

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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May 7, 2013

Michael Pickens
Operating Engineers Local Union No. 3
1916 North Broadway
Stockton, California 95205

Scott Osborne
Jackson Lewis LLP
1001 SW 5th Avenue, Suite 1205
Portland, Oregon 97204

Re: Public Works Case No. 2012-038
Venice Island Levee Rehabilitation, Phase 2
Levee Crown Rising Project
Robert Burns Construction, Inc./Jerico Products, Inc.

Dear Messrs. Pickens and Osborne:

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 unloading of fill material by employees of Jerico Products, Inc. ("Jerico") from a spud barge to the Venice Island Levee Rehabilitation Project is work done in execution of the public works contract and subject to prevailing wage requirements.

Facts

In June 2012, Reclamation District 2023 ("District") awarded the Levee Rehabilitation Project, Phase II ("Project") to Robert Burns Construction, Inc. ("RBC"). RBC is a signatory employer with the Operating Engineers Union. The project involves rehabilitating the levee on Venice Island by: (1) raising the levee's crest elevation to 1.5 feet above the Base Flood Elevation, (2) adding material to the landside slope to maintain the slope ratio, (3) replacing an existing road, and (4) installing siphons within the levee.

RBC contracted with Jerico to deliver embankment fill material and aggregate base used in the project. Jerico's price quote for the fill material and aggregate base states: "We are a material supplier only, not a subcontractor, therefore exempt from prevailing wages." (Exh. A of Jerico's 1/18/13 submission). On July 11, 2012, Jerico executed a Purchase Order (in the amount of \$1,191,000) for the fill and aggregate required for the project.

Jerico obtained the fill material from DI Aggregates, a commercial materials supplier, located on Decker Island, some 20 miles away from Venice Island. Jerico workers would load the barges with fill material at Decker Island and then move the barges to Venice Island. Near Venice Island, Jerico's workers would transfer the fill material to a smaller "spud" barge, which contained an excavator and a conveyor belt. Another Jerico employee would place the material onto the excavator and place it onto a conveyor belt (which would then discharge the material directly onto the levee) or occasionally into RBC trucks on the levee. The spud barge would move along the levee following the workers from RBC, offloading material as they were needed. When the conveyor belt dumped the material onto the levees, RBC workers would incorporate the fill into the project. If it was dropped into trucks, RBC drivers would transport it to another location on the island.

The construction specifications incorporated¹ into the contract between RBC and the Reclamation District contained a clause stating the contractor could not stockpile material "unless otherwise approved or designated by the Engineer." (Section 02505B, subsections 4.12; 4.15.) There is nothing in the documents provided that show that such an approval or designation ever occurred.

The process for the aggregate material was generally the same, except this material was purchased from Sustainable Crushing, a commercial materials supplier located at the Port of San Francisco. Once the barge reached the Island, the aggregate material was loaded onto trucks and transported by RBC workers to the roadways.

The project was completed in December 2012.

Discussion

Labor Code² section 1720(a)(1) defines "public works" as "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds" Section 1771 provides:

Except for public works projects of one thousand dollars (\$1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

....

Section 1772 provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." Section 1774 provides that: "The contractor to whom the contract is awarded, and any subcontractor under him,

¹ The contract at page 1 states: "For and in consideration of the payments hereinafter specified to be made by District, Contractor agrees at its own proper cost and expense, to do and/or provide the following in accordance with applicable plans and specifications and as directed by District."

² All further statutory references are to the California Labor Code unless otherwise indicated.

shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.” Sections 1772 and 1774 state the general rule that all workers employed in the execution of a public works contract by a construction contractor or subcontractor are entitled to the payment of prevailing wages. These sections are construed liberally because the overarching purpose of the prevailing wage law is to protect and benefit employees on public works projects. (*Williams v. SnSands Corp.* (“*Williams*”) (2007) 156 Cal.App.4th 742, 749) (internal citations omitted).)

O.G. Sansone Co. v. Department of Transportation (“*Sansone*”) (1976) 55 Cal.App.3d 434, 127 Cal.Rptr. 799, provides authority with respect to coverage of on-hauling. Under *Sansone*, on-hauling is in the execution of a contract for public work when it is “functionally related to the process of construction” and “an integrated aspect of the ‘flow’ process of construction.” (*Sansone, id.*, 55 Cal.App.3d at p. 444 quoting *Green v. Jones* (1964) 128 N.W.2d 1, 7.) *Sansone* relied extensively on *Green*, in which a Wisconsin court held that the Wisconsin prevailing wage law applied to a trucking company that delivered roadbed material which was immediately distributed over the roadway surface. (*Sansone, supra*, 55 Cal.App.3d at p. 444; *Green, supra*, 128 N.W.2d at p. 7.) The *Green* court reasoned that trucking company’s tasks were “functionally related to the process of construction.” (*Ibid.*)

Sansone established two different bases for determining whether on-hauling workers are deemed to be employed on public work construction: (1) whether the material is obtained from a source dedicated to the public work site (required to comply with prevailing wage laws) or from a commercial materials supplier (exempt from prevailing wage laws)³ and (2) whether the material delivered is immediately incorporated into the public work site (required to comply with prevailing wage laws) or stockpiled for later re-handling (exempt from prevailing wage laws).

Following *Sansone*, the First District Court of Appeal in *Williams*, concluded:

“What is important in determining the application of the prevailing wage law is not whether the truck driver carries materials *to* or *from* the public works project site. What is determinative is the role the transport of the materials plays in the performance or “execution” of the public works contract.” (*Williams, supra*, 156 Cal.App.4th at p. 762.)

Williams interpreted the statutory term “execution” to “plainly mean the carrying out and completion of all provisions of the contract.” (*Id.* at 750.)

³ *Sansone* distinguished hauling from a material supplier, which is exempt from prevailing wage requirements, from hauling performed as part of the public work. On-hauling from a bona fide material supplier is exempt because it is performed independently of the contract construction activities. (*Ibid.*; See, also *Williams, supra*, 156 Cal.App.4th at 752.) For the material supplier exemption to apply, the material supplier must sell to the general public, the material site must not be established specially for the public works project, and the material site must not be located at the public works site.

Here, it is undisputed that the Project is a public work under section 1720(a)(1) as it involves construction work done under contract and paid for with public funds. The sole issue presented is whether the unloading of fill material by employees of Jerico from the spud barge to the Project is considered work done in execution of the contract and therefore subject to prevailing wage requirements. As it is undisputed that Jerico obtained the fill material from commercial material suppliers, the resolution of this issue turns on: (1) whether the on-hauled material was immediately incorporated into the Project site or stockpiled for later re-handling and (2) whether Jerico's on-hauling of material onto the levee was necessary to carry out and complete all provisions of the contract.

Operating Engineers Local Union No. 3 ("Operating Engineers") takes the position that the on-hauled material was immediately incorporated and therefore, Jerico employees are subject to prevailing wage requirements.⁴ Operating Engineers also contends that without the offloading work done by Jerico's workers, the Project "would grind to a halt." Jerico takes the contrary position that the on-hauled material was stockpiled for later re-handling and therefore it is not subject to prevailing wage laws.⁵ For the reasons discussed herein below, Operating Engineers' position is correct.

The factual question of whether the on-hauled material was immediately incorporated or stockpiled for later re-handling is disputed, with parties producing witness statements supporting their respective positions. Although arguably a close question, additional facts support Operating Engineer's position that the material was immediately incorporated.

On March 24, 2013, an investigator with the Department of Industrial Relations spoke with Mark Burns, Vice President of RBC. During this conversation, Mr. Burns stated: (1) he served as the Project Manager for the entirety of the Project; (2) that the material on-hauled by Jerico's employees would be spread and incorporated by RBC employees, sometimes as soon as it hit the ground, but usually within an hour of being off-loaded from the spud barge; (3) about four or five times during the course of the project, the fill material may have been stockpiled until the

⁴ Operating Engineers contends that: (1) Jerico workers were on the spud barge 24 hours per day for the "purposes of offloading this material and without this offloading the project would grind to a halt" (11/16/12 Pickens letter), (2) material that was offloaded from the spud barge was "directly incorporated into the raising of the levee's crown" (2/5/13 Pickens letter), and, (3) the equipment used to place the material on the levee "was operated by Jerico employees that worked in concert with employees of RBC" (2/5/13 Pickens letter). In support of its position, Operating Engineers submitted witness statements from RBC employees that contended that the material was immediately incorporated into the project.

⁵ Jerico contends: (1) Jerico workers were not involved in any on-site work, including incorporating the material, and remained on the barges at all times and thus were physically incapable of rehandling the material (1/18/13 Osborne letter); (2) the fill material was not immediately incorporated in that the material was either stockpiled on the levee or into trucks that took the material elsewhere for stockpiling (1/18/13 Osborne letter); (3) the spud barge "acted like nothing more than the delivery chute of a concrete truck." (3/8/13 Osborne letter). In support of its position, Jerico submitted statements from its employees stating that the material was not immediately incorporated into the project but stockpiled for later re-handling. It also submitted a statement from Mark Burns stating that the material was stockpiled and that Jerico employees were not involved in incorporating the fill material on the levee.

following morning or afternoon; and, (4) the contract contained a "No Stockpiling" provision because too much weight could cause the levee to "blow out."⁶ Mr. Burns's account is supported by the fact that the construction specifications incorporated into the contract expressly prohibits the stockpiling of aggregate base material "unless otherwise approved or designated by the Engineer." (Section 02505B subsections 4.12; 4.15.)

Accepting that the material unloaded by Jerico employees onto the levee was immediately incorporated by RBC employees, this case is analogous to the *Green* facts expressly considered and relied upon by the *Sansone* court. As the *Sansone* court states:

"The Wisconsin court decided that Jones' employees were covered because under the facts of that case the materials hauled were dumped or spread directly on the roadbed and were immediately used in the construction of the project. ... The drivers' tasks were functionally related to the process of construction. ... Clearly, the materials were applied to the process of highway improvement, almost immediately after the drivers arrived at the site. The delivery of materials was an integrated aspect of the 'flow' process of construction. The materials were 'distributed over the surface of the roadway' with no 'rehandling' out of the flow of construction. The drivers were 'executing such highway improvement' and hence performing 'work under the contract.'" (*Sansone*, supra, 55 Ca.App.3d at pp. 444-45 (citations and quotations omitted).)

An additional basis for coverage of unloading of fill material by employees of Jerico to the project site is found in sections 1772 and 1774 which state the general rule that all workers employed in the "execution" of a public works contract by a construction contractor or subcontractor are entitled to the payment of prevailing wages. Under *Williams*, work is performed in the "execution" of a contract for public work when such work is necessary for carrying out and completion of all of the provisions of the contract. Here, the project specifically requires the raising the levee's crest elevation and adding material to the landside slope to maintain the slope ratio. Jerico unloaded onto the levee the material necessary to carry out and complete these express contract provisions.⁷ Jerico is indisputably a subcontractor under sections 1772 and 1774 because it performed work in the execution of this contract by hauling and unloading the material onto the levee.⁸ Therefore, the payment of prevailing wages is required for such on-hauling work under sections 1772 and 1774.

For the foregoing reasons, the unloading of fill material by employees of Jerico from the spud barge to the Venice Island Levee Rehabilitation Project is work performed in the execution of the public works contract and, therefore, subject to prevailing wage requirements.

⁶ It is unclear why Mr. Burns provided a contrary statement to Jerico's attorneys. In any event, the DIR investigator found Mr. Burns's oral account to be credible.

⁷ Indeed, Jerico's offloading work was also necessary for carrying out and completing the other two objectives of the contract: (1) replacing an existing road and (2) installing siphons within the levee.

⁸ This interpretation advances the overarching purpose of the prevailing wage law, which is to protect and benefit employees on public works projects. (See *Williams*, supra, 156 Cal.App.4th at p. 749.)

Letter to Messrs. Pickens and Osborne
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I hope this letter 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 to the right of the word "Sincerely,".

Christine Baker
Director