.3d at p. 444.) The fill material supply site at Bryan Ranch meets the definition of a borrow pit as defined in *Williams v. SnSands* (2007) 156 Cal.App.4th 742, 750 (“*Williams*”).⁴ The fill material supply site or “borrow pit” at Bryan Ranch was established on account of this Project for the purpose of supplying fill material to the Project. Under the Montna agreement, a dedicated source of fill material for the Project was established. Under the third factor, the fill material supply site must not be located at the site of the Project. Although the third factor is satisfied in that Bryan Ranch is not located at the Project site, the first two factors are not satisfied for the reasons explained above. Therefore, Montna does not qualify for the material supplier exemption. Because Montna is not a bona fide material supplier and the prime contract between DeSilva and Caltrans specifically calls for DeSilva to supply the fill material needed for the Project, the hauling of fill material from Bryan Ranch to the Project site is work performed in the execution of the contract under section 1772. (*Williams, supra*, 156 Cal.App.4th at pp. 749-750 [“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 facts here are similar to the facts in *Sansone*. In *Sansone*, the materials were obtained through private borrow agreements with third parties. Employees of independent trucking companies hauled materials from locations established specially to serve the project site. Based on these facts, the court in *Sansone* held that the material supplier exemption did not apply and the on-hauling was subject to prevailing wages. Here, the fill material was obtained through the Montna agreement, similar to the private borrow agreement in *Sansone*. The employee truck drivers of VAT haul the fill material from a location that was established specially to serve this Project. For the same reasons the court in *Sansone* found that the material supplier exemption did not apply to the facts in that case, the material supplier exemption does not apply here.

Turning to the counter arguments, VAT asserts under the first factor that the sale of fill material by Montna to DeSilva is a commercial transaction and, as such, qualifies as a sale to the general public. It is undisputed, however, that Montna is not a commercial supplier of construction

⁴“The ‘borrow agreement’ was presumably related to use of a ‘borrow pit,’ which is an excavated area where material or earth has been borrowed to be used as fill at another location.” (*Williams, supra*, 156 Cal.App.4th at p. 750, fn.3, citing Webster's 3d New Internat. Dict. (2002) p. 257.)

materials. There is no basis to equate a single commercial transaction with a continuously operating material supply business.

VAT and DeSilva both argue under the second factor that Montna's supply of fill material was not established specially for this Project. Their specific contentions are as follows: Bryan Ranch is not directly adjacent to the Project; Montna's supply of fill material exceeds the amount that will be used for the Project; Montna is not DeSilva's exclusive material supplier; and Bryan Ranch has other uses in addition to supplying fill material to the Project (i.e., rice farming and/or ecological preserve). These contentions are addressed in turn.

Sansone supports the proposition that the dedicated site must be adjacent to the public works construction site in order for the hauling of materials from the dedicated site to be deemed part of the construction. Consistent with prior public works coverage determinations,⁵ a definition of the term "adjacent" that provides a specific distance limitation is, however, impractical and inadvisable. Adjacency should be governed by a "practical analysis," as the Administrative Review Board ("ARB") within the Department of Labor noted in *Bechtel Contractors Corporation, Rogers Construction Company, Ball, Ball and Brosamer, Inc., and the Tanner Companies (Bechtel II)*, (March 25, 1998) ARB Case No. 97-149 (98 WL 168939) ("*Bechtel*"). Here, Bryan Ranch is located approximately seven or eight miles from the Project site. There is no evidence that a closer source of fill material for the Project was either practical or available. Using a "practical analysis" for adjacency, the site at Bryan Ranch is deemed to be adjacent to the Project.

The total amount of fill material available at Bryan Ranch is not relevant to the issue of whether the *supply* of material was established specially for this Project. Under the Montna agreement, DeSilva has the exclusive right to remove all fill material needed for the Project and is not required to remove any more fill material than is necessary for the Project. Even if DeSilva removes more fill material than is necessary for the Project, the fill material supply site at Bryan Ranch was nonetheless specially opened to serve the needs of the Project. Whether DeSilva uses other material suppliers for the Project is also not relevant because a single *dedicated* supply of material need not be the *exclusive* supply of materials. Finally, the fact that Bryan Ranch functions as a rice farm or ecological preserve does not mean that it is not a dedicated source of fill material for the Project. As defined by *Sansone*, a dedicated site is a site that has been established specially for a particular contract. Here, the "borrow pit" at Bryan Ranch has been established specially to supply fill material for the Project.

Finally, VAT and DeSilva argue that the drivers are not engaged in the immediate incorporation of the hauled materials and therefore the on-hauling is not covered work. Under *Sansone*, the delivery exemption for drivers employed by independent trucking companies applies when the truck driver is hauling materials from a bona fide material supplier *and* "does not himself immediately and directly incorporate the hauled material into the ongoing public works project."

⁵See, e.g., PW 2002-010, *Production of Recycled Asphalt Concrete from Reclaimed Asphalt Pavement and Related Off-hauling and On-Hauling, Street Resurfacing and Reconstruction Program* (August 8, 2007).

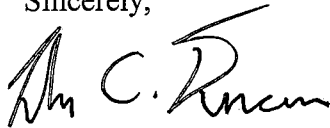
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(*Williams, supra*, 156 Cal.App.4th at p. 752.) Because Montna does not satisfy the requirements to be a bona fide material supplier, it is unnecessary to address whether the materials are being immediately incorporated into the Project by VAT's employees. As *Sansone* states, truck drivers on-hauling material from a source dedicated to the public works site are deemed employed on public work. (*Sansone, supra*, 55 Cal.App.3d at p. 442.)

For the foregoing reasons, the hauling of fill material from Bryan Ranch to the Project site is work performed in the execution of the public works contract and, therefore, subject to prevailing wage requirements.

I hope this letter satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Duncan". The signature is written in a cursive style with a large, stylized "D" at the end.

John C. Duncan
Director