

DEPARTMENT OF INDUSTRIAL RELATIONS
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April 21, 2010

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1800 Sutter Street, Suite 390
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Re: Public Works Case No. 2008-038
Solar Photovoltaic Distributed Generation Facility
Santa Cruz School District

Dear Mr. Nareau:

This constitutes the determination of the Director of Industrial Relations regarding the 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 and installation of the solar photovoltaic facility (the "Project") at Soquel High School in the Santa Cruz School District ("School District") is not a public work subject to prevailing wage requirements. Also, the maintenance of the facility is not covered.

Facts

The Project entails construction and installation of a solar photovoltaic ("PV") distributed generation facility ("solar PV facility" or "facility") on School District property. Solar PV distributed generation is a power supply model whereby solar panels directly convert sunlight into electricity that can be used on site. Excess electricity is distributed into the electricity grid.

On December 20, 2006, School District applied to Pacific Gas & Electric Company ("PG&E") for an incentive reservation for the Project to qualify for a monetary rebate under a program authorized by the California Public Utilities Commission ("CPUC") called Self-Generation Incentive Program ("SGIP").¹

¹CPUC established SGIP in response to Assembly Bill 970 (stats. 2000, ch. 329, §7) ("AB 970"). As it existed in 2006, SGIP offered rebates to electricity customers undertaking the construction and installation of facilities producing distributed generation from 30 kilowatts to one megawatt in capacity, including solar PV facilities. (CPUC Decision 01-03-073 (2001) ("SGIP Decision").) Beginning January 1, 2007, the incentive program for solar PV installations under SGIP was discontinued. In its place, CPUC established an incentive program under the California Solar Initiative ("CSI") for solar PV, solar thermal, solar water heating, and solar heating and air conditioning technologies. (CPUC Decision 06-01-024 (2006).)

On April 8, 2008, School District and MP2 Capital, LLC ("MP2 Capital") entered into a Solar Power Purchase Agreement (the "Agreement").² The Agreement provides that MP2 Capital will install a solar PV facility at Soquel High School on 287,600 square feet of roof space and School District will purchase all of the electricity generated by that facility at designated cents per kilowatt hour³ over a term of 25 years, subject to two five-year extensions. Under the Agreement, as amended on January 14, 2009, MP2 Capital agrees it will be solely responsible for all costs and the performance of all tasks required for the installation and maintenance of the facility, including obtaining "self-generation incentive credits for operation" of the facility.

The Agreement provides that MP2 Capital owns the solar PV facility and School District will have no responsibility to operate or maintain it, other than prevention of vandalism and destruction. School District acknowledges that MP2 Capital will sell its ownership interest in the facility to HSH Nordbank ("Bank") upon completion of the Project, subject to a leaseback for MP2 Capital. School District may exercise an option to purchase the facility after the sixth year of the term, at regular intervals specified in the Agreement, and at the expiration of the Agreement.

The Agreement provides that MP2 Capital is entitled to all "environmental attributes" relating to the Project, defined to include marketable environmental attributes or renewable energy credits, including carbon trading credits, renewable energy certificates, emissions reduction or offset credits, emission allowances, green tags and other tradable renewable credits. If MP2 Capital sells or assigns the environmental attributes, MP2 Capital agrees School District will have an equal share in any revenue.

The Agreement provides that School District will provide business interruption insurance on the solar PV facility at a cost to be reimbursed by MP2 Capital, and School District also will obtain an all risk property insurance policy naming MP2 Capital as the loss payee for the period of construction and operation. The Agreement also provides that MP2 Capital will maintain commercial general liability insurance naming School District as an additional insured. MP2 Capital will either provide, or ensure that its contractors provide, workers' compensation insurance. SGIP requires School District to maintain workers' compensation and business automobile liability insurance during the period of construction and installation.

On September 19 and 22, 2008, MP2 Capital entered into a contract ("Installation Contract") with Global Resource Options, Inc. ("Global Resource") for the design and installation of the solar PV

²School District entered into the Agreement under the authority of Government Code section 4217.12(a). That section provides that a public agency may enter into an energy services contract and ground lease where its governing board finds that the anticipated cost for purchase of electrical energy provided by an energy conservation facility will be less than the anticipated cost to the public agency of electrical energy that would be consumed in the absence of the purchase. The agency's governing board also must make a finding that the difference, if any, between the fair rental value for the real property subject to the facility ground lease and the agreed rent is anticipated to be offset by below-market energy purchases or other benefits provided under the energy services contract. School District's Board of Trustees made those findings on October 24, 2007.

³The cost of electrical power under the agreed rates is expected to be less than the cost to purchase power from PG&E.

facility on the roof of Soquel High School at a total price of \$2,248,839. The scope of work consists of the design, permitting, installation and construction of a fully operational roof-mounted solar PV system at the Soquel High School. The work included installing roof stanchions and roof racks for the solar PV panels, and trenching for conduits. Under the Installation Contract, Global Resources agrees to maintain the system for three years, including verifying torque of electrical connections, mechanical and visual inspection of power and control wiring, recording readings and environmental conditions, and verifying inverter modes of operation.

On December 18, 2008, School District leased to MP2 Capital the property at Soquel High School required for the installation and operation of the solar PV facility (the "Lease"). The term of the Lease is the same as the term under the Agreement. The Lease provides that MP2 Capital will obtain commercial general liability insurance for the construction, installation, operation and maintenance of the solar PV facility in an amount of \$2 million per occurrence. MP2 Capital also agrees to pay all real estate and personal property taxes and fees and any business or license taxes or fees associated with the solar PV facility. The Lease provides that MP2 Capital will pay rent at the rate of \$1 per year. School District's assistant superintendent indicates that while there is no appraisal, the value is minimal because the leased property is roof space and 240 square feet of ground for installation of the inverter and underground wiring. School District also represents that the roof of Soquel High School has never before been leased.

School District met its insurance obligations by applying the coverage under its existing workers' compensation, commercial general liability, and business automobile liability insurance policies at no additional cost. Application of its property insurance policy, however, caused an immediate increase of \$939 in School District's premium.

The SGIP claim form lists the total project cost as \$2,370,255. The initial application requested a \$1,277,369 rebate. The actual rebate amounted to \$787,500, payable to Bank.

Discussion

Labor Code section⁴ 1771 generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1) 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.... '[C]onstruction' includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work." Section 1771 also is "applicable to contracts let for maintenance work."

Section 1720, subdivision (b) provides, in relevant part:

- (b) For purposes of this section, "paid for in whole or in part out of public funds" means all of the following:
 - (1) The 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.

⁴All further section references are to the California Labor Code unless otherwise indicated.

- (2) Performance of construction work by the state or political subdivision in execution of the project.
- (3) Transfer by the state or political subdivision of an asset of value for less than fair market price.
- (4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, 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.
- ...
- (6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision.

Section 1720, subdivision (c)(3) provides, in relevant part:

- (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.

Section 16000 of title 8 of the California Code of Regulations provides the following definition of maintenance:

- (1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.
- (2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

No party contests that the Project involves construction and installation done under contract within the meaning of section 1720, subdivision (a)(1). The first issue presented in this case is whether payments by School District to MP2 Capital under the Agreement for the purchase of power generated by the solar PV facility constitute payments of public funds for construction within the meaning of subdivision (a)(1).

A second issue is whether any of the following potential public funds payments fall within the definitions set forth in subdivision (b): 1) the SGIP rebate paid by PG&E to Bank; 2) the rental arrangement between School District and MP2 Capital under the Lease; 3) federal tax credits and a depreciation allowance to which MP2 Capital and/or Bank is entitled; 4) renewable energy credits to which MP2 Capital is entitled under the Agreement; and 5) insurance premium increases paid by School District.

A third issue is whether the Project falls within the exemption set forth in subdivision (c)(3) for projects receiving a de minimis public subsidy. A final issue is whether maintenance work performed by Global Resources under the Installation Contract is covered work.

School District's Purchase of Power

For public works status to attach to the Project, section 1720, subdivision (a)(1) requires that the construction and installation of the solar PV facility be paid for in whole or in part out of public funds. It therefore must be determined whether payments made by School District under the terms of the Agreement are payments *for* construction and installation. As articulated in the Agreement, the payments made by School District are explicitly for the purchase of power generated by the solar PV facility. The payments are calculated not based on the cost of construction but, rather, on the cost of purchasing electrical power. In the Agreement, the price to be paid by School District is measured by cents per kilowatt-hour of electricity. While payments by School District for the purchase of electrical power are undisputedly public funds, they are not payments *for* construction. Rather, they are payments for electric power in the form of renewable energy over the term of the Agreement. For that reason, they do not constitute payments for construction and installation within the meaning of subdivision (a)(1). This conclusion is compelled by *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576 ("*McIntosh*"). That case addressed a situation involving government assistance payments for the care and treatment of disturbed and abused minors. *McIntosh* stated:

By a memorandum of understanding incorporated in the sublease, the County "commits" to placing minors in the finished facility and using what are undisputedly public funds to pay for their care and treatment there.... However, that is payment for later services, not preliminary construction. We hold that paying public funds for public services does not make incidental construction work done by a private provider of those services "public works" under section 1720, subdivision (a). The statute requires payment for "construction"; to take that as meaning "services" would violate plain, unambiguous language, which we cannot do.

(*McIntosh*, *supra*, 14 Cal.App.4th at p.1586.)

While subsequent amendments to section 1720 overturned other aspects of *McIntosh*, the above holding remains good law, as noted recently in PW 2008-026, *King/Chavez Preparatory Academy, City of San Diego* (October 1, 2009), PW 2008-025, *Construction of Animal Community Center, Humane Society Silicon Valley* (August 5, 2009), and PW 2010-008, *Southwest Community Health Center, Construction of Tenant Improvements at 3569 Round Hill Circle, County of Sonoma* (April 8, 2010).

Paid for in Whole or in Part out of Public Funds

The SGIP Rebate

Bank received \$787,500 from PG&E as an SGIP rebate.⁵ The issue is whether Bank's receipt of the SGIP rebate for the Project falls within the definition of "paid for in whole or in part out of public funds" set forth in section 1720, subdivision (b). Subdivision (b)(1), "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," is the only conceivably applicable subdivision. Because the rebate went directly from PG&E to Bank without first passing through the public coffers of School District, there was no payment of money by the state or political subdivision. The question under subdivision (b)(1) is whether there was a "payment of ... the equivalent of money" by School District. The answer to that question pivots on the nature of SGIP and the respective entitlement interests of School District and MP2 Capital to the rebate.

SGIP provides monetary rebates as financial incentives for the installation of new, qualifying self-generation equipment designed to meet all or a portion of the electric energy needs of a utility customer. Conditions to the receipt of an SGIP rebate are described in the SGIP contract signed by School District as host customer, Generating Assets, LLC as system owner⁶ and PG&E. The SGIP contract incorporates by reference the SGIP handbook, which contains further conditions to receipt of a rebate. The terms of the SGIP handbook changed from year to year. The version of the SGIP handbook that applies here is the one published in 2006, the year of School District's SGIP application. The 2006 SGIP handbook provides that the host customer is eligible to receive the SGIP rebate. It also provides that if the host customer consents, the system owner is also eligible to receive the SGIP rebate. According to the handbook, a rebate will not be paid until the eligible generating system is completely installed, interconnected, permitted, paid for and capable of producing electricity in the manner and in the amounts for which it was designed. Further conditions include the meeting of deadlines imposed by SGIP, successful field verification by PG&E, and the designation in writing by both the system owner and host customer as to whom PG&E should pay the SGIP check. The SGIP contract reinforces the condition that the rebate will be made payable to the entity designated in writing by the system owner and the host customer. Hence, the right to the rebate is subject to these conditions precedent.⁷

⁵SGIP is funded by a public goods charge on utility customer bills. The public goods charge was created by Assembly Bill 1890 (stats. 1996, ch. 854, § 10) ("AB 1890") as part of the restructuring of the electrical industry. SGIP rebates are paid by electric utilities out of utility balancing accounts. The utilities track their SGIP expenditures, and then seek reimbursement for these expenditures from their customers through formal ratemaking procedures at CPUC.

⁶Before its Agreement with MP2 Capital, School District had been working with Generating Assets, LLC to develop the Project as well as other projects. Generating Assets, LLC merged with another entity, and when the School District wanted to proceed on the Project, Generating Assets LLC declined and School District turned instead to MP2 Capital. MP2 Capital is the successor in interest to Generating Assets, LLC as to the SGIP rebate.

⁷Civil Code section 1436 provides: "A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed." A condition precedent is also described as an act that must be performed or an uncertain event that must happen before the promisor's duty of performance arises. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 776, p. 866.)

The SGIP contract also provides that it is joint and several. "Joint and several" means "constituting or relating to rights which two or more persons entitled thereto may assert either together or separately or to duties and liabilities of two or more persons for which they may be held liable either together or separately" (Webster's 3d New Int'l Dict. (2002) p. 1219.) Consequently, the host customer and the system owner, together or separately, are entitled to assert their rights under the SGIP contract.

As host customer, School District was in the class of entities eligible under SGIP to receive the rebate. Yet, as the Project unfolded, School District never became entitled to the rebate to the exclusion of MP2 Capital and Bank.⁸ Indeed, School District does not assert a right to the rebate on its own behalf. MP2 Capital undertook all the major steps necessary to meet the conditions precedent to PG&E's payment of the rebate. Having raised the funds necessary for construction and installation, having assumed the attendant risk, having undertaken the construction and installation through its contract with Global Resource, and having negotiated with School District the Agreement wherein MP2 Capital committed to finance the Project with funds that included the SGIP rebate, MP2 Capital was entitled to the rebate, not School District. Therefore, MP2 Capital, properly designated Bank on the SGIP claim form, pursuant to the terms of the Agreement, to receive the SGIP rebate. If Bank had not received the rebate to which it was entitled, MP2 Capital and Bank, as system owners, could have independently enforced their rights. Further, the SGIP rebate never reached the public coffers of School District or any other public entity in that the SGIP rebate was paid by PG&E, a private, investor-owned public utility, directly to Bank. Under these facts, it must be concluded that Bank's receipt of the SGIP rebate does not constitute the "payment of ... the equivalent of money" by School District within the meaning of subdivision (b)(1).

This conclusion finds support in other statutory schemes and the legislative history of SGIP. With Senate Bill 1078 (stats. 2002, ch. 516, § 3), the Legislature enacted Public Utilities Code section 399.14(h), which at the time provided that construction on a renewable energy resource receiving certain types of production incentives or supplemental energy payments is public work. SGIP incentives, however, are not production incentives or supplemental energy payments within the meaning of Public Utilities Code section 399.14(h). (See former Pub. Util. Code, § 383.5, subd. (b)(2)(D)(iii).)

Further, after CPUC adopted the *SGIP Decision*, the Legislature adopted two bills extending SGIP. (Stats. 2003, ch. 894, § 4 (Assembly Bill 1685); and stats. 2006, ch. 617, § 1 (Assembly Bill 2778).) Neither bill required the payment of prevailing wages for projects receiving SGIP rebates. With each of these enactments, the Legislature had the opportunity to impose prevailing wage obligations on solar PV projects receiving an SGIP rebate, as it did under similar circumstances when it passed Senate Bill 1078, but chose not to. As the California Supreme Court stated in *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 950, "Courts will liberally construe prevailing wage statutes [citations], but they cannot interfere where the Legislature has demonstrated the ability to make its intent clear and chosen not to act [citation]," quoting *McIntosh, supra*, 14 Cal.App.4th at p. 1589.

⁸Civil Code section 654 provides: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others."

Northern California Electrical Construction Industry argues that the Project is a public work because it receives similar funding to that in PW 2003-029, *Energy Efficiency and Generation Work, San Diego Police Headquarters* (January 28, 2005) (“*San Diego Police Headquarters*”). The analysis in *San Diego Police Headquarters*, however, does not resolve the question here due to factual differences between the two cases. There, the city engaged a contractor for demolition, construction and installation of various energy savings and renewable energy generating facilities at the city’s police department. The determination indicates that four types of payments to the contractor were involved: twelve annual payments and a lump sum payment out of city coffers; a self-generation incentive for a heat and power system; a photovoltaic buy-down incentive; and a standard performance contract incentive for energy-saving equipment. The determination found that the twelve annual and lump sum payments constituted payment out of public funds; that finding alone was sufficient to conclude there was a public work. The determination also found that the city assigned “incentive payments otherwise due” it to the contractor, without identifying which type of incentive payments were so assigned or which constituted payment out of public funds. Nor did it discuss whether the city had an entitlement to an SGIP rebate in the first instance. In contrast, in the current matter, there are no payments of public funds for construction given that School District’s payments are for future power, not for construction of the solar PV facility. Moreover, as discussed above, due to the conditions precedent to the maturing of the right to the SGIP rebate and the financial commitments MP2 Capital made under the Agreement, MP2 Capital, not School District, was the entity entitled to receive, and assign, the SGIP rebate. The finding in *San Diego Police Headquarters* was necessarily based on the particular facts, contracts, and program conditions applicable in that case. Under the facts of the current matter, the right to the SGIP rebate resides with MP2 Capital, not with School District.⁹

Rental Arrangement under the Lease

The property that School District leased to MP2 Capital for construction and installation of the solar PV facility is a portion of a roof at Soquel High School and 240 square feet of land used for conduit. The Lease calls for rent payments of \$1 per year for the 25-year term. The question, then, is whether rent was “paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision” within the meaning of section 1720, subdivision (b)(4).

The fact that the property has never been leased before supports School District’s representation that the property has minimal rental value. With no appraisal or other evidence of fair market value, there is no basis to conclude that the property was leased below fair market value. Neither is there any evidence that rent has been paid, waived, reduced, or forgiven. It is therefore concluded that rent was not paid, reduced, charged at less than fair market value, waived or forgiven by School District within the meaning of section 1720, subdivision (b)(4).

⁹*San Diego Police Headquarters* ultimately found the work at issue not subject to prevailing wages on chartered city grounds. It should also be noted that on September 4, 2007, the Department issued a notice stating that it would no longer designate public works coverage determinations as “precedential” under Government Code section 11420.60. Public notice of the Department’s decision to discontinue the use of precedent decisions can be found at [www.dir.ca.gov/DLSR/09-06-2007\(pwcd\).pdf](http://www.dir.ca.gov/DLSR/09-06-2007(pwcd).pdf).

Federal Tax Credits and Depreciation Allowance

While the Agreement does not specifically state as such, the federal renewable energy tax credits, and a five-year accelerated tax depreciation allowance under United States Code, title 26, sections 48(a)(3)(A)(i) and 168(e)(3)(B)(vi)(I), respectively are associated with the solar PV facility. Assuming that MP2 Capital or Bank will benefit from the tax credit and depreciation allowance, the question is whether any part of section 1720, subdivision (b) applies. A given transaction can be a payment of public funds only if it falls within one of the categories enumerated in section 1720, subdivisions (b)(1) through (b)(6). Subdivision (b) should not be construed to reach a financial arrangement that falls outside those definitional provisions. (*State Building and Construction Trades Council v. Duncan* (2008) (“*Trades Council*”) 162 Cal.App.4th 289, 319.) The only potentially applicable subdivisions are (b)(1), (b)(3), (b)(4) and (b)(6).

The federal renewable energy tax credits and the depreciation allowance do not constitute payment of public funds under subdivision (b)(1). Tax credits “‘have no value in themselves,’ only the contingent benefit ‘to reduce the taxes otherwise payable.’” (*Trades Council, supra*, 162 Cal.App.4th at pp. 312-313 [internal citations omitted].) “[I]n allocating a tax credit, the state parts with nothing of any realizable monetary worth. It thus is not ‘the payment of money or equivalent of money by the state....’” (*Id.* at pp. 310-311.) A depreciation allowance is a deduction on a tax return allowed for “a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)” of qualified property. (26 U.S.C. § 167.) The reasoning of *Trades Council* as to tax credits applies equally to the accelerated depreciation allowance.

Further, because tax credits have no value in themselves, the tax credits do not constitute a transfer by the state within the meaning of subdivision (b)(3). (*Trades Council, supra*, 162 Cal.App.4th at p. 311.) A depreciation allowance does not exist apart from the asset on which it is based and likewise does not entail a transfer by the state within the meaning of subdivision (b)(3). (See *TG Missouri Corp. v. C.I.R.* (2009) 133 T.C. No. 13, p. 10 [“[G]enerally, only taxpayers with an economic interest in an asset can deduct depreciation with respect to that asset....”].)

Neither the federal tax credits nor the depreciation allowance constitute “[f]ees, costs, rents, insurance or bond premiums, loans or interest rates ... that are paid ... by the state or political subdivision” within the plain meaning of section 1720, subdivision (b)(4). Like the low income housing tax credits in *Trades Council*, the effect of the renewable energy tax credits and the depreciation allowances is to reduce MP2 Capital’s or Bank’s federal income tax obligations. They are not fees, costs, rents, premiums, loans or interest rates; and they do not constitute “obligations that would normally be required in the execution of the contract.” The “execution of the contract” entails expenditures by, not income to, the public entity. (*Trades Council, supra*, 162 Cal.App.4th at p. 310 [“A tax credit has no intrinsic value to the state”].) As such, the federal renewable energy tax credits and the depreciation allowance do not entail a public subsidy to the Project under subdivision (b)(4).

Last, the federal renewable energy tax credits and depreciation allowance are not “[c]redits that are applied by the state ... against repayment obligations to the state...” within the meaning of subdivision (b)(6). Rather, they serve to reduce MP2 Capital’s or Bank’s tax liability on income unrelated to the Project. As stated in *Trades Council*, an income tax is not an obligation to repay

money obtained from a governmental entity. (*Trades Council, supra*, 162 Cal.App.4th at pp. 312-313.)

Hence, the federal tax credits and depreciation allowance do not constitute payment in whole or in part out of public funds under any part of subdivision (b).

Renewable Energy Credits

Under the Agreement, MP2 Capital is entitled to renewable energy credits associated with the solar PV facility, but must share any revenue from the sale of those credits with School District. The issue here is whether this sharing of revenues from a sale of renewable energy credits under the Agreement means the Project was paid for in whole or in part out of public funds within the meaning of any part of section 1720, subdivision (b). This requires an analysis of the nature of renewable energy credits.

The term “renewable energy credits” here relates to avoided air pollution, such as that caused by emissions of carbon dioxide, sulphur oxide, and nitrogen oxide that occur in the generation of electricity through means such as coal-burning plants. The owners of distributed generation facilities own the renewable energy credits. (CPUC Decision 07-01-018 (2007).) One renewable energy credit represents the environmental and renewable attributes associated with one megawatt-hour of electric power generation under the California Renewables Portfolio Standard (“RPS”) set forth in Public Utilities Code section 399.11. The renewable energy credits associated with the solar PV facility in this case potentially entail a payment because CPUC recently determined that renewable energy credits can be traded on the market. (CPUC Decision 10-03-021) (2010).)

Under the CPUC decisions cited above, MP2 Capital and Bank, as owners of the facility, are entitled to the renewable energy credits attributable to the electricity generated from the solar PV facility. Where the Agreement allows School District the benefit of half the revenues from any sale of renewable energy credits, assuming there is a buyer for the credits on the market, that provision represents income to School District, not a payment by School District to MP2 Capital. Consequently, there is no payment by School District within the meaning of subdivision (b)(1).

Where the Agreement allows MP2 Capital the benefit of revenues from a sale of renewable energy credits, that provision does not represent a transfer by School District of an asset of value for less than fair market price within the meaning of subdivision (b)(3). That is so because MP2 Capital and Bank, as system owners, have ownership of the credits to begin with.

Similar to the reasoning concerning the federal tax credits and depreciation allowance discussed above, renewable energy credits do not constitute “fees, costs, rents ... or other obligations that would normally be required in the execution of the contract” within the meaning of subdivision (b)(4) or “[c]redits that are applied by the state ... against repayment obligations to the state ...” within the meaning of subdivision (b)(6). Accordingly, the arrangement under the Agreement for the sharing of revenues from any sale of renewable energy credits does not entail a payment of public funds under any of the subdivision (b) definitions.

Insurance Premium Increases

School District was required by the Agreement and the SGIP contract to provide workers' compensation, commercial generality liability, and business automobile liability insurance. The issue is whether payment by School District of the premiums for these insurance policies falls within section 1720, subdivision (b)(4), which includes within the definition of paid for in whole or in part out of public funds "insurance or bond premiums ... that are paid ... by the state or political subdivision."

School District represents that it incurred no further cost by applying its existing policies to meet its obligations to provide workers' compensation, commercial general liability, and business automobile liability insurance. As such, the application of those policies involves no payment of public funds under subdivision (b)(4). On the other hand, School District's property insurance premium for the first policy year after construction and installation of the solar PV facility increased by \$939. Under the plain language of subdivision (b)(4), payment by School District of the increase in premium that is attributable to the solar PV facility over the term of the Lease constitutes payment of public funds.

The De Minimis Exemption

Section 1720, subdivision (c)(3) states that if the public entity "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" prevailing wages. The applicability of this exemption turns on two issues. The first issue is whether the Project is a private development project, a phrase that is not defined in the statute. MP2 Capital is a private entity that built the solar PV facility with private funds, outside of the small School District contribution mentioned above. The solar PV facility is privately-owned under the terms of the Agreement, at least until an option to purchase is exercised by School District. Under the Agreement, School District currently has no possessory ownership interest in the solar PV facility and it has no responsibility to operate or maintain it. Further, in large part, the solar PV facility is simply replacing or supplementing another private source of electricity provided by PG&E. These facts support the conclusion that the solar PV facility is a private development project within the meaning of subdivision (c)(3).

The second issue is whether the public subsidy to the Project is de minimis. Subdivision (c)(3) does not define "de minimis." "De minimis" means "trifling; minimal ... or so insignificant that a court may overlook it in deciding an issue or case." (Black's Law Dict. (9th ed. 2004) p. 496.) The public subsidy to the Project as identified in this determination consists of School District's payment of the increase in property insurance premium associated with the solar PV facility. The insurance premium increased by \$939 on account of the solar PV facility for the first year of operation. Assuming the same increase for the entire 25-year term of the Agreement, the total increase in premium attributable to the Project is \$23,475, without discounting the figure to achieve a present-day value. That figure represents 0.99 percent of the overall project cost of \$2,370,255. This public subsidy is proportionately small enough in relation to the overall cost of the Project so as not to affect the economic viability of the Project. As such, under section 1720,

subdivision (c)(3), the public subsidy is de minimis within the context of the Project and, therefore, the Project is exempt from prevailing wage requirements.¹⁰

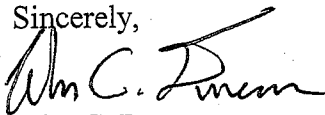
Maintenance

The issue of whether maintenance work performed by Global Resources under the Installation Contract is subject to prevailing wages requires consideration of the relevant regulation. The regulatory definition of maintenance requires that the work be done on a "publicly owned or publicly operated facility." (Cal. Code Regs., tit. 8, § 16000.) (Accord, PW 2005-026, *Tree Removal Project, County of San Bernardino Fire Department* (July 28, 2006).) In that the solar PV facility is not owned or operated by School District or any other public entity, the maintenance work performed by Global Resources does not meet the definition of maintenance. As such, maintenance work on the facility done by Global Resources under the Installation Contract is not subject to prevailing wages.

For the foregoing reasons, the Project, which entails the construction and installation of a solar PV facility on School District property to meet School District's electric energy needs is not a public work subject to prevailing wage requirements. Also, maintenance services under the Installation Contract is not covered.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John C. Duncan
Director

¹⁰This conclusion is consistent with PW 2008-037, *The Commons at Elk Grove, City of Elk Grove* (January 2, 2009) (sewer impact fee credit representing 1.1 per cent of total project costs was found to be de minimis), PW 2008-010, *Sewer Line Construction, City of Corona* (August 4, 2008) (public subsidy representing four-tenths of one percent of total project costs was found to be de minimis), PW 2007-012, *Sand City Design Center, Sand City Redevelopment Agency* (May 15, 2008) (public subsidy representing 1.4 percent of total project costs was found to be de minimis), and PW 2004-024, *New Mitsubishi Auto Dealership, Victorville Redevelopment Agency* (March 18, 2005) (public subsidy representing 1.64 percent of total project costs was found to be de minimis).