STATE OF CALIFORNIA Arnold Schwarzenegger, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
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April 21, 2010

Michele R. Justice, Director
C.A.N.D.O. Contract Compliance
P.O. Box 642
Buckeye, AZ 85326-0047

Re: Public Works Case No. 2009-005
Solar Photovoltaic Distributed Generation Facility
West County Wastewater District

Dear Ms. Justice:

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 West County Wastewater District ("Wastewater District") in the City of Richmond ("City") 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 Wastewater 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 October 11, 2006, Wastewater 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]

[1]CPUC 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 September 13, 2007, Wastewater District and Solar Power Partners LLC-1 ("Solar Partners")[2] entered into a Power Purchase Agreement (the "Agreement").[3] Under the Agreement as amended on April 14, 2008 and December 29, 2008, Solar Partners agrees to finance, own[4], and operate the solar PV facility on Wastewater District property in City and Wastewater District agrees to purchase the electricity generated by the facility at designated cents per kilowatt-hour[5] over a term of 20 years, subject to five three-year extensions. Solar Partners agrees to maintain the facility at its own cost.

The Agreement provides that Solar Partners is entitled to all "environmental attributes" relating to the Project, defined to include tax credits, subsidies, incentives, offsets, tax depreciation allowances, performance-based incentives, and financial allowances. Under that provision, Solar Partners is entitled to the rebate from PG&E under Wastewater District's incentive reservation with SGIP, as well as federal tax credits and an accelerated depreciation allowance for renewable energy facilities.

The Agreement provides that Solar Partners is entitled to "renewable energy credits" for the first five years and the 20th year, and Wastewater District is entitled to those credits from the sixth to the 20th years. "Renewable energy credits" are defined as green tags or transferable indicia of generation of energy from a renewable energy facility.

The Agreement also provides that both Wastewater District and Solar Partners will maintain commercial general liability insurance at their own cost, naming the other party as an additional insured. Wastewater District must also provide insurance against loss of the facility under its property or liability insurance policies. SGIP requires Wastewater District to maintain workers' compensation and business automobile liability insurance during the period of construction and installation.

On September 13, 2007, Wastewater District leased to Solar Partners five acres of land adjacent to a marsh to be used for construction and installation 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 Solar Partners

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[2]Solar Partners does business as Solar Power Partners Fund I, LLC. Also, Solar Partners uses other limited liability companies for different aspects of the construction and installation, operation, and ownership of the facility. For purposes of this determination, the phrase "Solar Partners" shall be deemed to include Solar Power Partners LLC-1 and all other limited liability companies used by Solar Partners.

[3]Wastewater 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. Wastewater District's Board of Directors made those findings on July 17, 2007.

[4]Solar Partners owns the facility subject to Wastewater District's option to purchase it for no more than 40 percent of the installation cost.

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

will obtain commercial general liability for the construction, installation, operation and maintenance of the solar PV facility. Solar Partners also agrees to pay all real estate and personal property taxes and any business or license taxes or fees associated with the solar PV facility. The Lease does not provide for payment of rent. Wastewater District's general manager indicates the fair rental value for the land is zero, although no appraisal exists. Prior to the Lease, the land had never been leased. It has been and will continue to be used by Wastewater District as a settling basin for storm water overflow.

Wastewater District met its obligation under the Agreement and the Lease to provide commercial general liability, workers' compensation and business automobile liability insurance by applying its existing policies at no further cost. In the first policy year after completion of the Project, Wastewater District's property insurance premium increased by $6,335.82 over the premium amount for the previous policy year. According to Wastewater District's insurance carrier, $2,765.90 of the increase is attributable to the inclusion of the facility under the policy.

On August 28, 2008, Solar Partners entered into a construction contract with Premier Power Renewable Energy, Inc. ("Premier") for the turnkey delivery of the solar PV facility at a price of $8,022,565. The scope of work consists of mechanical and electrical work required for construction and installation of a tracking solar PV facility mounted on a concrete foundation attached to the ground. Pursuant to its obligations under the Agreement, using Premier, Solar Partners constructed and installed a fully operational solar PV system with a capacity of approximately 1,194 kilowatts.

Wastewater District created a capital budget for the Project under which it spent $259,297.64 on various engineering and maintenance tasks. Wastewater District's maintenance crew set up pumps and hoses to divert overflow water from the area used for the solar PV facility to another area. The maintenance crew also coordinated removal and relocation of salvaged materials and oil storage tanks, which work was performed by two contractors, Tommy's Liquidations and Recycling and Oldcastle Precast. The maintenance crew tagged and locked electrical breakers and inspected electrical connections. Wastewater District engineering employees met with designers, oversaw the work of the maintenance crew, identified information on buried utilities and electrical infrastructure, coordinated revisions of electrical tie-in points, and prepared the SGIP application. Actual physical labor performed by Wastewater District employees and outside contractors accounts for $41,235.20 of the capital budget. Engineering-related services and activities account for the remainder of the capital budget.

On March 12, 2009, Solar Partners entered into a maintenance services agreement with Advance Energy Industries, Inc. ("Advance") under which Solar Partners agrees to pay Advance an increasing amount starting with $14,450 for the first year and Advance agrees to maintain the facility for one year with automatic one-year extensions for the same period as covered by the Lease. The service schedule includes annual inspection of the general site conditions and solar PV facility elements and annual preventive maintenance. On April 23, 2009, Solar Partners entered an open-ended maintenance services agreement with ET Solar, Inc. ("ET") under which Solar Partners agrees to pay ET an increasing amount starting with $5,150 in the first year and ET agrees to maintain identified aspects of the facility for one year with automatic one-year extensions. The

service schedule calls for bi-annual inspection of conduit runs and various physical and electrical components, and other bi-annual services outlined in a solar tracker maintenance manual.

The SGIP claim form lists the total project cost as $8,073,279. The SGIP application initially requested a $6,238,418 rebate. The actual rebate amounted to $2,196,328, payable to Solar Partners.

Discussion

Labor Code section[6] 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:
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> (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.
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> (2) Performance of construction work by the state or political subdivision in execution of the project.
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> (3) Transfer by the state or political subdivision of an asset of value for less than fair market price.
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> (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) 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

[6]All further section references are to the California Labor Code unless otherwise indicated.

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.
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> (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 Wastewater District to Solar Partners 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 definition set forth in subdivision (b): 1) the SGIP rebate paid by PG&E to Solar Partners; 2) the rental arrangement between Wastewater District and Solar Partners under the Lease; 3) federal tax credits and a depreciation allowance to which Solar Partners is entitled under the Agreement; 4) renewable energy credits to which Solar Partners is entitled under the Agreement; 5) insurance premium increases paid by Wastewater District; and 6) construction work undertaken by Wastewater 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 work performed by Advance and ET under the maintenance services agreements is covered work.

Wastewater 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 Wastewater District under the terms of the Agreement are payments *for* construction and installation. As articulated in the Agreement, the payments made by Wastewater 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 Wastewater District is measured by cents per kilowatt-hour of electricity. While

payments by Wastewater 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

Solar Partners received $2,196,328 from PG&E as an SGIP rebate.[7] The issue is whether Solar Partners' 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 Solar Partners without first passing through the public coffers of Wastewater 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 Wastewater District. The answer to that question pivots on the nature of SGIP and the respective entitlement interests of Wastewater District and Solar Partners to the rebate.

[7]SGIP 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.

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 Wastewater District as host customer, Solar Partners as system owner 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 Wastewater 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.[8]

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, Wastewater District was in the class of entities eligible under SGIP to receive the rebate. Yet, as the Project unfolded, Wastewater District never became entitled to the rebate to the exclusion of Solar Partners.[9] Indeed, Wastewater District does not assert a right to the rebate on its own behalf. Solar Partners 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 Premier, and having negotiated with Wastewater District the Agreement wherein Solar Partners committed to finance the Project with funds that included the SGIP rebate, Solar Partners was entitled to the rebate, not Wastewater District. Therefore, Solar Partners was properly designated on the SGIP claim form, pursuant to the terms of the Agreement, to receive the SGIP rebate. If Solar Partners had not received the rebate to which it was entitled, Solar Partners, as system owner, could have independently enforced its rights. Further, the SGIP rebate never reached the public coffers of Wastewater District or any other public entity in that the SGIP rebate was paid by PG&E, a private, investor-owned public utility, directly to Solar Partners.

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[8]Civil 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.)

[9]Civil 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."

Under these facts, it must be concluded that Solar Partners' receipt of the SGIP rebate does not constitute the "payment of ... the equivalent of money" by Wastewater 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.

Contra Costa Electrical Compliance ("CCEC") argues that the SGIP payment was assigned by Wastewater District to Solar Partners and therefore constituted a payment out of public funds. In making this argument, CCEC contends that AB 970, which created SGIP, appropriated $57.5 million from the State Treasury, allocating $50 million to CPUC to implement energy conservation and demand-site energy programs, which led to the SGIP Decision. CCEC also relies on PW 2003-029, *Energy Efficiency and Generation Work, San Diego Police Headquarters* (January 28, 2005) ("*San Diego Police Headquarters*") and PW 2002-043, *Salton Sea 6 Geothermal Power Plant Project, Imperial County* (April 10, 2003) ("*Salton Sea*").

CCEC's argument is misplaced for the following reasons. As discussed above, given its commitment to finance the Project and to fulfill other conditions to the receipt of the SGIP rebate under the terms of the SGIP contract and the Agreement, Solar Partners was the entity entitled to the SGIP rebate, not Wastewater District. Consequently, PG&E's payment of the SGIP rebate to Solar Partners does not constitute payment of "the equivalent of money" by Wastewater District within the meaning of section 1720, subdivision (b)(1).

AB 970 did appropriate $57.5 million from the State Treasury, as CCEC states. CCEC is incorrect, however, in its representations that $50 million was allocated to CPUC and that the appropriation was the source of the SGIP rebate here. The $57.5 million appropriation was divided amongst the State Energy Resources Conservation and Development Commission ("Energy Commission"), the California Environmental Protection Agency ("EPA"), the Resources Agency, and CPUC. $5.2 million of that amount was allocated to pay for temporary staff at Energy Commission, EPA, and the Resources Agency, and $50 million was allocated to Energy Commission for energy

conservation programs, demand-side management programs, and peak electricity demand reduction grant programs established pursuant to a former section of the Public Resources Code. The balance of the $57.5 million, $2.3 million, was allocated to CPUC for temporary staff. (Stats. 2000, ch. 329, §§ 5, 8 (AB 970).) SGIP rebates are not funded by any part of the $57.5 million appropriation and no funding for the Project came from the $50 million allocated to Energy Commission for energy conservation programs. SGIP rebates are funded by PG&E from the public goods charges collected under AB 1890, as authorized by the *SGIP Decision*, and are paid directly from a PG&E balancing account.

Regarding CCEC's reliance on prior public works coverage determinations, the analysis in *San Diego Police Headquarters* 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 Wastewater 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 Solar Partners made under the Agreement, Solar Partners, not Wastewater 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 Solar Partners, not with Wastewater District.[10]

Salton Sea, the second public works coverage determination cited by CCEC, found public works status based solely on Public Utilities Code section 399.14(h). Because the SGIP rebate is not a production incentive or supplemental energy payment under that statute, as discussed above, *Salton Sea* is distinguishable both from *San Diego Police Headquarters* and the case at hand.

The Rental Arrangement under the Lease

The property that Wastewater District leased to Solar Partners for construction and installation of the solar PV facility is a settling basin used for storm water overflow. The Lease calls for no rent

[10]*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.

payments. 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).

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. The fact that the property has never been leased before and is a settling basin used for storm water overflow supports Wastewater District's representation that the property has no rental 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 Wastewater District within the meaning of section 1720, subdivision (b)(4).

Federal Tax Credits and Depreciation Allowance

The Agreement provides that tax credits, subsidies, incentives, offsets, and tax depreciation allowances associated with the solar PV facility are deemed the property of Solar Partners. Under this language, Solar Partners is entitled to federal renewable energy tax credits and a five-year accelerated depreciation allowance under United States Code, title 26, sections 48(a)(3)(A)(i) and 168(e)(3)(B)(vi)(I), respectively. 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 subdivisions potentially implicated by the tax credits and depreciation allowance 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 Agreement's provision for tax credits does 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 Solar Partners' 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 Solar Partners' 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, Solar Partners is entitled to renewable energy credits associated with the solar PV facility for the first five years and after the twentieth year of the Agreement, and Wastewater District is entitled to those credits from the sixth through the 20th year. The issue here is whether this sharing 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 question 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, Solar Partners, as owner of the facility, is entitled to the renewable energy credits attributable to the electricity generated from the solar PV facility. Where the Agreement allows Wastewater District the benefit of the renewable energy credits from the sixth year through the 20th year of the Agreement, assuming there is a buyer for the credits on the market, that provision represents income to Wastewater District, not a payment by Wastewater District to Solar Partners. Consequently, by entering into the Agreement for sharing of the renewable energy credits, there is no payment by Wastewater District within the meaning of subdivision (b)(1).

Where the Agreement allows Solar Partners the benefit of the renewable energy credits from the sixth year through the 20th year of the Agreement, that provision does not represent a transfer by Wastewater District of an asset of value for less than fair market price within the meaning of subdivision (b)(3). That is so because Solar Partners, as system owner, has 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 renewable energy credits does not entail a payment of public funds under any of the subdivision (b) definitions.

Insurance Premium Increases

Wastewater 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 Wastewater 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."

Wastewater 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, Wastewater District's property insurance premium for the first policy year after construction and installation of the solar PV facility increased by $2,765.90. Under the plain language of subdivision (b)(4), payment by Wastewater 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.

Construction Work Undertaken by Wastewater District

Wastewater District accounting records from 2007 to 2009 show $259,297.64 was spent for various engineering and maintenance crew tasks associated with the Project. The question here is what portion of those expenditures paid for "construction work" within the meaning of section 1720, subdivision (b)(2), which defines paid for in whole or in part out of public funds to include "[p]erformance of construction work by the state or political subdivision in execution of the project."

The meaning of "construction work" as it appears in subdivision (b)(2) is informed by the use of the word "construction" in subdivision (a)(1). (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 [statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible].) Subdivision (a)(1) states

that "'construction' includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work." That wording was added by Senate Bill 1999 (stats. 2000, ch. 881, § 1) ("SB 1999"). The legislative history of SB 1999 shows that the bill had an earlier version that would have added subdivision (g) to section 1720 to include within the definition of public works "architectural, engineering, and inspection services including, but not limited to, services specified" in Government Code section 4525, subdivisions (d), (e), and (f), which pertain to public contracts with private professional architects and engineers, land surveyors and construction project managers.

An analysis of the Assembly Committee on Labor and Employment stated that this earlier version of SB 1999 would include the professional services of architectural, engineering, environmental, and land surveying work, as well as construction project management by an architect, engineer, or general contractor in connection with project development. The analysis added that the bill would codify Department practice by including inspectors and surveyors, and would expand the definition of public works to include architects, engineers and general contractors who have not before been subject to the prevailing wage law. (Assem. Com. on Labor and Employment, Rep. on SB 1999 (1999-2000 Reg. Sess.) as amended Aug. 17, 2000, p. 2.) The analysis went on to state the "proponents of the bill have indicated it is not their intent to expand the definition of public works to include traditional white collar workers such as architects and engineers and others in their employ who primarily work off-sight" (*sic*). (*Id.* at p. 4.) The next amendment of SB 1999, five days later on August 23, 2000, removed subdivision (g) from the bill and added to section 1720, subdivision (a) the sentence, "For purposes of this subdivision, work includes work during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work." (Assem. Amend. to SB 1999 (1999-2000 Reg. Sess.) Aug. 23, 2000.) In relevant part that is the language that ultimately was adopted.

From the legislative record for SB 1999, engineering and architectural services are not part of the definition of "construction" under section 1720, subdivision (a)(1). (*Trades Council, supra,* 162 Cal.App 4th at p. 319 [""The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision"" quoting *Rich v. State Board of Optometry* (1965) 235 Cal.App.2d 591, 607].)[11] Based on this reasoning, subdivision (a)(1) cannot be read to include traditional white-collar engineer and architect work. That being the case, it would not be logical to read subdivision (b)(2)'s use of "construction work" in a broader sense to include Wastewater District's engineering work.

Therefore, the construction work performed by Wastewater District in execution of the Project includes the setting up of pumps and hoses to divert water from the area used for the solar PV facility to another area by Wastewater District's maintenance crew and the removal and relocation of salvaged materials and used storage tanks by outside contractors as coordinated by Wastewater District's maintenance crew. The performance of these activities constitute the payment of public

[11]Section 1720, subdivision (a)(1)'s reference to "design" is not a basis to find design work itself to be a type of covered construction activity. The statute refers to work performed *during* the design phase of construction. That wording connotes a time frame, not a type of work.

funds within the meaning of subdivision (b)(2). The amount of Wastewater District's capital budget spent on these activities is $41,235.20.

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. Solar Partners is a private entity that built the solar PV facility with private funds, outside of the small Wastewater District contributions 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 Wastewater District. Under the Agreement, Wastewater 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 Wastewater District's payment of the increase in property insurance premium associated with the solar PV facility and Wastewater District's performance of construction work in execution of the Project. The insurance premium increased by $2,765.90 on account of the solar PV facility for the first year of operation. Assuming the same increase for the entire 20-year term of the Agreement, the total increase in premium attributable to the Project is $55,318, without discounting the figure to achieve a present-day value. Together with the cost of Wastewater District's construction work of $41,235.20, the total public subsidy for the Project is $96,553.20. That figure represents 1.2 percent of the overall project cost of $8,073,279.[12] 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.[13]

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[12]$8,073,279 was the estimated total cost of the Project as listed on the SGIP claim form. Solar Partners represents, however, that the actual total cost of the Project, including development fees, engineering costs, and interest on the construction loan, amounts to $10,017,101. Given the result reached herein using the lower amount listed on the SGIP claim form, further analysis based on Solar Partners' representation is unnecessary.

[13]This 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 percent of the total projects 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 the 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 the 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 the total project costs was found to be de minimis).

Maintenance

CCEC contends that work performed by Advance and ET under the maintenance services agreements is subject to prevailing wages. 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 Wastewater District or any other public entity, the work performed by Advance and ET under the maintenance services contracts does not meet the definition of maintenance. As such, maintenance work on the facility done by Solar Partners or its subcontractors under the Agreement is not subject to prevailing wages.

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

I hope this determination satisfactorily answers your inquiry.

Sincerely,

John C. Duncan
Director