

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
1515 Clay Street, 17th Floor
Oakland, CA 94612
(415) 703-5050



April 10, 2013

Patricia M. Gates
Sharon Seidenstein
Law Offices of Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501

Re: Public Works Case No. 2012-036
Meadow Glen Apartments
City of Modesto/Stanislaus County

Dear Mses. Gates and Seidenstein:

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 the Meadow Glen Apartments (Project) is a public work subject to both state and federal prevailing wage requirements.

Facts

In 2008 the City of Modesto (City) approved the allocation of \$713,162 in HOME Loan federal funds (2008 HOME Loan) to a local non-profit entity, the Stanislaus County Affordable Housing Corporation. Inc. (STANCO), for the acquisition and development of an apartment complex called the Meadow Glen Apartments. These units were to be used by individuals with mental health disabilities and their families. After STANCO depleted the entire loan, it was unable to secure additional funding for the project, and the City and STANCO determined that it was no longer feasible to continue pursuing the project.

On February 11, 2010, the U.S. Department of Housing and Urban Development (HUD) awarded the City a \$25,000,000 grant of Neighborhood Stabilization Program 2 (NSP2) funds. City allocated \$6,000,000 of these funds to the Housing Authority of the County of Stanislaus, (Housing Authority) for the purpose of constructing affordable rental housing for the City's emancipated foster and homeless youth.

On January 11, 2011, City, STANCO, and the Housing Authority entered into an agreement (Agreement) to transfer all of the plans, entitlements, and project development documents from the 2008 proposed project to the Housing Authority. Under the Agreement the Housing Authority would construct a low-income housing apartment complex for emancipated foster and homeless youth. The Housing Authority would utilize the NSP2 funds for construction as a sub-recipient of

as a result of the 2008 HOME Loan. The Housing Authority would own and operate the housing complex.¹

On November 8, 2011, HUD approved and permitted the City to disburse \$4,800,000 of the \$6,000,000 NSP2 funds for the Project.

On April 5, 2012, the Project was first advertised for bid. Bids were received through April 30, 2012. The bid invitation included information informing potential bidders that contractors were required to pay federal prevailing wage rates for construction of the Project.

On May 30, 2012, the Housing Authority entered into a written contract for the construction of the Project with Diede Construction (Diede).

On June 25, 2012, the Housing Authority submitted a request to HUD Contractor Industrial Relations Specialist, Patricia Baumgartner, requesting a determination by HUD as to the correct prevailing wage standard to apply in relation to the Project.²

On October 4, 2012, Carpenters Local 152 (Local 152), filed a Request for Determination with this office on behalf of Local 152.

Discussion

Labor Code section 1771³ generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1),⁴ 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....” Title 8, California Code of Regulations § 16001(b) states: “...[f]ederally 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 primary point of contention between the Housing Authority and Diede (together referred to as Authority) and Local 152, is whether *State Building and Construction Trades Council of California, AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547 (*Vista*), renders the Project exempt from state prevailing wage obligations, because the Project is a “municipal affair.” Specifically,

¹ As noted by Housing Authority, Housing Authority must pay all vendors with City approval and then is reimbursed for those payments by City.

² A number of letters, e-mails and telephone calls between the parties resulted. The letters and e-mails are included in the submissions by Sharon Seidenstein and the Housing Authority, and they contain representations of the parties' telephone conversations. The documents generally state the opinions of various persons as to the applicability of State prevailing wage laws. They do not provide any authority as to the whether the project is subject to State prevailing wage laws.

³ All subsequent references are to the Labor code unless otherwise specified.

⁴ Subsequent subdivision references are to section 1720.

Authority argues as follows: The City of Modesto is a charter city. Article XI, section 5, subdivision (a) of the California Constitution provides: “It shall be competent in any city charter to provide that the city governed there under 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 charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith”. Therefore, says Authority, the Project is exempt from prevailing wage requirements.

Local 152 argues that because the Project cannot meet the first prong of the analysis, it does not fall within Modesto’s home rule authority, and therefore state prevailing wages apply.

The *Vista* Court relied on the analysis in *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d. 1, 16-24, to determine whether a matter falls within the home rule authority of a charter city:

First, a court must determine whether the city ordinance at issue regulates an activity that can be characterized as a “municipal affair.” Second, the court “must satisfy itself that the case presents an actual conflict between [local and state law].” Third, the court must decide whether the state law addresses a matter of “statewide concern.” Finally, the court must determine whether the law is “reasonably related to ... resolution” of that concern and “narrowly tailored” to avoid unnecessary interference in local governance. “If ... the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related to its resolution [and not unduly broad in its sweep], then the conflicting charter city measure ceases to be a ‘municipal affair’ pro tanto and the Legislature is not prohibited by article XI section 5(a), from addressing the statewide dimension by its own tailored enactments.” (*Vista* at 556 citing *Calif Fed. Savings* at pp.16-24 (internal citations omitted)).

As explained in *Vista* at pp. 552-553:

In 2006, the voters of the City of Vista in San Diego County approved a .5 percent sales tax to fund the construction and renovation of several public buildings. The proposed projects involved the seismic retrofit of an existing fire station and the construction of two new fire stations, a new civic center, a new sports park, and a new stagehouse for the city’s Moonlight Amphitheatre. At that time, Vista was a general law city in February 2007, the Vista city attorney submitted a report to the city council recommending that Vista take steps to become a charter city. The report asserted that the conversion would give the city the option of not paying prevailing wages on its planned public works projects, “result[ing] in millions of dollars of savings over the next few years and beyond.”

...

“The ballot measure passed with approximately 67 percent of the votes cast. Shortly thereafter, Vista amended a city ordinance to prohibit any city contract from requiring payment of prevailing wages unless (a) such payment is compelled by the terms of a state or a federal grant, (b) the contract does not involve a municipal affair, or (c) payment of the prevailing wage is separately authorized by the city council.”

The *Vista* Court found the two fire stations were entirely and solely owned by Vista, financed by Vista, controlled by Vista, operated by Vista, and constructed for the benefit of the City of Vista. These facts led the *Vista* Court to find that the fire stations were a municipal affair of Vista.

The Project discussed in this determination is different. It is being constructed pursuant to a Memorandum of Understanding between City, Housing Authority and STANCO with HOME funds and federal NSP2 Funds through the American Recovery and Reinvestment Act of 2009 (ARRA). Housing Authority received, through the City, \$4.8 million in federal housing money for the project, in the form of a forgivable loan. STANCO transferred the property and the \$713,000 federal loan it received through City to Housing Authority. STANCO used the loan to acquire the site and to pay for permits, design work and for other preconstruction costs. The \$713,000 no-interest loan is due in 55 years.

The project will be owned by Housing Authority. The Project is not financed with City funds; it is financed by the Federal government, and specifically both NSP2 and federal loan funds, through the Federal American Recovery and Reinvestment Act of 2009, and Home funds.⁵ It is Housing Authority, and previously STANCO, which is constructing the Project. It is Housing Authority to whom STANCO “transferred plans, entitlements, and project development documents,” for development of the Project, which “advertised an invitation for bids” for the Project, and which accepted bids and “ultimately chose to accept the bid submitted by Diede Construction and entered into a written contract for the construction of the Meadow Glen Apartments.” The Project will not be owned and operated by City; it is to be owned and operated by the Housing Authority.

The use of non-city funds or combining with non-city entities, among other factors, may vitiate any claim to a project’s status as a Charter City project. Here, federal funds are financing the construction of the Project, Housing Authority and not City is a party to the construction contract, and will oversee the construction, and operate and own the facility. City’s function consists of obtaining federal funding and some financial oversight of the project as required by the terms of the federal grant. The Project is controlled and carried out by Housing Authority, with minimal City oversight under federal rules governing the grant and loan funds.

⁵ The HOME Investment Partnerships Program was established under Title II of the 1990 Cranston-Gonzalez National Affordable Housing Act and provides block grants to states and local public entities to increase affordable housing.

Letter to Patricia Gates, Esq. and Sharon Seidenstein, Esq.
Re: Public Works Case No. 2012-036
Page 5

For the foregoing reasons, the Project is a public work subject to the prevailing wage requirements of the Labor Code.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Christine Baker". The signature is written in black ink and is positioned above the printed name and title.

Christine Baker
Director