

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR

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December 9, 2009

Clare M. Gibson, Esq.  
Jarvis Fay Doporto & Gibson, LLP  
475 14th Street, Suite 260  
Oakland, CA 94612

Re: Public Works Case No. 2009-035  
Construction of the Headquarter Fire Station  
Arcata Fire Protection District/Arcata Volunteer Fire Department, Inc.

Dear Ms. Gibson:

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 construction of the Headquarter Fire Station constitutes a public work subject to prevailing wage requirements.

#### Facts

The Arcata Fire Protection District ("District") is a California public agency that provides fire protection services to approximately 36,000 residents in a 63-mile service area encompassing the City of Arcata ("City"), the communities of McKinleyville, Bayside, Manila and Jacoby Creek, and other rural areas. District is supported by the Arcata Volunteer Fire Department, Inc. ("AVFD"), a private entity, which was established on January 24, 1884. District and AVFD work together closely to provide fire protection services within District's boundaries. Many members of AVFD are also current or former paid District firefighters. For example, current District Chief John McFarland resigned from his position as Vice President of AVFD in August 2009; current AVFD President Dave White retired as District Chief in 2005. District and AVFD currently maintain their offices in the Arcata Fire Station, a building owned by AVFD and leased to District. In providing fire protection services, members of AVFD serve under the supervision of District employees.

AVFD is in the early planning and permitting stages of constructing the Headquarter Fire Station (the "Project") in City on property owned by AVFD (the "Site"), with the costs of design and construction to be paid for entirely by AVFD with private donations. Upon completion of construction, District will transfer its base of operations from the Arcata Fire Station to this new facility where it will lease from AVFD more than 50 percent of the assignable square footage. AVFD has yet to enter into a construction contract.

In June 2007, prior to AVFD taking possession of the Site, AVFD requested that District commit to occupying the new station upon completion of construction.<sup>1</sup> In June 2008, District Board of Directors instructed District Chief McFarland to negotiate and draft the lease agreement.<sup>2</sup> By letter dated August 19, 2008, District committed to leasing the new station upon completion. The letter states in pertinent part:

The Board of Directors of the Arcata Fire Protection District are in concurrence with Fire Chief McFarland that upon completion of the proposed Arcata Fire Headquarters on Sunset Avenue that the District will occupy the facility immediately upon completion.

The District offices as well as the fire apparatus housed at the current Arcata Station will merge with the personnel and apparatus from the Mad River Station to satisfy our intentions.

We trust that District staff will continue to be directly involved in the planning phase of the facility and that this Board will be kept completely informed at all times.

Compensation for the Volunteers will be similar to, but not exceed, the current exchange enjoyed by both the Volunteers and the District. The exact details for compensation of Volunteer services to the District will be determined and presented in contract format through the Volunteer President and Fire Chief working with their respective Boards of Directors.<sup>3</sup>

In late 2008, after District agreed to lease the new fire station from AVFD upon completion of construction, AVFD took possession of the Site, incorporated as a 501(c)(3) nonprofit corporation for purposes of financing the Project through private fundraising, and retained two design firms.

As reflected in the August 19, 2008, letter, District had been directly involved in the planning phase of the Project and intended to continue its involvement. For example, in March 2007, AVFD Building Planning Committee co-chair Carl Pellatz and District Chief McFarland attended a presentation about permeable surfaces for possible use on the Project to meet environmental goals concerning runoff.<sup>4</sup> In October 2007, Steve Tyler, Director, District Board of Directors, met with AVFD and City staff regarding the Project.<sup>5</sup> In January 2008, AVFD and District Chief

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<sup>1</sup>District Board of Directors Minutes, June 26, 2007, at p. 1; interview by the Department of Industrial Relations with AVFD President Dave White in which he confirmed that AVFD sought District's written commitment to occupy the new station.

<sup>2</sup>AVFD Board of Directors Minutes, June 18, 2008, at p. 3.

<sup>3</sup>See District Board of Directors Minutes, July 15, 2008, at p. 1 ["Chief McFarland reported that he had drafted a letter stating the District would occupy the new fire station and that the pay would be similar to the amount we are currently paying."]; interview by the Department of Industrial Relations with John Davis, Chairman, District Board of Directors, in which he confirmed that one of the conditions of District's agreement to occupy the new station was that District would pay the same amount as it is currently paying.

<sup>4</sup>AVFD Board of Directors Minutes, March 15, 2007, at p. 4.

<sup>5</sup>District Board of Directors Minutes, October 23, 2007, at p. 3.

McFarland met with City staff and RRM Design, one of the two design firms retained for this Project, at both the Site and the Arcata Fire Station to review the site plan.<sup>6</sup>

In the course of the Department of Industrial Relations' investigation, telephone interviews with District employees and members of AVFD were conducted. District Battalion Chief Russ Locatelli, also a member of AVFD, stated that he participated in planning meetings regarding the Project on paid District time over a three-year period. He further stated he gave specific input as to the location of the new station as well as the design of the offices, training room, bays and apparatus. District Assistant Chief/Fire Marshal Desmond Cowan, also a member of AVFD, attended planning meetings on paid District time over a two-year period and gave specific input as to the design and location of the generator, cleaning station for apparatus, and living quarters.

#### Discussion

Labor Code section 1720.2<sup>7</sup> provides as follows:

For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public works" also means any construction work done under private contract when all of the following conditions exist:

- (a) The construction contract is between private persons.
- (b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.
- (c) Either of the following conditions exist:
  - (1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.
  - (2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work.

Regarding subdivisions (a) and (b), the construction contract will be between private persons, AVFD and a yet to be designated building contractor. The Site where the Headquarter Fire Station is to be built is privately owned by AVFD. Upon completion of construction, more than 50 percent of the assignable square feet of the new station will be leased by AVFD to District, a political subdivision of the state, for its own use. The conditions of subdivisions (a) and (b) are met.

In addition to meeting the requirements of subdivisions (a) and (b), subdivision (c)(1) or (c)(2) must also be met for the Project to be a public work. Under subdivision (c)(1), the lease agreement must be entered into prior to the construction contract. Here, by letter dated August 19, 2008, District responded to AVFD's request for a written commitment and agreed to lease and occupy the new station upon completion of construction. AVFD has not yet entered into a construction contract. Under subdivision (c)(1), there is an agreement to lease between the lessor, AVFD, and

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<sup>6</sup>AVFD Board of Directors Minutes, January 17, 2008, at p. 2.

<sup>7</sup>All further statutory references are to the California Labor Code unless otherwise indicated.

District, a political subdivision of the state. That agreement was entered into prior to the execution of a construction contract, and therefore subdivision (c)(1) applies.

District argues that subdivision (c)(1) does not apply because the parties will not enter into the actual lease document until sometime after the construction contract is executed. To accept this argument would allow parties to avoid prevailing wage obligations simply by holding off on memorializing an existing agreement. The intent of section 1720.2 is to assign public works status to privately funded construction where a public entity has agreed to lease more than 50 percent of the assignable square footage prior to the owner of the property undertaking construction. That is what happened here. In response to AVFD's offer, District agreed to lease the Site upon completion of construction for compensation at a sum not to exceed what District is currently paying, as memorialized in District's letter of August 19, 2008. This agreement to lease predates the construction contract. In fact, it predates AVFD taking possession of the Site. These facts are sufficient to establish a lease agreement within the meaning of subdivision (c)(1).

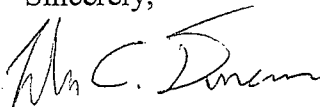
District appears to argue that the only possible basis for coverage lies in subdivision (c)(2). Under subdivision (c)(2), where the lease agreement is entered into during or after construction, prevailing wage requirements would apply if construction is performed according to plans, specifications or criteria furnished by the state or political subdivision. District contends that subdivision (c)(2) does not apply here because construction will be performed according only to plans, specifications and criteria furnished by AVFD.

Contrary to District's assertions, District was involved in all stages of planning for the new station. District participated in the decision to locate the station at the Site. District employees participated in planning meetings and provided specific design input on paid District time. By letter dated August 19, 2008, District declared that its staff would continue to be directly involved in the planning phase of construction. Accordingly, District, a political subdivision of the state, furnished plans, specifications or criteria for the Project. Therefore, the Project would be a public work under subdivision (c)(2), even if the lease agreement had been entered into during or after construction rather than prior to execution of the construction contract, because construction is going to be performed according to plans, specifications or criteria furnished by District.

For the foregoing reasons, under the specific facts of this case, the Project is a public work subject to prevailing wage requirements under section 1720.2.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John C. Duncan  
Director