

DEPARTMENT OF INDUSTRIAL RELATIONS

Christine Baker, Director

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To All Interested Parties:

Re: Public Works Case No. 2012-008

Ensemble Theatre Company, Inc.

City of Santa Barbara/Santa Barbara Redevelopment Agency

The Decision on Administrative Appeal, dated June 25, 2013, in Public Works Case No. 2012-008, *Ensemble Theatre Company, Inc., City of Santa Barbara/Santa Barbara Redevelopment Agency*, was reversed by the Santa Barbara Superior Court on May 5, 2015 in *Ensemble Theatre Company, Inc. v. Christine Baker, et al.*, Case No. 1468066. The Court found that the project was not a public work and therefore not subject to prevailing wage requirements.

DEPARTMENT OF INDUSTRIAL RELATIONS
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May 1, 2013

Jon Goetz
Kronick Moscowitz Tiedemann & Girard
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San Luis Obispo, CA 93401

Derek A. Westen
Law Office of Derek A. Westen
1800 Jelinda Drive
Santa Barbara, CA 93108

Re: Public Works Case No. 2012-008
Ensemble Theatre Company, Inc.
City of Santa Barbara/Santa Barbara Redevelopment Agency
City of Santa Barbara

Dear Messrs. Goetz and Westen:

This constitutes the determination of the Director of Industrial Relations regarding the 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 construction work performed on the Ensemble Theatre (Project) is a public work subject to California prevailing wage requirements.¹

Facts

Ensemble Theatre Company, Inc. is a professional theater company which is organized as a 501(c)(3) nonprofit corporation (Ensemble). Ensemble originally entered into a long term lease dated October 5, 2010, (the "Lease"), for an existing approximately 300-seat theater located at 33 West Victoria Street, Santa Barbara. The Theater has been operated and used as a theater for at least 25 years. Ensemble is renovating the Theater to construct new seating, restrooms, dressing rooms, and a stage house. Ensemble privately raised funds for the Project to date.

Original Grant and Operating Agreement

Approximately nine months after it entered into the Lease, Ensemble entered into a Grant Agreement and Operating Agreement with the Redevelopment Agency of the City of Santa Barbara (Agency), dated June 21, 2011, Section 2 of the Agency Grant and Operating Covenant provided for the Agency to reimburse Ensemble up to \$1,000,000 for the costs of purchase and

¹ This assumes that Ensemble accepts the grant funds at issue in this determination.

installation of certain capital equipment and furnishings for the Theater. The capital equipment and furnishings eligible for reimbursement (the "Furnishings") consisted of six items: seating, stage draperies, stage rigging equipment, audio-visual equipment, stage lighting fixtures and equipment, and theatrical and architectural dimming and controls. Ensemble was to acquire and install the Furnishings only after it had completed the renovation work.

The Agency Grant and Operating Covenant was to be provided to Ensemble in consideration for Ensemble's performance of certain services to the community, pursuant to operating covenants set forth in the Agreement (the "Operating Covenant"). Under Section 5 of the Agency Grant and Operating Covenant, Ensemble must offer "Performing Arts Venue" programming for at least 100 days per year for a six-year period (discussed *infra.*). The Agency Grant and Operating Covenant was to be secured with a deed of trust encumbering Ensemble's leasehold interest in the Theater. If Ensemble violated the Agency Grant and Operating Covenant, it would have had to repay the Agency grant funds to the Agency.

The Agency Grant and Operating Covenant acknowledged that Ensemble had acquired long-term rights to the Theater and that, pursuant to contractual agreements between the owners of the Theater and Ensemble, Ensemble intended to undertake the renovation work. Undertaking and completing that renovation is a contractual obligation between Ensemble and the owners of the Theater that pre-existed the Agency Grant and Operating Covenant but which were to have been completed before any Agency grant funds would be disbursed to Ensemble. The Agency Grant and Operating Covenant did not grant the Agency any right to review or approve plans for construction work. The Agency Grant and Operating Covenant did not specifically obligate Ensemble to purchase or install any of the Furnishings. Ensemble states that Agency was only committed to disburse the Agency Grant once Ensemble had purchased, installed, and paid for the Furnishings and that Agency's only obligation was to reimburse Ensemble once the Furnishings have been fully installed.

The Restated Grant Agreement

The Restated Grant Agreement is between the Successor Agency to the Redevelopment Agency, the City of Santa Barbara (City)² and Ensemble. Ensemble has now commenced renovations of the Theater to reconfigure the seating, restrooms, dressing rooms, and to improve the stage house.

At the time of the original Grant Agreement, Ensemble had not raised the funds that it anticipated it would require for the Project. Since that time, Ensemble has raised \$7,858,159 in cash gifts and signed pledges to its capital campaign. The total costs for the Renovation are \$7,231,823.³ According to Ensemble, it has already secured \$626,336 more than the entire cost of the Renovations, and does not require any of the Grant Agreement funds for the Project. Ensemble states that it has no intention of using any portion of the Grant Agreement funds for construction.

² The Redevelopment Agency was dissolved with the passage of AB1X26. The Agency is being wound down by its Successor Agency, City.

³ Ensemble has entered into a not-to-exceed construction contract with Frank Schipper Construction Company, Inc., in that amount.

At the time of the Grant Agreement, Ensemble only held the 30-Year Lease of the Theater. Now, however, Ensemble is going to purchase the Theater outright. The purchase price for the Theatre is \$2,015,000. Ensemble has already paid \$414,000 of the purchase price. The balance is \$1,601,000 that will be required in cash at the closing. Ensemble has secured financing for the cash required, but will be required to pay down the purchase loan in 2013. Ensemble believes that the purchase of the Theater, as opposed to the 30-year lease of the Theater, is in its best interest.

City, through its City Council, has determined that there would be a substantial benefit to have the Grant Agreement amended and restated to direct that \$950,000 be granted to Ensemble for the purchase of the property. On September 20, 2012, it directed City staff to negotiate and approve an amended and restated agreement to achieve that objective. On November 6, 2012, City approved the terms of an amended and restated Grant Agreement.

The Restated Grant Agreement provides that the Agency Grant of \$950,000 is to be used only for the purchase of the property: no portion of the grant funds is to be used for any renovations. The Restated Grant Agreement does not require Ensemble to make any renovations to the Theater, or to purchase or install any furnishings and equipment for the Theater, and prohibits it from expending any grant funds for those purposes. Disbursement of the City grant funds will not be conditioned upon performing or completing the Theater Renovations or upon the installation of any furnishings and equipment for the Theater. The Restated Grant Agreement does not grant City any right to review or approve plans for construction work.

As in the original agreement, certain services to the community, pursuant to operating covenants set forth in the Restated Grant Agreement, require that Ensemble offer itself as a Performing Arts Venue for at least 100 days per year for a six-year period. Ensemble's obligations are defined to include:

- The operation of a multipurpose venue for performances of live theater, music, dance, dramatic productions and readings, and similar live performances
- Local and regional performing arts presenters
- National and international touring performing arts groups ranging from theatrical and musical performances, comics, contemporary pop acts and performance artists
- Film presentations and festivals
- Educational and outreach components for local youths and youth theater programs; and
- Making the Theater available to nonprofit and government agencies for civic events, and
- Meetings, conferences and conventions, performances, rehearsals and other community uses.

The Restated Grant Agreement will be secured with a deed of trust encumbering Ensemble's interest in the Theater. If Ensemble violates the Restated Grant Agreement, it must repay the grant funds to City.

Discussion

Labor Code section 1771⁴ generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1),⁵ defines "public works" generally under a three pronged definition: [c]onstruction, alteration, demolition, installation, or repair work done under contract, and paid for in whole or in part out of public funds...."

Section 1720(b) states in relevant part: "[f]or purposes of this section, paid for in whole or in part out of public funds" means all of the following: (1) 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"

The Project meets the first and second requirements for public works coverage, in that it constitutes "construction, alteration, demolition, installation, or repair work" and it is "done under contract." The last requirement is that it is "paid for in whole or in part out of public funds." The statutory requirement that the construction be performed "under contract" does not mean that the construction must be contractually required by a public entity. All that is required is that the work is being paid for in part out of public funds, no matter how the parties to the agreement characterize the purpose of the funding.

Before 2002, and at the time of the decision in *Mcintosh v. Aubry* (1993) 14 Cal.App.4th 1576 ("*Mcintosh*"), the prevailing wage law did not define the phrase "paid for in whole or in part out of public funds." It was not until the passage of Senate Bill 975 (Chapter 938, Statutes of 2001) that the Legislature carefully and extensively defined "public funds."

Ensemble believes that claiming that the public funds will not be used to pay for the actual construction work is sufficient to avoid the requirement to pay prevailing wages. However, this limiting interpretation of Section 1720 has already been disapproved in *Hensel Phelps Construction Co. v. San Diego Unified Port District* (2011) 197 Cal.App.4th 1020, 1034 ("*Hensel Phelps*"). In *Hensel Phelps*, the public agency sought to build or have built a hotel on a waterfront parcel of land. (*Hensel Phelps*, 197 Cal.App.4th at 1024.) In furtherance of this, the public agency entered into a lease of the land with a private tenant that would build the desired hotel, which lease provided for \$46.5 million in rent credits for the land from the public agency to the tenant. *Id.* at 1025. The Court of Appeals held that it need not be shown that the rent credit paid for actual construction costs in order for the project to be "paid for in whole or in part out of public funds." As explained by the Court:

We also find no support in the statutory language for Petitioners' contention that a project does not constitute "construction ... done under contract" unless the public agency pays the actual costs of construction

⁴ All subsequent references are to the Labor Code unless otherwise specified.

⁵ Subsequent subdivision references are to section 1720.

rather than providing a different type of subsidy to the project. Indeed, the language of section 1720, subdivision (b) suggests that the opposite is the case. In defining the type of public subsidies that will render a project “paid for in whole or part out of public funds,” the statute specifies numerous types of subsidies that, as a practical matter, cannot be used to pay the actual construction costs, but that can serve to reduce a developer’s project costs. Among such subsidies are a public entity’s (i) performance of construction work (§ 1720, subd. (b)(2)); (ii) transfer of an asset for less than fair market price (§ 1720, subd. (b)(3)); (iii) payment, reduction, forgiveness or waiver of fees, costs, rents, bond premiums or interest rates (§ 1720, subd. (b)(4)); and (iv) allowance of credits against payment obligations. (§ 1720, subd. (b)(6).) The Legislature’s inclusion of these items would serve no purpose if the phrase “[c]onstruction ... done under contract” is understood to mean that the public agency must contract to pay the *actual costs* of construction. We will not adopt a statutory interpretation that renders meaningless a large part of the statutory language. (*Id.* at p. 1034.)

The fact that the Restated Grant Agreement provides that the grant funds are to be used only towards the purchase price of the Theater is not relevant to this analysis. As with the rent credits at issue in *Hensel Phelps*, the grant funds are designed to assist Ensemble in obtaining the property that is being renovated or improved. As such, the grant funds reduce Ensemble’s cost for the renovation of the Theater, rendering the project paid for in part out of public funds. As a factual matter, both the rent credit in *Hensel Phelps* and the payment of grant funds here occur during or after construction but in either case they constitute a subsidy to the project and serve to reduce project costs.

Mcintosh v. Aubry, supra, offers no support for Ensemble’s interpretation of the statute. *Mcintosh* arose under a prior version of Section 1720 and has been superseded by the revised Section 1720, as noted in *Hensel Phelps, supra*, 197 Cal.App.4th at 1036. Therefore, the conclusions in *Mcintosh* regarding forbearance of rent, payment of surety bond premiums, and absorption of inspection expenditures would be different if the case were decided under current law because under subdivision (c)(4) of section 1720, those items would be deemed expenditures of “public funds.” As such virtually any financial assistance (other than a de minimis amount), be it money paid, costs forborne, reduced, forgiven, waived, or otherwise absorbed by a public entity is sufficient to trigger the application of the Section 1720, as it is now constituted. For the foregoing reasons, the Project is a public work subject to the prevailing wage requirements of the Labor Code if it is funded in part by City’s \$950,000 subsidy.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Christine Baker
Director

Letter to Messrs. Goetz and Westen
Re: Public Works Case No. 2012-008
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