

DEPARTMENT OF INDUSTRIAL RELATIONS
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February 25, 2010

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

Re: Public Works Case No. 2009-048
2007 Tulare Road Overlay Improvement Project
City of Lindsay

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 the 2007 Tulare Road Overlay Improvement Project (the "Project") in the City of Lindsay ("City") is a public work; and, City's chartered city status does not exempt it from the requirement to pay prevailing wages.

Facts

The Project entailed the re-paving and re-striping of Tulare Road, a two-mile long, two lane stretch of arterial roadway, in City. City posted invitations to bid in August 2008. The Notice Inviting Bids states: "This [P]roject is wholly funded by local revenues and is therefore exempt from prevailing wage requirements." The contract was awarded to Mitch Brown Construction, Inc. ("Contractor").¹ The Notice of Completion was recorded on September 15, 2009.

To finance the Project, City received funding from multiple outside funding sources.

City received a \$225,000 grant from the State of California Integrated Waste Management Board, subsequently renamed CalRecycle ("CIWMB"). CIWMB receives an annual appropriation from the California Tire Recycling Management Fund to administer the Tire Recycling Act. (Stat. 1990, ch. 35 (Senate Bill 937).) Public Resources Code section 42872(a) allows for the awarding of grants to public entities involved in activities that result in reduce the stockpiling of waste tires or the disposal of waste tires at landfills. The \$225,000 grant to City was awarded from CIWMB's Targeted Rubberized Asphalt Concrete Incentive Grant Program, which provides financial assistance to first time or limited users of rubberized asphalt concrete made from recycled waste

¹Both the Instructions to Bidders and the construction contract contain language similar to the prevailing wage exemption statement in the Notice Inviting Bids quoted above. Both documents state that City determined the Project to be exempt under City Ordinance No. 467. It should be noted, however, that this ordinance was effective for fiscal years 1995/1996 through 1997/1998, and that the construction contract here was entered into 10 years later. See Instructions to Bidders, Section 1B-14, p. 3; construction contract, Eighth ¶, p. 2.

tires. To qualify for the grant, City was required to certify compliance with principles of Environmental Justice as defined by Government Code section 65040.12(e) and pass a resolution authorizing the grant application. Additional conditions required by CIWMB included the filing of Reliable Contractor Declaration and Recycled-content Certification forms, the posting of a CIWMB-approved sign,² approval by the CIWMB grant manager of changes or modifications to the Project, the filing of progress and final reports, the maintenance of records for auditing purposes, and the scheduling of a CIWMB-sponsored training prior to construction. On February 27, 2008, CIWMB issued the Notice to Proceed, which authorized City to begin work on the Project. Under the terms and conditions of the grant, CIWMB had the right to issue a stop work notice requiring City to cease all work on the Project.

City also received a \$1.6 million Community Facilities Loan from Rural Housing Services, United States Department of Agriculture ("USDA"). A document entitled USDA Rural Development Bid Requirements was included in City's bid package. The construction contract between City and Contractor did not become effective until approved by a representative of USDA Rural Development, which occurred on October 10, 2008.

The method of repaying the USDA loan was accomplished through a series of contractual agreements amongst City, USDA and the Lindsay Financing Authority, a joint powers authority,³ ("Authority"). City entered into a Property Lease with Authority in which City agreed to lease Tulare Road to Authority for one dollar. City and Authority then entered into the Lease Agreement in which City agreed to lease Tulare Road back from Authority for annual payments starting on November 12, 2009 at \$52,300 and increasing over the next 19 years to \$116,912. City, Authority and USDA entered into an Assignment Agreement in which Authority agreed to assign its rights under the Lease Agreement to USDA in consideration for the USDA loan to City. The Lindsay Financing Authority Certificates of Participation Road Improvements (Measure R) was issued in an aggregate principal amount of \$1.6 million, acknowledging USDA's entitlement to City's lease payments under the Lease Agreement.

As indicated in the Certificates of Participation, the USDA loan is being repaid through the above financing mechanism out of Measure R funds. Passed by residents of the County of Tulare ("County") in 2006, Measure R is a one-half cent sales tax that in the next 30 years is expected raise more than \$652 million in County revenue to address County's major transportation needs. The Tulare County Association of Governments, composed of representatives from each of County's eight cities, the Tulare County Board of Supervisors and staff, also serves as the Tulare County Transportation Authority, which coordinates all aspects of Measure R. Through the 1st quarter of the 2009/2010 fiscal year, the Tulare County Transportation Authority allocated \$20,576.46 in Measure R funds to City for servicing the USDA loan.⁴

²According to a photograph submitted by City to CIWMB, the CIWMB-approved sign at the Project site states: "Funded By A Grant From California Integrated Waste Management Board; The Repaving Of This Street With Rubberized Asphalt Diverted 10,730 Waste Tires From California's Landfills; Zero-Waste-You Make It Happen!"

³Authority operates pursuant to a Joint Exercise of Powers Agreement dated July 1, 1990, between City and the Lindsay Redevelopment Agency. See \$1,6,000,000 Lindsay Financing Authority Certificates of Participation Road Improvements (Measure R), Certificate Regarding Effectiveness of Joint Powers Agreement, November 12, 2008.

⁴Under the Measure R Cooperation Agreement entered into on May 30, 2007, between City and the Tulare County Association of Governments, acting as the Local Transportation Authority, City was required to install Measure R signs approved and/or required by Authority at both ends of the Project site. A representative of the Tulare County

Section 3 of the Assignment Agreement states: "Authority does hereby absolutely assign and transfer to the United States, all of its right, title and interest under the Lease Agreement, including but not limited to its right to receive the Lease Payments from City under the Lease Agreement; ... and otherwise to protect its interests and enforce its rights under the Lease Agreement in the event of a default by City." Under section 9.2 of the Lease Agreement, remedies on default include the right to enter the property in order to take possession of the property or re-let it, and to terminate the Lease Agreement. Section 9.6 acknowledges that the rights and remedies of Authority under the Lease Agreement have been assigned to USDA with City's consent.

As the grantor, USDA imposes a series of conditions on its grantees. Under the terms of the USDA loan, USDA had approval authority over the construction contract, any contract change orders, and pay estimates. USDA dictated progress payment terms. USDA also participated in a mandated pre-construction conference, and conducted mandated pre-final and final inspections of the Project on November 7, 2008, January 8, 2009, February 9, 2009, April 14, 2009, and May 29, 2009. In addition, Contractor was required to create a Project sign in accordance with USDA specifications and post it at a location designated by a USDA representative.⁵

City became a chartered city on April 17, 1996. Its charter contains a "home rule" provision at section 2.03, which states as follows: "As regards municipal affairs, and all powers granted herein and hereby, this Charter shall supersede all laws inconsistent therewith." Section 8.11K of the charter allows the City Council to adopt its own bidding and wage requirements that are otherwise consistent with the charter. On September 16, 1996, the City Council passed Ordinance 482 enacting title 3, chapter 3.04 to the Lindsay Municipal Code. Section 3.04.210, subdivisions A and B state that public works contracts shall contain no provision for "payment of so-called prevailing wages" unless required by grant contract or funding mechanism.

Discussion

Labor Code section 1720,⁶ subdivision (a)(1) 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" Subdivision (b)(1) includes within the definition of "paid for in whole or in part out of public funds" the payment of money by the state or political subdivision of the state directly to the public works contractor. California Code of Regulations, title 8, section 16001(b) states:

Association of Governments provided the Department with a template of the sign used at the Project site. The template includes the name and logo of the city undertaking the project and the statement: "This Project is funded by: Measure R; Tulare County Association of Governments: YOUR TAX DOLLARS AT WORK."

⁵The sign's specifications can be found at www.usda.gov/rus/water/ees/englib/contract.htm. As confirmed by a representative of USDA Rural Development, the USDA sign at the Project site included information about the Project and the following statement: "USDA Rural Development: Committed to the future of rural communities; Financed by United States Department of Agriculture (USDA) Rural Development; Barack Obama, President of the United States; Tom Vilsack, Secretary of Agriculture." See USDA Rural Development Supplemental Provisions 20, 20.1.

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

Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort.

The Project entails construction done under contract and paid for out of the federal, state and county funds described above. Therefore, the Project meets the definition of "public works" in subdivision (a)(1). The USDA loan triggers application of the above regulation concerning federally funded or assisted projects. Under the regulation, the Project is subject to state prevailing wage requirements because it was carried out by City, a California awarding body.

City asserts, however, that its chartered city status exempts it from state prevailing wage requirements on the Project. Under article XI, section 5, subdivision (a) of the California Constitution, a city "may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." City has, by operation of its charter, availed itself of the constitutional power to make and enforce all laws and regulations with respect to its own municipal affairs.

The California prevailing wage law, a general law, does not apply to public works projects of a chartered city "as long as the projects in question are within the realm of 'municipal affairs'." (*Vial v. City of San Diego* (1981) 122 Cal.App.3d 346, 348, citing *City of Pasadena v. Charleville* (1932) 215 Cal.384, 392 [disapproved on other grounds by *Purdy and Fitzpatrick v. State* (1969) 71 Cal.2d 566].) Whether the chartered city exemption applies in this case, therefore, depends on whether the Project is a municipal affair⁷ or a subject of statewide concern. The following three factors are considered in making this determination: (1) the extent of extra-municipal control over the project; (2) the source and control of the funds used to finance the project; and (3) the nature and purpose of the project. *So. Cal. Roads Co. v. McGuire* (1934) 2 Cal.2d 115. Related to the nature and purpose of the project are its geographical scope (*Young v. Superior Court of Kern County* (1932) 216 Cal. 512, 516-517) and its extra-territorial effects (*Pacific Telephone and Telegraph Co. v. City and County of San Francisco* (1959) 51 Cal.2d 766, 771-774).

Regarding the first factor, City planned and executed the Project, determined the scope of work and awarded the contract. By the terms and conditions of the USDA loan, however, the federal government had the authority to approve or reject the construction contract. In fact, the construction contract did not become effective until approved by USDA. USDA also monitored the course and completion of the Project through pre-final and final inspections, and had approval authority over change orders. Under the terms of the Assignment Agreement, USDA holds a leasehold interest in the Project site. By the terms and conditions of the CIWMB grant, the state also had authority over the Project. CIWMB's grant manager had the authority to approve changes or modifications to the Project. The filing of progress and final reports was required by the state, as was attendance at a CIWMB-sponsored training prior to construction. Moreover, the state

⁷In determining the applicability of the chartered city exemption, courts have asked whether the act or activity in question is "merely a municipal affair" (*City of Pasadena v. Chamberlain* (1928) 204 Cal. 653, 660 [emphasis supplied], *So. Cal. Roads Co. v. McGuire*, *supra*, 2 Cal.2d 115, 123 [emphasis supplied]); "strictly municipal affairs" (*Committee of Seven Thousand v. Superior Court of Orange County* (1988) 45 Cal.3d 491, 505 [emphasis supplied]); "purely municipal affairs" (*Baggett v. Gates* (1982) 32 Cal.3d 128, 136, citing *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 539 [emphasis supplied]); or, "exclusively municipal affairs" (*Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 291 [emphasis supplied]).

authorized the work to commence, and had the authority to issue a stop work notice. Given elements of both federal and state authority over the project, analysis of the first factor does not support City's assertion that the Project is purely a municipal affair.

Regarding the second factor, there were three funding sources – a federal loan, a state grant and a county-wide sales tax. Contrary to the Notice Inviting Bids, the Instructions to Bidders and the construction contract, none of the funds used to finance the Project was derived from local revenue.⁸ Representations made by City in the bid and contract documents are contradicted by signs City was required to post at the Project site, which stated as follows: "Financed by United States Department of Agriculture (USDA) Rural Development; Barack Obama, President of the United States; Tom Vilsack, Secretary of Agriculture;" "Funded By A Grant From California Integrated Waste Management Board;" and "This Project is funded by: Measure R; Tulare County Association of Governments: YOUR TAX DOLLARS AT WORK." Additionally, the terms and conditions of the USDA loan include external oversight over those federal funds. For example, USDA has approval authority over pay estimates and dictated progress payment terms. The Tulare County Transportation Authority, not City, allocates and coordinates Measure R funds. Plainly, the Project would have not been possible without the assistance of county, state and federal taxpayers. The manner in which their tax dollars is spent is surely of concern to more than just those living within the boundaries of City. Given the outside funding sources, analysis of the second factor does not support City's assertion that the Project is purely a municipal affair.

Regarding the third factor, the re-paving and re-striping of Tulare Road, a two-mile long, two lane stretch of arterial roadway located entirely within City's limits, appears to serve a municipal nature and purpose in improving the roadways within City. It would also appear, however, that the federal loan was given as part of a federal program to improve the quality of rural communities throughout the nation and the state grant was given as part of a concerted effort on the part of the state to reduce landfill waste by recycling tires. In addition, County's voters approved Measure R to address major county-wide transportation needs. Analysis of the third factor does not support City's assertion that the Project is purely a municipal affair.

In sum, analysis of the above factors renders the chartered city exemption inapplicable because the Project is not solely, merely, purely, or exclusively within the realm of a municipal affair. City relies on *Vial v. City of San Diego, supra*, 122 Cal.App.3d 346 to support its argument that the Project does fall within the realm of a municipal affair. *Vial*, however, involved the expenditure of "a city's funds" subject to its sole control. In *Vial*, the City of San Diego's resolution exempting public works projects from prevailing wage requirements did not apply to state or federally funded projects, such as the Project here. As such, City's reliance on *Vial* is misplaced.

City also asserts that receipt of the state grant does not negate the Project's municipal affairs status because the state grant is not explicitly conditioned on payment of prevailing wages. First, construction paid for in whole or in part out of a state grant is a public work subject to prevailing wage requirements under section 1720, subdivision (a)(1) regardless of whether prevailing wages are explicitly required by a grant contract or funding source. This is because the obligation to pay prevailing wages is statutory, not contractual, in nature. (See *Lusardi Construction Co. v. Aubry*

⁸Generally, a municipality can raise revenue through its taxing authority, the issuance of licenses or the exercise of police powers in imposing fines and penalties, assessing fees or leasing property. See McQuillin, *Municipal Corporations* (3rd Revised) § 39:3, pp. 5-6. The federal loan, state grant and county taxes involved here cannot be fairly characterized as "local revenues."

(1992) 1 Cal.4th 976, 986-987.) Second, City's municipal code, which does not require "payment of so-called prevailing wages" on public works projects unless required by grant contract or funding mechanism, does not control the analysis of whether the Project is a municipal affair for purposes of determining whether the chartered city exemption applies. That analysis is controlled by case law that has developed under the California Constitution. Under the *McGuire* factors, the Project does not fall within the realm of a purely municipal affair.

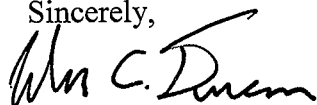
City similarly argues that receipt of the federal loan does not negate the Project's municipal affairs status because the federal loan is not subject to federal prevailing wage requirements under the Davis-Bacon Act. Regardless of whether a federally funded or assisted project is subject to the Davis-Bacon Act, it is nonetheless subject to California prevailing wage requirements if it is controlled or carried out by a California awarding body. (Cal. Code Regs., tit. 8, § 16001(b).) As explained by USDA: "Projects financed by this agency are not subject to the wage requirements of the Davis Bacon Act. ... Also, if the Owner is not a public body, then state prevailing wages may not be required."⁹ Conversely, if the owner is a public body, then state prevailing wages may indeed be required. As stated above, case law controls the municipal affairs analysis and, under the *McGuire* factors, the expenditure of federal funds removes the Project from the ambit of a purely municipal affair.

Finally, City contends that application of the chartered city exemption would be consistent with the Director's prior determination in PW 2008-030, *Lili Valley Water System Improvement Project, City of West Point* (November 3, 2008). It should be noted that *Lili Valley* did not involve a construction project undertaken by a chartered city. The project in *Lili Valley* was undertaken by a private utility company with a USDA loan and grant. The Director found that the project was not controlled or carried out by a California awarding body and therefore the application of state prevailing wages was not required. If the issue in this case were the applicability of the regulation concerning federally funded or assisted projects, the Project would be subject to California's prevailing wage laws because, unlike the project in *Lili Valley*, the Project here was carried out by a California awarding body. In relying on *Lili Valley*, City presumably is aware that the law characterizes the Project as a federally funded or assisted project, a characterization at variance with City's position that the Project is a municipal affair.

For the foregoing reasons, under the specific facts of this case, the Project is a public work that does not fall within the chartered city exemption and therefore is subject to California's prevailing wage laws.

I hope this determination satisfactorily answers your inquiry.

Sincerely,


John C. Duncan
Director

⁹USDA RURAL DEVELOPMENT, Architect-Engineers Instructions For Use Of The Contract Requirements Guide, Item #2.