

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

PUBLIC WORKS CASE NO.: 2011-030
MAINTENANCE & REPAIR OF SIDEWALKS, CURBS, AND GUTTERS
CITY OF SACRAMENTO

PUBLIC WORKS CASE NO.: 2013-006
2013 PUBLIC WORKS CURB, GUTTER, AND SIDEWALK RESTORATION
CITY OF SAN MARCOS

The undersigned, having reviewed the joint administrative appeal filed by the cities of Sacramento and San Marcos on December 2, 2013, hereby denies the appeal for the reasons set forth in the initial coverage determination dated November 1, 2013, which is incorporated by reference herein. This decision constitutes final administrative action in this matter.

Dated: 5/9/2014



Christine Baker, Director

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 1, 2013

Bryan Berthiaume
Foundation for Fair Contracting
3807 Pasadena Avenue, Suite 150
Sacramento, California 95821

James Sanchez, City Attorney
City of Sacramento
P.O. Box 1948
Sacramento, California 95812

Juan Montanez, Streets Manager
City of Sacramento
5730 24th Street, Building 1
Sacramento, California 95814

John F. Shirey, City Manager
City of Sacramento
9151 I Street, 5th Floor
Sacramento, California 95814

Bret Randall Wolfe
BRW Concrete Incorporated
4120 Happy Lane
Sacramento, California 95827

Jim Desmond, Mayor
City of San Marcos
1 Civic Center Drive
San Marcos, California 92069-2918

Branden Lopez
Center for Contract Compliance
1168 E. La Cadena Drive, #202
Riverside, California 92507

Helen Holmes Peak, City Attorney
City of San Marcos
1 Civic Center Drive
San Marcos, California 92069-2918

Jack Griffin, City Manager
City of San Marcos
1 Civic Center Drive
San Marcos, California 92069-2918

Michael D. Edwards, City Engineer
City of San Marcos
1 Civic Center Drive
San Marcos, California 92069-2918

Re: Public Works Case No. 2011-030
Maintenance & Repair of Sidewalks, Curbs, and Gutters
City of Sacramento

Public Works Case No. 2013-006
2013 Public Works Curb, Gutter, and Sidewalk Restoration
City of San Marcos

Dear Interested Parties:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced projects 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 these cases and an analysis of the applicable law, it is my determination that both Maintenance & Repairs of Sidewalks, Curbs, and Gutters ("Sacramento Project") and 2013 Public Works Curb,

Gutter, and Sidewalk Restoration ("San Marcos Project," and collectively, "Projects") are public works subject to prevailing wage requirements, and the charter city status of City of Sacramento ("Sacramento" or "City") and City of San Marcos ("San Marcos" or "City" and collectively, "Cities") does not exempt the Cities from the requirement to pay prevailing wages.

Facts

A. Sacramento Project

In 2006, Sacramento entered into ten separate contracts with ten separate construction contractors for potentially hundreds of concrete work projects, ranging from six square feet to 600 square feet, located throughout Sacramento, for the maintenance and repair of the city's sidewalks, curbs and gutters. These contracts expired in June 2008. In July 2008, the city entered into eleven new contracts with eleven separate construction contractors for the Sacramento Project. These contracts are for one-year terms with options to extend year-to-year not exceeding five years.

In fiscal years 2006/2007 and 2007/2008, the Sacramento Project was funded by three sources: (1) general fund (approximately 84% and 76%, respectively), (2) Special Gas Tax Street Improvement Fund (approximately 12.5% and 13%, respectively), and (3) the City's Measure A funds (approximately 3.5% and 11%, respectively).¹ Sacramento's Special Gas Tax Street Improvement Fund is comprised of the state gasoline sales tax revenues ("gas tax revenues").

Sacramento is a charter city and by operation of article II, section 10, of its charter has availed itself of the constitutional home-rule privilege (discussed at p. 3, *infra*). Section 3.60.180 of City's Municipal Code requires prevailing wages for every "contract for any public project to be performed within the state at the expense of the city, or paid out of city moneys . . . must provide . . . shall be paid not less than the general prevailing rate of wages in private employment for similar work in the city; provided, however, that the foregoing provisions as to payment of the general prevailing rate of wages shall not apply to contracts for any public project originally awarded or executed in an amount of twenty five thousand dollars (\$25,000.00) or less . . ."

B. San Marcos Project

In February 2013, San Marcos entered into a contract with Tri-Group Construction, Inc. for the demolition, removal, and replacement of curb, gutter, sidewalk and other miscellaneous local street improvements at various locations throughout the city. The San Marcos Project is financed by the city's Special Gas Tax Street Improvement Fund, which is wholly funded by the gas tax revenues.

Like Sacramento, San Marcos is a charter city. By operation of article I, section 100, of its charter, San Marcos has also availed itself of the constitutional home-rule privilege. San Marcos, by article II, section 200 of its charter, has exempted itself from complying with the state's prevailing wage laws. Section 2.30.090(d) of City's Municipal Code further states that the payment of prevailing wage "shall not be required by the City or any of its agencies except when required as a condition of any Federal or State grants and on other jobs considered to be of statewide concern."

¹ David Womack's June 4, 2009 Opinion Letter to DIR at pp. 2-3.

The issue in these cases is whether the charter city exemption from state regulation applies where the Cities' Projects are funded, in whole or in part, by the state's gas sales tax revenues or whether California's prevailing wage laws apply to the Projects. The answer to this question in turn depends on whether the Projects are purely a municipal affair or a matter of statewide concern.

Discussion

A. The Projects are public works under Labor Code section 1720.

It is undisputed that the Projects are public works. Labor Code section 1720(a)(1) defines public works as "[c]onstruction, alteration, installation, or repair work done under contract and paid for in whole or in part out of public funds . . ." Under section 1720(a)(3), public works includes:

"Street, sewer, or other improvement work done under the discretion and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not,"

Section 1771 sets forth the general requirement that prevailing wages be paid to all workers employed on public works, including "contracts let for maintenance." The Cities, however, argue that their charters exempt them from complying with the state's prevailing wage laws because the Projects are purely municipal affairs. This argument fails for reasons below.

B. The use of State Gas Tax Revenues to fund the Projects takes the Projects outside of the ambit of municipal affairs.

1. California's Home Rule Doctrine

As the California Supreme Court recently explained, charter cities are "specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs." (*State Bldg. and Constr. Trades Council of California, AFL-CIO v. City of Vista* ("Vista") (2012) 54 Cal.4th 547, 555; Cal. Const. art XI, § 5; *Vial v. City of San Diego* (1981) 122 Cal.App.3d 346, 348.) As to matters which are of statewide concern, charter cities remain subject to and controlled by general state laws regardless of the conflicting provisions of their charters. (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56 at 61-62; *Pac. Tel. & Tel. Co. v. City & Cty. of San Francisco* (1959) 51 Cal.2d 766, 769 [citations omitted].) For state law to control there must be "a convincing basis" for the state's action that "justifies" the state's "interference in what would otherwise be a merely local affair." (*Vista, supra*, 54 Cal.4th at 560 (citation and quotation omitted).)

In *Southern California Roads Co. v. McGuire*,² the California Supreme Court considered the following factors in determining whether a project is a municipal affair³ or a matter of state

² (1934) 2 Cal.2d 115.

³ There is no "precise definition" of the term "municipal affair." *R & A Vending Services, Inc. v. City of Los Angeles* (1985) 172 Cal.App.3d 1188, 1192. Indeed, as the California Supreme Court long ago observed: What did they observe?

concern: (1) the extent of the non-municipal control over the project; (2) the source and control of the funds used for the project; and (3) the nature and purpose of the project, including its geographical scope and extraterritorial effects.⁴

As to the first and second factors, the Projects are funded, in whole or in part, by the gas tax revenues, over which the state exerts its authority and control.⁵ The California Supreme Court has observed, where a project is funded by "money belonging to the state," the "people of the state are concerned in its expenditure." *Southern California Roads Co. v. McGuire*, *supra*, 2 Cal.2d at 123. To protect the state's interests in the gas tax revenues, the state has expressly asserted control over the use and allocation of the gas tax revenues. The state has further reserved supervisory authority to oversee the spending of the allocated gas tax revenues to ensure their proper use and "to superintend the fiscal concerns of the State."⁶ The use of the gas tax revenues to fund the Projects takes the project outside the ambit of a municipal affair and renders the charter city exemption inapplicable.

An analysis of the third factor is unnecessary in this determination because the outcome of the analysis of the first two factors, to wit: that the Projects are matters of statewide concern because of their use of gas tax revenues, cannot change from a contrary finding on the third factor.

2. Extent of Non-Municipal Control Over the Projects

Cities have no rights to gas tax revenues, other than that which is granted to them by the state constitutional and statutory scheme. Through this scheme, the state asserts substantial control over these funds by limiting their allocation and use to statutorily prescribed purposes (based in part on consistency with statewide transportation goals) and imposing strict requirements on cities to comply with the state's Streets and Highways Code and to submit annual reports of expenditures of these funds to the state's Controller for oversight.

Article XIX, section 1, of the state Constitution mandates that gas tax revenues be used for specified purposes. These purposes are for either "research, planning, construction, improvement, maintenance, and operation of public streets and highways (and their related public facilities for

"[T]he constitutional concept of municipal affairs is not a fixed or static quantity. It changes with the changing conditions upon which it is to operate. What may at one time have been a matter of local concern may at a later time become a matter of state concern controlled by the general laws of the state." *Pac. Tel. & Tel. Co. v. City & Cty. of San Francisco* (1959) 51 Cal.2d 766, 781.

⁴ See *Young v. Superior Court of Kern County* (1932) 216 Cal. 512, 516-17 (geographical scope) and *Pac. Tel. and Tel. Co. v. City of San Francisco* (1959) 51 Cal.2d 766, 771-74 (extraterritorial effects). An analysis of the third factor is, however, unnecessary because it does not change the outcome of this determination.

⁵ While San Marcos' Project is fully funded by the state, Sacramento's Project is only partially funded by the gas sales tax revenues. This analysis nonetheless applies to both Projects. See, e.g., DIR Coverage Determination in Public Works Case No. 2000-048 (finding coverage based on the non-municipal source of partial funding from the state); *Young v. Superior Court of Kern County* (1932) 216 Cal. 512, 516 (a charter city construction project "cannot be deemed a matter of purely municipal concern" in part based on the non-municipal source of partial state funding).

⁶ See Cal. Gov. Code, § 12410; see also *Guidelines Relating to Gas Tax Expenditures for Cities and Counties* ("Gas Tax Guidelines"), § 130.

nonmotorized traffic)"⁷ or "research planning, construction and improvement of exclusive public mass transit guideways."⁸ The sole authority to allocate gas tax revenues to cities, counties and other areas of the state is vested by the Constitution in the state Legislature.⁹

The Legislature's allocation determinations are based, in part, on the consistency with the "orderly achievement of the adopted local, regional, and *statewide* goals for ground transportation in local general plans, regional transportation plans, and *the California Transportation Plan.*" (Cal. Const., art. XIX, § 4, subd. (b), par. (1) [emphases added].)¹⁰

In order to receive gas tax revenues, cities are required to: (1) set up a "special gas tax street improvement fund" into which the apportioned funds must be deposited (Cal. Sts. & Hy. Code, § 2113¹¹), (2) file annually with the California State Controller ("Controller") a complete report of expenditures during the preceding fiscal year (Cal. Sts. & Hy. Code, §§ 2119, 2151, 2155),¹² and (3) maintain public streets and hold elections of municipal officers within a ten year period (Cal. Sts. & Hy. Code, § 2111).

Streets and Highways Code imposes further limitations on cities' use of the state gas tax revenues by: (1) forbidding cities from using more than one-quarter of the allocated funds for principal and interest payments on bonds (Cal. Sts. & Hy. Code, § 2107.4) and (2) restricting cities' use of patented or proprietary paving material (Cal. Sts. & Hy. Code, § 2112.) Moreover, although any of the cities may enter into an agreement regarding their allocation of the state gas tax revenues, such agreement "shall be filed with the State Controller" for verification and disposition of the allocated funds.¹³

3. The Source and Control of the Funds Used for the Projects

⁷ Cal. Const., art. XIX, § 2, subd. (a).

⁸ Cal. Const., art. XIX, § 2, subd. (b).

⁹ See, e.g., Cal. Const., art. XIX, § 4. The Legislature's allocation determinations are based, in part, on the consistency with the "orderly achievement of the adopted local, regional, and *statewide* goals for ground transportation in local general plans, regional transportation plans, and *the California Transportation Plan.*" (emphases added). This language remains unchanged by Proposition 22 (approved November 2, 2010, effective November 3, 2010).

¹⁰ This language remains unchanged by Proposition 22 (approved November 2, 2010, effective November 3, 2010).

¹¹ Cities are further required to deposit any interest received from the investment of the gas tax revenues in their Special Gas Tax Street Improvement Fund. These funds are only to be used for street purposes.

¹² The Controller "shall prescribe the form and contents of the report." Section 2151 of the Streets and Highways Code nonetheless requires that the report contain at least the following:

"... the amount expended for construction by contract, maintenance by contract, construction by day labor, and maintenance by day labor. For construction and maintenance by day labor, the amount shall include the cost of material, labor, equipment, and overhead for work performed thereunder."

Section 2155 prohibits the allocation of money to a city when the city is "delinquent" in filing the section 2151 report.

¹³ Cal. Sts. & Hy. Code, §§ 2106.5, subds (b) & (c).

Gas tax revenues derive from three types of taxes established by the Revenue & Taxations Code¹⁴: (1) the Motor Vehicle Fuel Tax,¹⁵ (2) the Use Fuel Tax, and (3) the Diesel Fuel Tax. These taxes are deposited into the Highway Users Tax Account in the state's Transportation Tax Fund¹⁶ and apportioned to cities under Streets & Highways Code sections 2105(b), 2106 and 2107.

The Controller is delegated the legislative authority to oversee spending by cities of their allocated gas tax revenue as part of the Controller's constitutional duties "to superintend the fiscal concerns of the State."¹⁷ Among the laws and procedures set forth in the Controller's *Gas Tax Guidelines*, there is a clear and unambiguous statement that all expenditures by cities and counties of the gas tax revenue are subject to audit by the Controller.¹⁸ The annual reports are regularly audited to ensure that the cities spend gas tax revenues only for authorized purposes and that proper accounting procedures are employed to track these expenditures.¹⁹

As demonstrated above, there is "a convincing basis" for the state's action that "justifies" the state's "interference in what would otherwise be a merely local affair." (*Vista, supra*, 54 Cal.4th at 560 [citation and quotation omitted].) The gas tax revenues are unquestionably state funds. The state exerts control over these funds by: (1) limiting their allocation and use to statutorily prescribed purposes, based in part on their consistency with statewide transportation goals, (2) imposing strict requirements on cities to comply with the state's general laws, to wit: the Streets and Highways Code, (3) and subjecting the cities' expenditures of these funds to the Controller's oversight as a part of his duties "to superintend the fiscal concerns of the State."

C. This determination is consistent with California Supreme Court's recent *Vista* decision.

In *State Building and Construction Trades Council of California, AFL-CIO v. City of Vista*, the California Supreme Court recently held that "wage levels of contractor workers constructing locally funded public works are a municipal affair (that is, exempt from state regulation), and that these wage levels are not a statewide concern (that is, subject to state legislative control)." (*Vista, supra*, 54 Cal.4th at 556 (emphasis added).) In expressly limiting its holding to municipally-funded public works projects, the Supreme Court observed:

"We can think of nothing that is of greater municipal concern than how a city's tax dollars will be spent; nor anything which could be of less interest to taxpayers of other jurisdictions." (*Id.* at 562.)

Setting aside the *Vista* Supreme Court's express limitation of its holding to municipally-funded public works projects, its approach and logic nonetheless applies with equal force where state tax dollars are used to finance public works projects. That is, there is "nothing of greater [statewide] concern than how [the state's] tax dollars will be spent. . ."

¹⁴ Cal. Rev. & Tax Code, § 7360 et seq.

¹⁵ Until December 31, 2001, it was called the Motor Vehicle Fuel License Tax.

¹⁶ Cal. Const., art. XIX, § 2; Cal. Sts. & Hy. Code, §2100.

¹⁷ See Cal. Gov. Code, § 12410; see also *Guidelines Relating to Gas Tax Expenditures for Cities and Counties* ("Gas Tax Guidelines"), § 130.

¹⁸ *Gas Tax Guidelines*, § 140.

¹⁹ See *Gas Tax Guidelines* at §§ 130, 210, 220, 230, 240; Cal. Sts. & Hy. Code, §2153 (imposing mandatory duty on the Controller to ensure annual street and road reports are adequate and accurate).

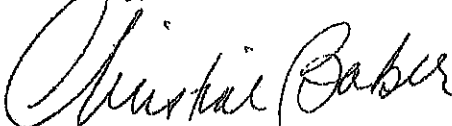
D. This determination is consistent with California case law.

The Cities are unable to cite to a case where a court has held that a project funded (in part or in whole) by state funds falls within the ambit of a municipal affair. Indeed, case law, including the cases relied on by the Cities, supports the contrary conclusion, that a non-municipally funded project is excluded from the ambit of a "municipal affair." (See, e.g., *Young v. Superior Court of Kern County* (1932) 216 Cal. 512, 516 (a charter city construction project "cannot be deemed a matter of purely municipal concern" in part because it was to be financed from federal, state, and county funds); *Vial v. City of San Diego, supra*, 122 Cal.App.3d at 348 (specifically excluding, pursuant to city's resolution, state and federally funded projects from the sphere of "municipal affairs"); *Southern California Roads Co. v. McGuire, supra*, 2 Cal.2d at 121-22 (finding improvement of Sepulveda Boulevard by the city of Los Angeles "not merely a local or municipal affair of the city, but that is an affair in which the state has a direct and vital interest" in part due to its state funding); *City of Pasadena v. Charlesville* (1932) 215 Cal. 384, 389 (improvement was a municipal affair in part because "[t]he money to be expended for the cost of the improvement belongs to the city and the control of its expenditure is a municipal affair".))

For the foregoing reasons, the Projects are not municipal affairs but rather matters of statewide concern that come within the domain and statutes of the general laws of the state. Therefore, the Projects, are public works and subject to prevailing wage requirements.

I hope this letter satisfactorily answers your inquiry.

Sincerely,



Christine Baker
Director