

DEPARTMENT OF INDUSTRIAL RELATIONS

Christine Baker, Director

Office of the Director

1515 Clay Street, 17th Floor

Oakland, CA 94612

Tel: (510) 622-3959 Fax: (510) 622-3265



November 22, 2013

Michael Pickens
Operating Engineer Union Local 3
1916 N. Broadway Avenue
Stockton, CA 95205

Van Allyn Goodwin, Esq.
Littler Mendelson P.C.
501 W. Broadway, Suite 500
San Diego, CA 92101

RE: Public Works Case No. 2013-015
Central Valley Next Generation Broadband Infrastructure Project
Central Valley Infrastructure Network

Dear Messrs. Pickens and Goodwin:

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 Central Valley Next Generation Broadband Infrastructure Project (Project) is partially funded with state monies and therefore is a public work subject to California prevailing wage requirements.

Facts

Under the American Recovery and Reinvestment Act (ARRA), the federal government provided \$7.2 billion to increase broadband network access, particularly in rural, underserved and unserved areas. The Central Valley Independent Network (CVIN) and its non-profit partner The Corporation for Education Network Initiatives in California (CENIC) is building a 1,371 mile fiber-optic infrastructure through 18 California counties: Amador, Calaveras, Colusa, El Dorado, Fresno, Kings, Kern, Mariposa, Merced, Madera, Nevada, Placer, San Joaquin, Stanislaus, Sutter, Tuolumne, Tulare & Yuba. The goal is to provide direct fiber connectivity to 63 anchor institutions, access by another 40 anchor sites and access to hundreds of thousands of businesses and residences.

In 1995, CVIN was founded. CVIN is a joint enterprise of affiliated independent telephone companies located in central and northern California. CVIN deploys fiber optic infrastructure to both rural and metropolitan areas throughout California, with a focus on expanding the availability of its communication services. In 1997, CVIN created CENIC. CENIC is a non-profit corporation with the goal of providing cost-effective, high-bandwidth networking support to California's education and research communities.

On December 20, 2007, the California Public Utilities Commission (CPUC or the Commission) created the California Advanced Services Fund (CASF) to encourage the deployment of broadband services in unserved and underserved areas. On September 27, 2008, Governor Schwarzenegger signed SB 1193 sanctioning the Commission's formation of the CASF and authorizing the State Treasury to handle CASF funds.

In February of 2009, the ARRA was signed into law. The law included funding of \$7.2 billion to expand broadband service to underserved and unserved communities throughout the country. The funds were provided to the National Telecommunications & Information Administration (NTIA) and granted through a program called the Broadband Technologies Opportunity Program (BTOP).

On July 29, 2009, the Legislature enacted Assembly Bill 1555 (Chapter 24, Statutes of 2009), which expanded the application eligibility to entities other than telephone corporations provided that CASF funding is pursued in conjunction with funding from the ARRA.

On March 26, 2010, CVIN submitted an application to NTIA for the Broadband Technologies Opportunity Program. CVIN was ultimately successful in its efforts to seek Recovery Act funding. On August 18, 2010, CVIN received a federal Recovery Act grant award of \$46,619,757 for its broadband infrastructure project to preserve and create jobs, and promote economic benefits and recovery.

On April 1, 2010, CVIN submitted an application to the CPUC for the CASF program.

On September 25, 2010, Governor Schwarzenegger signed SB 1040 (Chapter 317, Statutes of 2010), which increased the CASF appropriation from \$100 million to \$225 million.¹

On October 14, 2010, CVIN's application was approved by the CPUC. Funding was granted in the amount of \$6,659,967, which represents 10% of the Project's total estimated cost.

Construction began in October of 2010 and is expected to be complete in 2013.

The Project is funded in part by the American Recovery and Reinvestment Act of 2009. The monies flow through the Broadband Technologies Opportunity Program, which is administered by the National Telecommunications and Information Administration. This funding accounts for 70%

¹ The CASF is funded by a surcharge rate on revenues collected by telecommunications carriers from end-users for intrastate telecommunications services. On January 1, 2008, the Commission adopted a surcharge rate of 0.25% to fund the program. On December 17, 2009, the Commission approved Resolution T-17248 which reduced the CASF surcharge from 0.25% to 0.00% effective January 1, 2010. To collect the additional funds authorized by SB 1040, the Commission issued Resolution T-17343 on September 22, 2011, which revises the surcharge from 0.0% to 0.14% effective November 1, 2011. The Commission approved Resolution T-17386 on February 13th, 2013, increasing the surcharge rate from 0.14% to 0.164% effective April 1, 2013.

of the Project's cost. The CASF grant provides an additional 10% of the Project's cost. The final 20% will be paid by CVIN. The total cost of the Project is estimated to be \$66,599,688.00.

Discussion

Labor Code section 1771² generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1) 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: "[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. . . .

Title 8, California code of Regulations section 16000 also defines public funds to include "state, local and/or federal monies." Section 16001(b) states: "[t]he 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."

It is undisputed that 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 that it is "paid for in whole or in part out of public funds" is the sole issue in this case.

The Project is a Public Work under Labor Code Section 1720 Because California State Public Funds are Used in the Project

The issue is whether the payment of funds from the CASF grant that accounts for 10% of the Project's cost is a source of public funds sufficient to require that the Project be subject to prevailing wage requirements. The definition quoted above clearly states the project is paid for "in part" with public funds through the CPUC.³ In this case the funds in question are ordered collected by the CPUC, a state public entity, and forwarded to the State Treasurer. The State Treasurer in turn holds the funds⁴ until directed to make payments to private entities developing and constructing the new telecommunications service. The funds are held in public coffers subject to disbursement by the Treasurer on behalf of a California public entity. The CPUC funds the Project with funds levied as a surcharge on intrastate telecommunications services. The funds it

² All citations are to the California Labor Code; all subdivision references are to the subdivisions of Section 1720 unless otherwise specified.

³ In 1911, the CPUC was established by Constitutional Amendment as the Railroad Commission. In 1912, the Legislature passed the Public Utilities Act, expanding the Commission's regulatory authority to include natural gas, electric, telephone, and water companies as well as railroads and marine transportation companies. In 1946, the Commission was renamed the California Public Utilities Commission.

⁴ The funds are reflected as line item 3141 in the Governor's budget.

collects are public funds when received and disbursed by order of the Commission to the State Treasurer acting as the CPUC's agent. (See section 1722.)

This definition of public funds interpretation appears to comport with the legislative intent behind the definition of public funds contained in SB 975. As noted in the last bill analysis prepared before the bill was passed:

This bill establishes a definition of "public funds" that conforms to several precedential coverage decisions made by the Department of Industrial Relations. These coverage decisions define payment by land, reimbursement plans, installation, grants, waiver of fees, and other types of public subsidy as public funds. The definition of public funds in this bill seeks to remove ambiguity regarding the definition of public subsidy of development projects. (Senate Rules Committee, Office of Senate Floor Analysis, Senate Bill No. 975 as amended August 30, 2001, (September 5, 2001).

If construction of a project is paid for in part out of public funds and no exemption under section 1720(c) applies, all the work in the project is a public work. (*Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 24-25 (*Azusa*)). Here, the funds are public funds and no exemption applies so the project is a public work in its entirety.⁵ A similar situation occurred in the *Azusa* case. There the court, discussing the public nature of a community facilities district, found:

A CFD⁶ is "defined as 'a legally constituted governmental entity ...'" and as such is an independent political body from the City. (*Friends of the Library of Monterey Park v. City of Monterey Park, supra*, 211 Cal.App.3d at p. 376, 259 Cal.Rptr. 358.) The city council is the City's legislative body, and the governing body of the CFD. The City's manager and finance director maintain control over the CFD's fiscal agent and, pursuant to the Funding Agreements, have sole authority to authorize payment of Mello-Roos funds to ALP⁷. Bond funds held by Wells Fargo on behalf of the CFD are held in the CFD's public coffers. The City, acting on behalf of the CFD, authorizes expenditures and controls disbursement of those funds. The Rosedale CFD issued bonds and paid ALP approximately \$71 million in bond proceeds to perform public infrastructure work. Consistent with the Department's prior determinations, these funds have all the characteristics of "public funds." (See PW 93-054 (*Tustin Fire Station*) (June 28, 1994 [money collected for, or held in coffers of, public agency constitutes "public funds" under § 1720].) Payment by the CFD to ALP is a payment of money or its equivalent from or on behalf of a "governmental entity" to a developer within the plain meaning of subdivision (b)(1).

In this case the funds are held in public coffers subject to disbursement by the Treasurer on

⁵ Contrary to CVIN's assertion, there is no requirement that there be an actual construction contract with a public entity in section 1720(a). *Hensel Phelps Construction Company v. San Diego Port District* (2011) 197 Cal.App.4th 1020, 1034 ("*Hensel Phelps*").

⁶ Community Facilities District

⁷ Azusa Land Partners

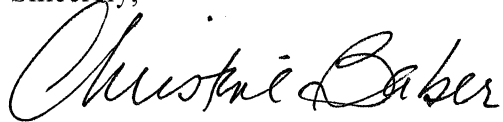
Letter to Messrs Pickens and Goodwin
Re: Public Works Case No. 2013-015
Page 5

behalf of a California public entity. Thus under Section 1720(b)(1) there is payment of money . . . by the state . . . directly to or on behalf of the public works contractor, subcontractor, or developer.

For the foregoing reasons, the Project is a public work within the meaning of section 1720. Therefore, the Project is subject to prevailing wage requirements.

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 above the printed name and title.

Christine Baker
Director

Letter to Messrs Pickens and Goodwin
Re: Public Works Case No. 2013-015
Page 6

cc: Ana Maria Johnson
California Advanced Services Fund
505 Van Ness Avenue
San Francisco, CA 94102

Jan Dubiakova
CVIN, LLC dba Vast Networks
9479 N. Fort Washington Ave. Suite#105
Fresno, CA 93730

Zenida Tapawan-Conway
California Advanced Services Fund
505 Van Ness Avenue
San Francisco, CA 94102

Jerry McClain Jr.
Deputy Labor Commissioner I
Department of Industrial Relations
Division of Labor Standards Enforcement
2031 Howe Avenue, Ste. 100
Sacramento, CA 95825