

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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San Francisco, CA 94102
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February 8, 2012

Robin Ludwig, Controller
Associated Pacific Constructors, Inc.
495 Embarcadero
Morro Bay, CA 93442

Re: Public Works Case Number 2011-029
Boat Removal During Replacement of Slip Piling
Santa Cruz Harbor

Dear Ms. Ludwig:

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 boat removal and relocation work around Santa Cruz Harbor during reconstruction of tsunami damaged piers and docks is not a public work subject to California's prevailing wage requirements.

Facts

On March 11, 2011, the Santa Cruz Harbor (Harbor) sustained approximately \$22 million in physical infrastructure damage due to a tsunami. On the same day, the Board of Santa Cruz Port Commissioners (Commissioners) and Governor Edmund G. Brown declared a state of emergency, due to the severe and ongoing damage to the harbor. President Barack Obama declared a federal disaster on April 18, 2011. Approximately 108 marina pilings and 150 pile guides were damaged and/or dislodged by the tsunami surges. Marina pilings serve as the "foundation" for the harbor's 29 docks. The piles and pile guides are critical infrastructure required to secure docks against ordinary tidal movements, in addition to storm surges, tsunamis and other events. The Commissioners undertook the Emergency Pile and Pile Guide Replacement Project (Project) to repair the infrastructure damage. According to documents provided by the Santa Cruz Port District (District), the scope of work was to remove and replace approximately 102 pilings and 150 pile guides. The Project was awarded by resolution of Commissioners on April 8, 2011, to Associated Pacific Contractors, Inc. (APC), in an amount not to exceed \$750,000.

According to District, the project was completed on August 23, 2011, and the Notice of Completion was approved by Commissioners on September 27, 2011. According to District, the funding for the tsunami disaster recovery is from the Federal Emergency

Management Agency (FEMA) (75%), California Emergency Management Agency (CalEMA) (18.75%) and the District (6.25%).

The actual work entailed 135 boat removals and relocations performed by APC or Pacific Marine Salvage, Inc. (PMS). The privately owned boats were towed by a tow vessel to another location within the Harbor for temporary storage and returned to their original locations in the same manner. A total of 76 boat moves were done by APC, at \$184 each, for a total of \$13,984. A change order in June 2011 allowed for APC to hire PMS as a third party boat mover for 59 additional boat moves. The estimated additional cost of these boat moves, at \$184 each, was \$10,856. An e-mail submission by APC indicates that an oral subcontract was formed between APC and PMS for the boat moving in May 2011. The parties agree that efforts at a formal agreement never resulted in a final written agreement.

Discussion

Labor Code section 1771¹ 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)(1), defines 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" Section 1721 defines "political subdivision" as "any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts." Section 1772 states: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work."

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, 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.)

¹ All section references are to the Labor Code, unless otherwise provided.

Here, it is undisputed that the Project meets the definition of a public work set forth in section 1720, subdivision (a)(1). The Project entails construction performed under contract. Also, by virtue of FEMA, CalEMA and District's funding, the Project is paid for out of public funds within the meaning of section 1720, subdivision (b)(1). Further, because of FEMA's funding, 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 ("Section 16001(b)").²

The issue presented here is whether under the facts of this case the removal and temporary relocation of private watercraft is performed in the execution of this public work of construction. In *Williams v. SnSands* (2007) 156 Cal.App.4th 742 (*Williams*), the court of appeal held that not all work performed under contract is subject to prevailing wage requirements. The court in *Williams* was asked to decide whether certain off-hauling work was subject to prevailing wage requirements. The court set forth factors to consider in determining whether the work was integral to a public works project:

- Whether the transport was required to carry out a term of the public works contract;
- Whether the work was performed on the project site or another site integrally connected to the project site;
- Whether work that was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract.

(*Williams, supra*, 156 Cal. App.4th at p. 752.) The court held that there was no evidence from which a determination could be made that the off-hauling was "an integrated aspect of the 'flow process' of the project. The court stated that the "off-hauling is unrelated to the performance of the prime public works contract, and Williams fell within the material supplier exception. S&S Trucking's off-hauling of the generic materials to a locale bearing no relation to public works project site . . . was no more an integral part of the process of the public works project than the delivery of generic materials to the public works site by a bona fide material supplier." Just because "it is necessary to remove" the boats from the construction area does not mean that the work was related "to the performance of the prime public works contract."³ (*Id.* at p. 753.)

² The Project is controlled and/or carried out by Commissioners, a California awarding body under section 1722. As such, state prevailing wages are required. (Section 16001(b).)

³ Operating Engineers, Local Union No. 3 (OE3) contends that "the work in question is covered by an existing general prevailing wage determination made by the Director of Industrial Relations. . ." Whether or not there is a wage determination is not dispositive of coverage. OE3's argument also fails to recognize that none of the boats in question are involved in the flow process of construction; they are merely in the way of construction and must be moved to allow for the boats and barges that are involved in the construction process to perform their functions. Once the Project has been completed the boats are merely returned to their original locations.

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Here, the boat removal and relocation was incidental to the construction process but not part of it. While the overall number of boat moves is referenced in certain FEMA documents and the 59 boat moves at issue here are discussed in a contract change order, the movement and relocation are not necessary to the actual construction. The boats were moved to locations having no relationship to the Project. Further, the boats played no role whatsoever in the construction process and were not similar to work boats or barges engaged on the project. They are privately-owned personal use watercraft. The object of the boat moves was to protect private property, not accomplish construction. Accordingly, there is no evidence that the removal and relocation of personal watercraft was an integrated aspect of the flow process of the Project.

For the foregoing reasons, the removal and relocation of private boats by PMS is not public work subject to California's prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Christine Baker".

Christine Baker
Director