

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050



May 17, 2010

Mr. David Chidlaw, Esq.
Sheppard, Mullin, Richter & Hampton, LLP
501 West Broadway, 19th Floor
San Diego, CA 92101-3598

Re: Public Works Case No. 2009-036
Construction of Gateway Retail Complex
City of Chula Vista, City of National City

Dear Mr. Chidlaw:

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 presented in this case and an analysis of the applicable law, it is my determination that the construction of the Gateway Retail Complex (the "Project") is a public work. In this case, however, the requirement to pay prevailing wages is restricted to the public improvement work required as a condition of regulatory approval of the Project.

Facts

The Project involves the construction of an approximately 270,000 to 300,000 square foot retail complex referred to as "The Gateway" on 26.5 acres located near the intersection of National City Boulevard and Highway 54 (the "Site") in the City of National City and the City of Chula Vista (collectively referred to as "Cities"). The Site is owned by Derco Properties, LLC ("Derco") and the National City Community Development Commission ("CDC") and will be developed by Sudberry Properties, Inc. ("Sudberry"). Sudberry created an entity, NCSDI, LLC ("NCSDI"), which will purchase CDC's portion of the Site and lease from Derco the remainder for 45 years. Sudberry will undertake initial construction, after which NCSDI will sublease individual building sites to retail stores for development, including a Lowe's home improvement store. The total project cost, including the cost of land acquisition and construction, is estimated to be \$50 million.

On April 28, 2009, Cities, CDC, Sudberry and NCSDI entered into a memorandum of understanding (the "MOU") concerning the Project. The MOU describes the Project as consisting of approximately seven or more buildings and required public improvements, and memorializes the parties' mutual desire to cooperate in the planning and development of the Project.

Cities are requiring Sudberry to construct the following public improvements as a condition of approving the Project:

- Construct an additional off-ramp lane from Highway 54 onto National City Boulevard;
- Create a new, fully signalized intersection at the entrance to the Project from National City Boulevard;

- Upgrade water pipes on 34th Street;
- Improve right of ways, curbs, sidewalks and drainage; and
- Upgrade signals serving the Project.

In addition, Cities may also require Sudberry to:

- Place overhead utilities underground; and
- Upgrade two existing trunk sewer lines that serve the Site and adjacent properties.

The cost of the above-described work required by Cities (collectively, the “Public Improvement Work”) is estimated to be \$2.5 to \$3.5 million. Sudberry will finance construction of the Public Improvement Work and seek reimbursement from various public entities, including but not limited to Cities and local redevelopment agencies (collectively, “Contributing Political Subdivisions”), in an amount not to exceed the actual cost of the work. The Project otherwise will be privately funded.¹

Discussion

Labor Code section 1720, subdivision (a)(1)² generally defines “public works” to mean: “Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds” Section 1720, subdivision (b)(1) defines “paid for in whole or in part out of public funds” to include the following: “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.” In addition, section 1720, subdivisions (c)(2) and (c)(3) set forth the following exemptions:

(c) Notwithstanding subdivision (b): ...

- (2) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

¹The facts described in this section were presented to the Department in letter format by Sudberry and have not been memorialized by the parties in a development agreement or other legally binding document. Cities do not challenge Sudberry’s recitation of the facts and, therefore, it is presumed that the facts presented by Sudberry and described in this determination accurately describe the Project.

²All section references are to the Labor Code, unless otherwise provided.

- (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.

The Project entails construction done under contract and paid for in part out of public funds in the form of an approximately \$2.5 to \$3.5 million payment from Contributing Political Subdivisions to be used to reimburse Sudberry for the Public Improvement Work. As such, the Project is a public work under section 1720, subdivision (a)(1). While the requesting party asks eight separate questions with multiple sub-parts about the scope of coverage, the questions come down to only a few essential issues. The discussion that follows is organized around those issues and not the specific questions.

The main issue concerns the applicability of the exemptions for private development projects set forth in section 1720, subdivisions (c)(2) and (c)(3). With respect to the exemption in section 1720, subdivision (c)(2), the Project must satisfy the following requirements: First, the Public Improvement Work must be required as a condition of regulatory approval; second, the Project must be an otherwise private development; third, Contributing Political Subdivisions must not contribute more money, or the equivalent of money, to the overall Project than is required to construct the Public Improvement Work; and fourth, Contributing Political Subdivisions must not maintain any proprietary interest in the overall Project.

Here, the elements of subdivision (c)(2) are met because Cities are requiring Developer to construct the Public Improvement Work as a condition of Cities' approval of the Project; the Project is an otherwise private retail development; Contributing Political Subdivisions' contribution will not exceed the cost of the Public Improvement Work; and Contributing Political Subdivisions will have no proprietary interest in the overall Project in that the Site and associated development, apart from the Public Improvement Work, is privately owned. Accordingly, the Project falls within the section 1720, subdivision (c)(2) exemption, and prevailing wages need only be paid for the construction of the Public Improvement Work and not for the otherwise private development including lateral sewer connections and store construction.³ This conclusion is consistent with the Department's prior public works determinations addressing the subdivision (c)(2) exemption.⁴

With respect to the exemption in section 1720, subdivision (c)(3), there are two independent bases that can be used to exempt a project from prevailing wages. Under the first basis, an exemption

³The Public Improvement Work includes an additional off-ramp lane on Highway 54. It should be noted that Streets and Highways Code section 670.1 provides an independent basis of public works coverage for certain highway improvement work.

⁴See, PW 2005-038, *Rosedale Project, City of Azusa* (October 25, 2007) and the Decision on Administrative Appeal, (July 2, 2008); PW 2002-099 (*Lowe's Home Improvement Center*)/PW 2002-100 (*Costco Retail Building*) *Pacheco Pass Retail Center, City of Gilroy* (July 10, 2003); PW 2003-010, *Destination 0-8 Shopping Center, City of Palmdale* (October 7, 2003); PW 2003-020, *Slatten Ranch Project City of Antioch* (October 29, 2003); and PW 2003-040, *Sierra Business Park/City of Fontana* (January 23, 2004).

would apply if the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public. While the phrase "costs ... normally borne by the public" is undefined, it suggests something similar to the exemption set forth in subdivision (c)(2). Where two statutes apply, courts will apply the more specific statute. (Code Civ. Proc., § 1859; *Strother v. California Coastal Com'n.* (2009) 173 Cal.App.4th 873, 879.) Given that the Public Improvement Work is required as a condition of regulatory approval of the Project and the Contributing Political Subdivisions are contributing no more money than that which is required to perform this work, the exemption in subdivision (c)(2) is the more specific statute and, therefore, is the one that applies.

Under the second basis, an exemption would apply if the state or a political subdivision provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project. "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.) Here, the public subsidy, \$2.5 to \$3.5 million, is five to seven percent of total project costs, which is not a trifling or insignificant amount. This conclusion is consistent with prior determinations, which consistently have found public subsidies in the range of 1.64 percent or less to be de minimis.⁵

Therefore, under the facts presented, the applicable exemption is that set forth in subdivision (c)(2), which exempts all but the Public Improvement Work from prevailing wage requirements. In several of the questions, Sudberry attempts to distinguish Public Improvement Work performed "on-site," such as the sewer trunk upgrade, from Public Improvement Work performed "off-site," such as the off-ramp construction. The plain language of subdivision (c)(2) does not make such distinctions. Subdivision (c)(2) merely requires that the work be performed as a condition of regulatory approval of an otherwise private development project. Neither the location nor ownership status of the work is material to the coverage analysis.

Further, Sudberry speculates that it might not receive a contribution of public funds for the Public Improvement Work. Alternatively, Sudberry hypothesizes that some work, such as the construction of lateral sewer connections, might be subject to additional reimbursement from Contributing Political Subdivisions, though the work itself is not required by Cities as a condition of approval of the Project. Coverage determinations are made with regard to "either a specific project or type of work to be performed." (Cal. Code Regs., tit. 8, § 16001(a)(1).) As such, purely hypothetical or speculative scenarios such as the two described above are not appropriate subjects for a coverage determination. This determination is based upon Sudberry's representations that Cities are requiring Sudberry to undertake the Public Improvement Work and that the contribution from Contributing Political Subdivisions will not exceed the cost of the Public Improvement Work. Should the facts change, the parties may request a new determination.

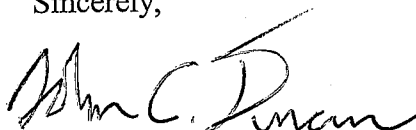
⁵See, PW 2008-037, *The Commons at Elk Grove, City of Elk Grove* (January 2, 2009) (public subsidy representing 1.1 per cent of total project costs was found to be de minimis); PW 2008-010, *Sewer Line Construction, City of Corona* (August 4, 2008) (public subsidy representing four-tenths of one percent 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).

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For the foregoing reasons, the Project is a public work under subdivision (a)(1) because it entails construction done under contract and paid for in part out of public funds in the form of a \$2.5 to \$3.5 million payment by Contributing Political Subdivisions. The Project, however, falls within the subdivision (c)(2) exemption and prevailing wages need only be paid for the Public Improvement Work specifically enumerated in the Facts.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script, appearing to read "John C. Duncan".

John C. Duncan
Director