STATE OF CALIFORNIA Edmund G. Brown, Jr., *Governor*

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

June 6, 2011

Douglas W. Nelson, Esq.
Assistant County Counsel
County of Madera
200 West 4th Street, Fourth Floor
Madera, CA 93637

Re: Public Works Case No. 2010-031
Construction of Fire Station
North Fork Rancheria of Mono Indians of California
County of Madera

Dear Mr. Nelson:

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 section 16001(a) of title 8 of the California Code of Regulations. 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 a fire station ("Project") by the County of Madera ("County") and the North Fork Rancheria of Mono Indians of California ("Tribe") is a public work subject to California's prevailing wage requirements.

Facts

The Project entails the design and construction of an approximately six thousand square foot metal building to serve as the North Fork Fire Sub Station and includes two drive-through bays accommodating four apparatus (a squad truck, water tender, fire engine and ambulance), a bathroom, reception area and office space. The fire station will provide fire and emergency services for the unincorporated community of North Fork and will benefit members of Tribe who live and work in the affected area and County residents alike.

The fire station will be built on property that formerly housed a mill ("mill property") and was owned at that time by South Fork Timber Industries, Inc. ("South Fork Timber"). In 1997, after the mill closed, South Fork Timber donated the mill property to the Redevelopment Agency of the County of Madera. The Redevelopment Agency subsequently deeded the mill property to the North Fork Community Development Council ("NFCDC").[1] In 1998, NFCDC agreed to make the mill property available to Tribe for development purposes.

[1] NFCDC is a non-profit corporation whose primary goal is to redevelop the mill property for the purpose of promoting job creation, developing green space and building community facilities for the community of North Fork.

On May 12, 2009, Tribe, NFCDC and County entered into a Memorandum of Understanding ("MOU"). Pursuant to the MOU, NFCDC is to donate a 15-acre parcel of the mill property to County for subdivision into small parcels for various proposed tribal development projects.[2] After subdivision, County is to convey a 2.686 acre parcel to Tribe free of cost for the Project. According to an appraisal obtained by NFCDC, the subdivided parcel is worth $181,287.

Pursuant to the MOU, "the Tribe has offered to assist the COUNTY in funding the construction of the volunteer fire station … ." The cost of construction is estimated to be $1,005,000. County will contribute $400,000 from its Capital Improvement Funds[3] and Tribe will contribute $605,000 from an Indian Community Development Block Grant ("ICDBG").[4] The ICDBG funds are federal funds administered by the United States Department of Housing and Urban Development ("HUD").[5] ICDBG-funded construction is exempt from federal Davis-Bacon Act prevailing wage requirements under Title 24 of the Code of Federal Regulations, part 1003.603 (April 1, 2010). Upon completion of construction, Tribe is to lease the fire station to County for $1 per year. County is to operate the fire station and will staff it primarily with volunteers. Under the terms of the MOU and the ICDBG, Tribe will convey the subdivided fire station property back to County for free some time in the future.

According to the MOU, County is to provide certain architectural and surveying services. Also, County is to ensure that the Project is in compliance with the California Environmental Quality Act ("CEQA") and the National Environmental Policy Act ("NEPA").[6] While Tribe is to retain the general contractor, engage a project director and provide financial management and administrative services, County is to manage the actual construction work as follows: County's "Project Planner" is responsible for construction planning and obtaining permits. County's "Day-to-Day Program Manager" is responsible for supervising daily construction activities. County's Project Planner is also responsible for overseeing County's day-to-day Program Manager. Construction is to proceed according to plans and specifications agreed to by County.[7]

In November 2009, Tribe issued a Request for Proposals ("RFP") for "Engineering Services, Architectural Services, Construction Services and Project Management Services." The RFP states

---

[2] Other proposed tribal development projects are not at issue in this determination.

[3] In addition, County will waive plan check and permit fees for the Project.

[4] According to the ICDBG application, approximately $496,100 of the ICDBG funds will pay for construction, and $108,900 will pay for administrative costs.

[5] The ICDBG program provides eligible grantees with direct grants for use in developing Indian and Alaska Native Communities. ICDBG funds can be used for the development of single- or multi-purpose community facilities including the construction of necessary infrastructure such as roads, water and sewer facilities. (Information obtained from HUD's Web site at <http://www.hud.gov/offices/pih/ih/grants/icdbg.cfm> [as of Dec. 16, 2010].)

[6] CEQA prescribes the environmental review procedures for projects requiring approval from state or local agencies. NEPA prescribes the environmental review procedures for projects requiring approval from federal agencies. Both statutory schemes require that the potential environmental impacts of a proposed project be assessed, quantified, disclosed and either minimized or eliminated.

[7] A November 18, 2008, letter from Ronn Dominici, Chairman of the County Board of Supervisors, states that "County will manage the construction project and will contribute such funds to the project as may be legally available through the county's capital facilities fees program."

that the Project is a "joint venture" design-build project among Tribe, County and NFCDC. County will participate in the bid process; however, "Tribe reserves the right to award the contract to the firm that, in the sole judgment of the Tribe, can best accomplish the desired results." The RFP also states that the "overall administration and implementation of this project is under the United States Housing Urban Development Indian Community Block Grant."

The construction contract for the Project has not yet been awarded. A proposed construction contract, attached to the RFP, contains, among other things, the following terms regarding the applicable law governing the Project:

> 19. Applicable Law and Venue:
> This Agreement shall be constructed and interpreted solely in accordance with the laws of the State of California. The venue for any dispute resolution, including legal action or any other method, shall be the County of Madera.
>
> 20. Ordinances:
> The Contractor shall complete work on this Project to conform to all applicable Federal State, and local laws, codes, ordinances, and regulations as modified by any waivers which may be obtained from the appropriate jurisdictions.

Discussion

Labor Code section 1771[8] requires, with certain exceptions, prevailing wages be paid to all workers employed on public work. Section 1720, 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 ... ." Section 1720, subdivisions (b)(l), (b)(3) and (b)(4), respectively, define the phrase "paid for in whole or in part out of public funds" to include "the payment of money or the equivalent of money by the state or political subdivision … ," the "transfer by the state or political subdivision of an asset of value for less than fair market price" and "fees … or other obligations that would normally be required in the execution of the contract, that are … waived, or forgiven by the state or political subdivision." Section 1721 defines "political subdivision" as "any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts."

Further, section 16000 of title 8 of the California Code of Regulations provides that "public funds" includes "state, local and/or federal monies," and section 16001(b) provides as follows:

> 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.

Section 1722 defines "awarding body" as "department, board, authority, officer or agent awarding a contract for public work." Section 1722's promulgating regulation further defines "awarding body" as follows: "Any state or local government agency, department, board, commission, bureau,

[8] All section references are to the Labor Code, unless otherwise provided.

district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works." (Cal. Code Regs., tit. 8, § 16000.)

Here, the Project meets the definition of a public work set forth in section 1720, subdivision (a)(1). It is undisputed that the Project involves construction performed under contract. Also, the Project is paid for in whole or in part out of public funds within the meaning of section 1720, subdivision (b) in the form of a $400,000 payment by County (subd. (b)(1)), the transfer of land by County for below market price (subd. (b)(3)), and County's fees/costs waiver (subd. (b)(4)). Further, by virtue of HUD's administration of the $605,000 in ICDBG funds awarded to Tribe, the Project is appropriately characterized as a federally funded or assisted project under section 16001(b) of title 8 of the California Code of Regulations.

The disputed issue is whether the Project is "controlled or carried out" by a California awarding body such that California's prevailing wage requirements would apply under section 16001(b). County is an "awarding body" as defined by section 1722 and section 16000 of title 8 of the California Code of Regulations. The terms "controlled" and "carried out" are not defined by statute or regulation; however, the familiar meaning of these terms is found in dictionary definitions. "Control" is defined as the "power or authority to guide or manage" and "carry out" is defined as "to put into execution; to bring to a successful issue; to continue to an end or stopping point." (Webster's 3d New Internat. Dict. (2002) pp. 344, 496.)

Here, the MOU, ICDBG materials and RFP delineate the roles of County, Tribe and NFCDC with respect to the Project. Tribe will award the construction contract with County involvement in the bid process, but County will select the fire station's location and will direct all activities relating to architectural design, permit approvals, environmental approvals and day-to-day construction. Further, upon completion of construction, County will operate the fire station; and, upon satisfaction of the conditions of the ICDBG, County will own the fire station. Tribe's interim lease of the fire station to County for the nominal sum of $1 per year is merely to satisfy the terms of the ICDBG, which appear to require tribal ownership. Therefore, the Project is controlled by County within the meaning of section 16001(b) of title 8 of the California Code of Regulations because County has the "power or authority to guide or manage" the Project's location, design and construction. The Project is carried out by County within the meaning of the regulation because County "put into execution" the Project by providing funding, land, architectural design plans and construction planning and management.

That Tribe will supply a Project Director to oversee certain aspects of the Project, including the selection of a contractor and administration of the contracts, does not negate or diminish the level of County's control. The key components of the Project, as documented by the MOU and the RFP, including site selection, design, construction, operation and ultimate ownership, support the conclusion that the Project is carried out or controlled by County within the meaning of section 16001(b) of title 8 of the California Code of Regulations. Accordingly, California's prevailing wage requirements apply.

County and Tribe contend that this case is analogous to PW 2001-046, *Casmalia Resources Hazardous Waste Management Facility* (March 30, 2005) ("*Casmalia*")[9] and *Southern Cal. Lab.*

---

[9] The Decision on Administrative Appeal in *Casmalia* was affirmed in 2007 in an unpublished opinion of the First District Court of Appeal. (*Southern California Labor/Management Operating Engineers, et al. v. John Rea, Acting Director of DIR* (2007) Unpublished, First Dist. Court of Appeal, No. A113481.)

Management etc. Committee v. Aubry (1997) 54 Cal.App.4th 873 ("*Seven Oaks Dam*"). *Casmalia* involved certain environmental remediation work done pursuant to a consent decree obtained by the Environmental Protection Agency ("EPA"). The consent decree designated EPA as lead regulatory agency. EPA had complete oversight authority in supervising a steering committee of major waste polluters, including several local government entities, in the performance of the clean-up and closure work. The state regulatory agency had no authority to direct, manage or supervise the work at the project site or to contest the decisions of EPA. The Department found that although the federal government was not awarding the construction contracts, it exercised exclusive control over the work. Accordingly, California's prevailing wage requirements did not apply because the project was carried out or controlled by the federal government, not by a California awarding body.

Seven Oaks Dam involved a large dam project awarded by the United States Army Corps of Engineers. Under the "Local Cooperation Agreement," the federal agency exercised exclusive authority over construction, financial audits, payments to construction companies, and determinations regarding project completion. California's prevailing wage requirements did not apply because the project was controlled or carried out by the federal government, not by a California awarding body.

The facts of this case are distinguishable from *Casmalia* and *Seven Oaks Dam*, and therefore Tribe and County's reliance on these cases is misplaced. HUD will neither award the construction contracts, as was the case in *Seven Oaks Dam*, nor supervise construction, as was the case in *Casmalia*. Although HUD is a funding source and is responsible for overall implementation of the Project pursuant to the terms of the ICDBG, HUD exercises no control over construction. In addition, although Tribe is awarding the contracts and is responsible for overall financial management of the Project, Tribe exercises no more control over the Project than County. County, in fact, made the Project possible by obtaining the property, subdividing it and making it available to Tribe for development; County will control the design and architectural stage of the Project; County will obtain permits and environmental approvals; County will waive plan check and permit fees; and County will supervise the day-to-day construction. Further, County will operate the fire station upon completion of construction and ultimately own it. In sum, Tribe will be responsible for the contract management aspect of the Project, but it will be County's fire station in terms of location, design, supervision of construction, operation and ultimate ownership.

For the foregoing reasons, the Project is controlled or carried out by County within the meaning of section 16001(b) of title 8 of the California Code of Regulations. Accordingly, the Project is a public work subject to California's prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Christine Baker
Acting Director