

DEPARTMENT OF INDUSTRIAL RELATIONS

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July 14, 2014

Bryan Berthiaume
Executive Director
Foundation for Fair Contracting
3807 Pasadena Avenue, Suite 150
Sacramento, CA 95821

RE: Public Works Case No. 2014-001
Reconstruction of Wastewater Pump Station 11 and Force Main Replacement
Including Ocean View Blvd. Street Overlay and Urban Runoff Diversion – Phase 3

Dear Mr. Berthiaume:

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 Labor Code section 1773.5¹ and 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 Reconstruction of Wastewater Pump Station 11 and Force Main Replacement Including Ocean View Blvd. Street Overlay and Urban Runoff Division – Phase 3 (Project) is public work subject to California prevailing wage requirements.

Facts

In 2008, the City of Pacific Grove (City or Pacific Grove) submitted a Grant Proposal to the California State Water Resources Control Board (State or SWRCB) under Proposition 84 Areas of Special Biological Significance (ASBS)² Grant Program to fund an Urban Runoff Diversion Project – Phase 3³, which would divert dry weather flows from the Pacific Grove ASBS. California's Proposition 84, the Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006 provided the State Water Board \$90 million for matching grants to local public agencies for the reduction and prevention of storm water contamination of rivers, lakes, and streams (Pub. Resources Code § 75050, subd.(m)).

¹ All citations are to the California Labor Code, unless otherwise specified.

² The Pacific Grove ASBS is 3.2 miles of coastline adjacent to the City. The ASBS lies entirely within the Monterey Bay National Marine Sanctuary, and contains the Pacific Grove State Marine Conservation Area and Hopkins State Marine Reserve. (Pacific Grove City Council Agenda Report dated May 18, 2011.)

³ The City previously began diverting dry weather runoff in two phases. Phase I, completed in 2005, and Phase II, completed in June 2007, are not at issue in this determination.

The Urban Runoff Diversion - Phase 3 included the installation of dry weather diversions on two storm drain outfalls, construction of a storm water treatment wetland at Greenwood Park⁴, construction of an urban runoff lift station adjacent to the Monterey Bay Aquarium and implementation of an outreach and incentive program in the project area.

In 2010, an updated Grant Application stated that the Project consisted of five main components, including: (1) Install dry weather diversions on two storm drain outfalls at the ASBS, directing flows to the Monterey Regional Wastewater Treatment Facility; (2) Construct a storm water treatment wetland at Greenwood Park; (3) Construct a new sewer pump station and urban runoff lift station adjacent to the Monterey Bay Aquarium; (4) Implement an outreach and incentive program in the project area; and (5) Conduct a minimum of one year of effectiveness monitoring. The Grant Application also stated, "The purpose of this project is to reduce the volume of storm water entering the Pacific Grove ASBS State Water Quality Protection Area at the City of Pacific Grove on the Monterey Bay, and to improve water quality."

The 2010 Grant Application added the inclusion of the construction of Pump Station 11 to the Project. The Grant Application noted the construction of Pump Station 11 was a high priority identified in the City's 2006 Sewer Master Plan, being in need of repair to prevent sewer overflows and to replace undersized and aging infrastructure. It further noted the Pump Station would be constructed with City sanitary sewer funds, comprising the bulk of the City's match on the Project⁵. Included with the construction of the pump station was the Forcemain Replacement, the replacement of approximately 1400 feet of sewer forcemain pipeline along Ocean Blvd, and the Ocean Blvd. Street Overlay, the removal and replacement of a portion of the sidewalk above the pump station.

On May 25, 2011, the City and State entered in a Proposition 84 ASBS Grant Program Grant Agreement (GA or Grant Agreement) awarding a maximum of \$2,400,000 to Pacific Grove and incorporating the five Project components discussed in the Grant Application. In addition to the funds awarded by the State, the City agreed to provide match funds in the amount of \$875,000 for the Project. (GA, Ex. B, ¶ F).

The Urban Runoff Diversion Phase 3 and Pump Station 11 components were itemized in the Grant Agreement with several requirements. Entitled "Install Dry Weather Diversions on Two (2) Storm Drain Outfalls", the Grant Agreement, exhibit B, paragraph 3 reads in pertinent part:

3.1 Prepare contract documents (construct plans, specifications, and final costs estimate) for (2) dry weather storm drain diversions in accordance with City of Pacific Grove Standards. Submit approved plans and specifications to the Grant Manager.

⁴ Pacific Grove City Council Agenda Report dated May 1, 2013 indicated the Council would be requesting a grant deviation request and propose a storm drain construction in lieu of the treatment Wetland at Greenwood Park. This component is not at issue here.

⁵ Pacific Grove City Council Agenda Report dated May 18, 2011 also noted that the City committed to provide a \$875,000 cost match of the total project, through implementation of an already planned sewer improvement project at Pump Station 11, utilizing funds from the City's Sewer Fund.

3.2 Advertise the Project in accordance with Public Contracting Code. Submit the As-Advertised contract documents to the Grant Manager.

3.3 Provide a copy of bid summary and proof of advertising to the Grant Manager.

3.4 Construct the diversions according to approved plans and specifications. Provide a copy of the Notice of Completion to the Grant Manager.

Entitled “Construct Pump and Lift Stations”, the Grant Agreement, exhibit B, paragraph 5 reads:

5.1 Prepare contract documents (construction plans, specifications, and final costs estimate) for a Pump Station and Urban Runoff Lift Station in accordance with City of Pacific Grove Standards. Submit approved plans and specifications to the Grant Manager.

5.2 Advertise the Project in accordance with Public Contracting Code. Submit the As-advertised contract documents to the Grant Manager.

5.3 Provide a copy of bid summary and proof of advertising to the Grant Manager.

5.4 Construct a new wastewater pump station and urban runoff lift station, with new pumping equipment, pipes and valves, wet well structure, emergency bypass connection, emergency standby power generator, electrical and control equipment. Provide a copy of the NOC to the Grant Manager.

The Grant Agreement contains continuing obligations of the City including deadlines, the submission of invoices and supporting documentation (GA, Ex. B, ¶¶ 1-3), and the submission of quarterly, annual and final progress reports. (GA, Ex. B, ¶G.) Additional terms provide:

- All work shall be completed by May 20, 2014 (GA, p. 1);
- Absolutely no funds may be requested after June 30, 2014 (GA, p.1);
- The City will not proceed with any work on the Project until authorized in writing by the State (GA, Ex. C, ¶2);
- The City cannot assign the grant, in whole or in part, without the written consent of the State (GA, Ex. C, ¶ 3);
- The City must permit the State to review and copy any records and supporting documentation (GA, Ex. C, ¶ 4);
- The State shall have suitable access to the Project site at all reasonable times...for the life of the Project (GA, Ex. C, ¶ 20).

On October 30, 2012, the City issued a “Notice Inviting Sealed Bids For Combined Reconstruction of Wastewater Pump Station 11 and Force Main Replacement Including Ocean View Blvd. Street Overlay and Urban Runoff Diversion – Phase 3 Project”. The Notice states “In accordance with the provisions of California Labor Code Section 1770, 1773, 1773.1, 1773.2, 1773.6, and 1773.7, the current prevailing wages in Monterey County, California, as determined by the Director of the California Department of Industrial Relations are required to be paid to mechanics and laborers, employed directly upon the site of the work for the Urban Runoff Diversion – Phase 3 portion of the work. For the Reconstruction of Pump Station 11 and Force Main Replacement including the

Ocean View Blvd. Street Overlay portion of the work, the City is not governed by State Prevailing Wage Law (Labor Code Section, 1770) in accordance with the City Resolution No. 5874.”

On February 14, 2013, the City entered into a Public Works Agreement for Contract Services with Monterey Peninsula Engineering, Inc. (Monterey Peninsula). The services to be provided by Monterey Peninsula are generally described as “Reconstruction of Wastewater Pump Station 11 and Force Main Replacement, Ocean View Boulevard Street Overlay and Urban Runoff Division – Phase 3 Project.”

Pacific Grove is a charter city. In 1988, Pacific Grove’s City Council adopted Resolution No. 5874 which provides in pertinent part: “Wage rates paid on public works projects undertaken by the City of Pacific Grove, by either its own forces or by contract, shall not be governed by the prevailing wage law found at California Labor Code Section 1770, et seq.”⁶

Discussion

Labor Code section 1771 generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1)⁷ 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”

No party contests that the Project involves construction, alteration, and installation done under contract and paid for in whole or in part out of public funds. The issues here are the scope of the Project for purposes of the California prevailing wage law (PWL) (section 1720 *et seq.*); and whether the City’s charter city status exempts it from complying with the PWL.

As to the scope of the Project, even if “part of” construction was paid for with public funds, the entire project is a public work, unless a statutory exemption applies. (§ 1720, subds. (a)(1),(c).). The Supreme Court has rejected contract-based analysis that allows parties to agree to allocate public funds to one piece of work instead of applying it to all required work. (*Lusardi Construction Co. v. Aubrey* (1992) 1 Cal.4th 976, 987-988.) Allowing private arrangements would encourage parties to circumvent such laws as California’s PWL. (*Ibid.*) The court in *Azusa Land Partners v. Department of Industrial Relations*⁸ recently restated the Supreme Court’s findings in *Lusardi*, emphasizing “the statutory obligation to pay prevailing wages may not be contracted away.”

The City argues that in regard to the work completed by contractor Monterey Peninsula, there are actually two separate projects, the first encompassing the reconstruction of Pump Station 11, Forcemain Replacement and the Ocean View Blvd. Street overlay funded by the City Sewer Fund, and the second encompassing the Urban Runoff Diversion-Phase 3 funded by the Proposition 84 grant. The City argues that different engineering firms designed each project and neither project relied upon the work of the other to accomplish its individual purpose. The City states that in an effort to minimize disruption to local businesses, residents and visitors of Pacific Grove, the City

⁶ City of Pacific Grove City Council Resolution No. 5874 dated February 3, 1988, Section 1.

⁷ All subdivision references are to the subdivisions of section 1720, unless otherwise specified.

⁸ *Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 15.

determined that public convenience and safety was best served by simultaneous implementation of these two projects.

Here, while the City may have originally planned to complete the pump station and diversion work separately, the City eventually chose to propose to the State one Project for funding, and subsequently entered into a Grant Agreement with the State, which terms required both the pump station and diversion work. Furthermore, in order to receive the State funds for the Project, the City was obligated to provide match funds, and explicitly agreed to do so in the amount of \$875,000. The City allocates its match funds to the pump station work alone, but the inclusion of both pump station and diversion work in the Grant Agreement shows the pump station work is a necessary component of the Project. In addition, these two components of the Project were bid together, completed by the same contractor simultaneously, and done in close geographical proximity. “The PWL does not permit parties to an agreement to carve up the individual components of an overall project into publicly and privately financed pieces.” (*Azusa Land Partners, supra*, 191 Cal.App.4th at p. 18.)

Together, both components’ functions served the purpose of the Project to reduce storm water entering the ASBS and improving water quality, which was proposed to the State to receive the funds. “The proposed development project improves coastal water quality by redirecting dry weather flows to the sanitary sewer system and by replacing an aging/failing sewer pump station with a similarly sized and more reliable, energy efficient, pump station, thus reducing the risk for spill or overflow affecting the Pacific Ocean.” (California Coastal Commission Notice of Proposed Permit Waiver dated August 28, 2012)

“[S]ection 1720 require[s] a project based analysis.” (*Azusa Land Partners, supra*, 191 Cal.App.4th at p 19.) Due to the Grant Agreement, the required match construction, the timing and location of the construction, and the components’ functions and purpose, the scope of construction subject to the PWL consists of both the pump station and diversion work completed by Monterey Peninsula.

Given the payment of public funds for the Project from the City’s Sewer Fund and the State, the next question is whether the City’s charter city status exempts it from complying with the PWL because the Project is purely a municipal affair. The California Constitution explicitly authorizes charter cities to govern themselves, free from intrusion of the state legislature, regarding matters deemed municipal affairs. (*State Bldg. and Constr. Trades Council of California, AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 555; Cal. Const. Art. XI, section 5.) Charter cities “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.” (Cal. Const. Art. XI, section 5(a).) “City charters adopted pursuant to this Constitution shall...with respect to municipal affairs...supersede all laws inconsistent therewith.” (*Id.*) 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, 61-62.)

The California Supreme Court recently reiterated the four-part analytical framework for resolving 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.”

(*City of Vista, supra*, 54 Cal.4th at p. 556 [internal quotation marks and case citations omitted].) The Court in *City of Vista* held that the “wage levels of contractor workers constructing locally funded public works are a municipal affair, and that these wage levels are not a statewide concern.” (*Id.*, at pp. 556, 566.) The analysis of the coverage question for this Project must begin with the first *City of Vista* factor.

Although the California Constitution grants charter cities the ability to regulate their own municipal affairs, the California Constitution does not provide a definition of what constitutes a municipal affair. As a result, “courts must decide, under the facts of each case, whether the subject matter under discussion is of municipal or statewide concern.” (*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 292.)

In *Southern California Roads Co. v. McGuire*,⁹ the California Supreme Court considered the following factors in determining whether a project is a municipal affair or a matter of statewide 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.

Regarding the first factor, the City planned and designed the Project, advertised for bids and awarded the contract. The City also oversaw construction activities, including reviewing plans and specifications. In its grant application process, however, the State determined if the City met the State’s eligibility requirements for funding, identified the permissible purposes of the grant funds, and allocated the grant funds only when provided invoices and supporting documentation. In addition, the Grant Agreement set a deadline to use the grant funds, required written approval before any work could begin, and gave the State inspection and audit control over the Project and expenditures. The conditions represent shared control over the Project between City and State. Under these facts, analysis of the first factor does not support the City’s assertion that there is no extra-municipal control over the Project.

With respect to the second factor, the Project is funded by two sources, a Proposition 84 grant from the State in the maximum amount of \$2,400,000 (which the City sought) and approximately \$875,000 from the City’s Sewer Fund. The terms and conditions of the State grant include external oversight and control over how and when the State grant funds are spent. The State retained approval authority over all expenditures by requiring progress reports, invoices and supporting documentation before any reimbursements were issued. The State also had the authority to audit and inspect all fund expenditures at any time.

⁹ (1934) 2 Cal.2d 115, 120-23.

The City argues that because one component of the Project is entirely funded by the City's funds, Pump Station 11, that component is a municipal affair. However, as discussed above the scope of the Project included the work completed by Monterey Peninsula at Pump Station 11 as well as other components of the Project. Although the City chose to apportion the State funds and the City match funds a certain way, the analysis does not change. The Court's decision in the *City of Vista* is distinguishable on this point because the project in that case was only locally funded. (See *City of Vista, supra*, 54 Cal. 4th at p. 566.) Here, where non-city funds are used, the Project cannot properly be characterized as only locally funded. California's Proposition 84, from which the majority of Project funds derive, was passed by California voters in 2006, creating an obvious statewide concern over how the funds are used. Analysis of the second *McGuire* factor does not support City's assertion that the Project is purely a municipal affair.

Regarding the third factor, the installation of dry weather diversions, a new sewer pump station and urban runoff lift station located entirely within the City serves a municipal purpose in reducing the volume of storm water and improving water quality within the City. However, as stated by the Pacific Grove City Council, "the goal of the diversion is to reduce bacteria and other pollutants loading into the Monterey Bay Sanctuary during the dry season, when flows are prohibited by the ASBS Special Protections."¹⁰ The California Coastal Commission's Notice of Proposed Permit Waiver further notes, "The proposed development protects and improves coastal water quality by redirecting dry weather flows to the sanitary sewer system and by replacing an aging/failing sewer pump station with a similarly sized and more reliable energy efficient, pump station, thus reducing the risk for spill or overflow affecting the Pacific Ocean."¹¹ Therefore, because the Project and Proposition 84 grant funds are intended to benefit the City, neighboring communities and coastal waters, the third *McGuire* factor does not favor finding the Project purely a municipal affair undertaken by the City.

Due to the shared control of the Project between City and State, the State's control over the majority of funding for the Project, and the extra-municipal purposes served by the Project, the Project does not constitute a municipal affair. Therefore, an analysis of the other factors from the *City of Vista* (*City of Vista, supra*, 54 Cal. 4th at p. 556) is unnecessary because this Project falls outside the home rule authority of a charter city and is a matter of statewide concern.

For the foregoing reasons, the Reconstruction of Wastewater Pump Station 11 and Force Main Replacement Including Ocean View Blvd. Street Overlay and Urban Runoff Diversion –Phase 3 Project is a public work that is subject to California's prevailing wage requirements.

I hope this letter satisfactorily answers your inquiry.

Sincerely,



Christine Baker
Director

¹⁰ Pacific Grove City Council Agenda Report dated December 19, 2012.

¹¹ California Coastal Commission Notice of Proposed Permit Waiver dated August 28, 2012.