

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR

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January 12, 2010

Bryan Berthiaume
Executive Director
Foundation for Fair Contracting
3807 Pasadena Avenue, Suite 150
Sacramento, CA 95821

Re: Public Works Case No. 2009-041
Highway 132 and Dakota Avenue Intersection Upgrades
County of Stanislaus

Dear Mr. Berthiaume:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to California Code of Regulations, title 8, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that construction of upgrades to the intersection of Highway 132 and Dakota Avenue performed pursuant to a California Department of Transportation ("Caltrans") encroachment permit (the "Project") in the County of Stanislaus ("County") is a public work subject to prevailing wage requirements.

Facts

The Salida Hulling Association ("Association"), an almond grower/owner co-op, undertook at its own expense the construction of an expanded almond hulling and shelling facility (the "Plant") located on Dakota Avenue in an unincorporated area of County. As a condition of approval for construction of the Plant, County required Association to undertake certain upgrades to the intersection of Highway 132 and Dakota Avenue (the "Project"). The Project in the main entailed the widening of the intersection to accommodate the truck traffic generated by the operation of the newly constructed Plant.

Association contracted with Vito Bavaro Construction, Inc. ("Prime Contractor") for construction of the Plant. Prime Contractor entered into a subcontract with Ross F. Carroll, Inc. ("Subcontractor") for performance of the work required for completion of the Project. The Project was paid for by Association with private funds. The Project began on February 8, 2009, and was accepted as completed by Caltrans on November 18, 2009.

The Project proceeded under Caltrans Encroachment Permit 1008-6MC-0510 issued to Association,¹ which outlines the scope of work and provides the necessary authorization as follows:

PERMISSION IS HEREBY GRANTED to: Upgrade the intersection of State Highway 132 and Dakota Avenue by widening to accommodate acceleration and deceleration lanes, left turn channelization, STAA trucks turning movement, and future signalization of the intersection. Works will also include striping, and placement of ducts for electrical facilities of the future signal light and all the appurtenances that goes with the upgrading of the intersection. All work shall be done in accordance with the attached approved plans. Traffic control shall be in accordance with the attached Traffic Window to the satisfaction of the State.

Discussion

Streets and Highways Code² section 670.1³ provides as follows:

- (a) The department [Caltrans] may issue a permit to the owner or developer of property adjacent to or near a state highway to construct, alter, repair, or improve any portion of the highway for the purpose of improving local traffic access, if the improvements to the highway are required as part of, or as a condition to the development of property, and the improvements are accepted by the department.
- (b) The permit may be issued only if the work within the highway right-of-way is to be performed in accordance with plans and specifications approved by the department and the department reserves the right to inspect and accept the work as complying with the approved plans and specifications.
- (c) All road, bridge, street, lighting, or installation of signal work performed under a permit issued pursuant to this section for acceptance into the state highway system, except work performed solely to allow private encroachments onto the state highway or for utility or drainage encroachments within the state highway,

¹Caltrans also issued Encroachment Permit 1009-6DP-0055 permitting Subcontractor to perform the work described in Association's permit. Encroachment permits are issued by Caltrans with attachments, including one entitled Encroachment Permit General Provisions ("General Provisions"). Provision 27 of the General Provisions, entitled Prevailing Wages, states that work performed under a Caltrans encroachment permit may require the permit holder's contractors and subcontractors to pay prevailing wages and that inquiries regarding prevailing wage enforcement should be directed to the Department of Industrial Relations. The box on Association's and Subcontractor's permits indicating whether the General Provisions attachment was included with the permits is checked off. The permits refer to the General Provisions on pages two and four. The Standard Encroachment Permit Application includes the following language: "PLEASE READ THE FOLLOWING CLAUSES PRIOR TO SIGNING THIS ENCROACHMENT PERMIT APPLICATION. ... The applicant, understands and herein agrees to the general provisions, special provisions and conditions of the encroachment permit" Association's application was signed on July 14, 2008, by Anthony Plaza, Project Manager, and Subcontractor's application was signed on January 14, 2009, by Garrett Thompson, General Manager.

²Further statutory references are to the Streets and Highways Code.

³Although the Project entails construction work done under contract, it is paid for entirely out of private funds and therefore does not constitute a public work under Labor Code section 1720, subdivision (a)(1).

are public works for purposes of Part 7 (commencing with Section 1720) of Division 2 of the Labor Code.

Under section 670.1, subdivision (a), Caltrans issued an encroachment permit authorizing Association to undertake the Project. The Project was required as a condition of approval for construction of the Plant. The Project was designed to improve local traffic access. Under subdivision (b), the Project was performed in accordance with plans and specifications approved by Caltrans. Caltrans accepted the work into the state highway system on November 18, 2009.

Work performed under a permit issued by Caltrans pursuant to section 670.1 is deemed to be a public work subject to prevailing wage requirements by operation of subdivision (c). Subdivision (c), however, contains an exception from public works status for "work performed solely to allow private encroachments onto the state highway or for utility or drainage encroachments within the state highway." Given the scope of work for the Project, the exception for utility or drainage encroachments does not apply. The sole issue is whether the Project falls within the exception for private encroachments onto the state highway.

By letter dated September 9, 2009, the requesting party argues that the exception from public works status does not apply because the Project involves a public access road. By letter dated October 21, 2009, Prime Contractor argues that the exception does apply because the purpose of the Project is to allow Association's trucks better access to the Plant, a private facility located on private property.

By letter dated November 23, 2009, Caltrans takes the position that the exception from public works status does not apply, but not for the reasons advocated by the requesting party. In deciding whether improvement work authorized under section 670.1 is "performed solely to allow private encroachments onto the state highway," Caltrans considers the location and end result of the improvement work. Caltrans notes that the Plant is located on an established public access road, Dakota Avenue, along which are also located other businesses, many farms and residences. Caltrans notes that Dakota Avenue receives traffic from outside the immediate area as it is a primary route from the City of Modesto to the City of Salida. According to Caltrans, the acceleration and deceleration turn lanes at the intersection of Highway 132 and Dakota Avenue existed prior to commencement of the Project. As Caltrans describes it, the Project lengthened those lanes and prepared the intersection for the installation of signals to be undertaken at a later date.

Rules of statutory construction provide that exceptions in a statute are to be construed narrowly. *McAllister v. California Coastal Com'n* (2008) 169 Cal.App.4th 912, 934-935. Accordingly, I concur in Caltrans's conclusion⁴ that the Project does not entail work performed solely to allow a

⁴Courts will give deference to the interpretation of a statute by the administrative agency entrusted with its enforcement. *Sheet Metal Workers International Association, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1080 ["An administrative agency's interpretation of the statute that the Legislature charges it to enforce – while not controlling – is entitled to great weight."] Section 670.1 concerns the issuance of permits by Caltrans for highway improvement work undertaken by private property owners or developers. Such work must be performed according to the plans and specifications of, and subject to inspection and acceptance by, Caltrans. Caltrans, as the

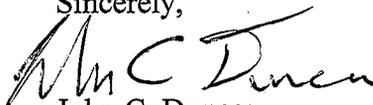
private encroachment onto the state highway within the meaning of the exception set forth in section 670.1, subdivision (c) given that the improvements to Highway 132 brought about by the Project allow all vehicles, not just Association's trucks, to more safely enter and exit Dakota Avenue, a public road.⁵

This determination is consistent with a prior public works coverage determination involving similar facts. PW 2003-024, *Highway 41 Road Widening, Coarsegold, California* (September 18, 2003) involved the widening of State Highway 41 performed in connection with the construction of a casino. The highway widening work improved access to Lucky Lane leading to the casino. The Director found that the exception in section 670.1, subdivision (c) did not apply. As Caltrans points out, the casino's intent, similar to that of Association's in this case, was only to improve access to its own business. In the end, however, the widening work improved access to a public road used by the general public. The same is true here.

Accordingly, under the specific terms of section 670.1, subdivision (c), the Project is a public work subject to prevailing wage requirements. The exception for private encroachments onto the state highway does not apply.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John C. Duncan
Director

state agency responsible for enforcement of this statute, is uniquely qualified by its administrative expertise to determine what qualifies as "private encroachments onto the state highway" under section 670.1.

⁵According to Caltrans, a typical project that would qualify for the exception under section 670.1, subdivision (c) would be work done under an encroachment permit by a private homeowner that improves driveway access into the homeowner's private residence. In that example, the improvements to the driveway would not provide the general public with improved traffic access; the improvements would benefit only the homeowner and the homeowner's invited guests. Caltrans states that it would have come to a different conclusion in this case if the upgrades undertaken by Association to Highway 132 improved traffic access solely to the Plant, rather than improving access to Dakota Avenue, a public road used by the general public.