

DEPARTMENT OF INDUSTRIAL RELATIONS

Christine Baker, Director

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October 26, 2015

Mr. Dennis B. Cook

Ms. Lisa V. Ryan

Cook Brown LLP

555 Capitol Mall, Suite 425

Sacramento, California 95814-4503

Re: Coverage Determination
Public Works Case No. PW 2014-038
Mental Health America of Los Angeles, City of Long Beach

Dear Mr. Cook and Ms. Ryan:

This letter constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under the California Prevailing Wage Law, Labor Code section 1720,¹ *et seq.* This coverage determination was requested and is made pursuant to California Code of Regulations, title 8, section 16001. Based on my review of the facts concerning this project and an analysis of the applicable law, it is my determination that the project is a public work subject to the prevailing wage requirements of the California Labor Code.

Facts

The project at issue (hereinafter “the Project”) consists of the construction and rehabilitation of two existing commercial buildings located at 1955 – 1965 Long Beach Boulevard, in the City of Long Beach (“the City”), together constituting approximately 28,000 square feet, which will be renovated into a facility that will include: 1) medical and psychiatric healthcare services for homeless individuals; 2) one or more retail cafés, including at least one commercial kitchen, and 3) one meeting room of approximately 1,250 square feet.

The real property on which the Project is located was purchased by the City for \$2.8 million as part of the transfer of military base property from the United States Army to the City, pursuant to the Federal Defense Base Closure and Realignment Act of 1990. To facilitate the Project, the City and Mental Health America of Los Angeles (“MHA”) have entered into a lease agreement (“the Lease”), which specifies the nature and parameters of the Project, and the respective covenants of the parties.

The terms of the Lease provide, *inter alia*, that the City will lease the real property to MHA for a period of ten (10) years at no charge, provided that MHA operates the facility in accordance with the lease terms, including that the facility be used to provide medical and psychiatric services

¹ Unless otherwise indicated, subsequent statutory references are to the California Labor Code and subsequent subdivision references are to section 1720.

to the homeless. (Lease, at paragraph 4, page 2; paragraph 6, page 4.) The Lease also provides that MHA will operate one or more sit-down retail cafes on the premises, including at least one with a commercial kitchen, and provide one meeting room to the community on an as-needed basis. The Lease specifies that “the parties generally intend that the Tenant’s uses of the Premises meet the definition of ‘professional services’ and ‘basic retail sales’ as defined in the Long Beach Municipal Code.” (Lease, at paragraph 4, page 2.) At the expiration of the 10-year Lease term, MHA has an option to purchase the property and all improvements for the sum of \$1.00.

Among other provisions, the Lease expressly provides that MHA will not provide any overnight accommodations for any of its clients. (Lease, at paragraph 5, p. 3.) The Operating Covenants also state that MHA shall limit its operating hours at the site to Monday through Saturday from 7:00am to 5:00 pm, with exceptions only for occasional staff meetings and professional trainings. (Lease, at paragraph 5, p. 3.) The facility will not include any living quarters or sleeping accommodations of any kind.²

In addition to leasing the real property to MHA for no charge, and providing the option to purchase for the sum of \$1.00, the City will also contribute \$1.2 million to the Project, from its City General Services Fund and Gas Fund, to support the design and construction of the retail spaces and community room. MHA has estimated that the total rehabilitation costs will be approximately \$4.9 million. The costs in excess of the \$1.2 million to be provided by the City will be funded by MHA, including through the sale of other real estate owned by MHA, conventional loans, and private donations solicited for the Project. MHA has also indicated that it may apply for a loan in the amount of \$428,000, to be provided by the California Endowment and the Community Development Financial Institution (“CDFI”).

Discussion

Section 1771 generally requires the payment of prevailing wages to workers employed on public works. Labor Code section 1720, subdivision (a)(1), defines “public works” as including, among other work, “construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds.” The phrase “paid for in whole or in part out of public funds” is defined in subdivision (b) of the statute as including, *inter alia*, “[t]he 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,” and “[f]ees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.”

In its request for this coverage determination, MHA acknowledged and affirmatively conceded that the Project is a “public work” that will be paid for in part out of public funds. Thus, the sole issue presented is whether the Project should nevertheless be exempt from the Prevailing Wage Law under a statutory exemption.

² Counsel for MHA confirmed that the Project does not include or involve any residential units, although the facility will include showers and lockers to be used by homeless clients.

Specifically, MHA has argued that the Project is exempt under section 1720, subdivision (c)(5)(D).³ That statutory exemption provides, in full, as follows:

(c) Notwithstanding subdivision (b):

* * *

(5) Unless otherwise required by a public funding program, the construction or rehabilitation of *privately owned residential projects* is *not* subject to the requirements of this chapter if one or more of the following conditions are met:

(A) The project is a self-help housing project in which no fewer than 500 hours of construction work associated with the homes are to be performed by the home buyers.

(B) The project consists of rehabilitation or expansion work associated with a facility operated on a not-for-profit basis as temporary or transitional housing for homeless persons with a total project cost of less than twenty-five thousand dollars (\$25,000).

(C) Assistance is provided to a household as either mortgage assistance, downpayment assistance, or for the rehabilitation of a single-family home.

(D) The project consists of new construction, expansion, or rehabilitation work associated *with a facility developed by a nonprofit organization to be operated on a not-for-profit basis to provide emergency or transitional shelter and ancillary services and assistance to homeless adults and children*. The nonprofit organization operating the project shall provide, at no profit, not less than 50 percent of the total project cost from nonpublic sources, excluding real property that is transferred or leased. Total project cost includes the value of donated labor, materials, architectural, and engineering services.

(E) The public participation in the project that would otherwise meet the criteria of subdivision (b) is public funding in the form of below-market interest rate loans for a project in which occupancy of at least 40 percent of the units is restricted for at least 20 years, by deed or regulatory

³ MHA's request for a coverage determination refers to subdivision (c)(6)(D). The statute was amended, effective January 1, 2015 (Gray, AB 1722, Stats. 2014, ch. 900, §1), to delete the prior paragraph (5) of subdivision (c), which resulted in a re-numbering of the relevant provision from subdivision (c)(6)(D) to subdivision (c)(5)(D).

agreement, to individuals or families earning no more than 80 percent of the area median income.

(§1720(c)(5), emphasis added.)

In arguing for the application of this exemption, MHA has focused solely on the language of subparagraph (D), which refers – as emphasized in italics above – to facilities developed by nonprofit organizations to “provide emergency or transitional shelter and ancillary services and assistance to homeless adults and children.” Relying on this language, MHA argues that the Project is statutorily exempt because it will be a facility operated by a non-profit to provide ancillary services to homeless adults.

While there is no dispute that the Project will, in fact, provide services to homeless individuals, and while the Director acknowledges the laudable and important public benefits of such facilities, the problem with MHA’s argument is that it ignores the plain language of the overall exemption of which subparagraph (D) is a part. Paragraph (5) of subdivision (c), quoted above, states the threshold requirement for application of the exemption that applies to the specific types of projects described in the subparagraphs that follow, including that in subparagraph (D). That language expressly applies and limits the exemption to “the construction or rehabilitation of privately owned *residential projects*” involving one or more of the specified conditions. (§1720(c)(5) (emphasis added).) In other words, the exemptions authorized in subdivision (c)(5), including that in subparagraph (D) for facilities that will provide emergency or transitional shelter and ancillary services to the homeless, apply only to *residential projects*.

Although the Prevailing Wage Law does not define the term “residential project,” there is guidance in title 8, section 16001, subdivision (d) of the applicable regulations, which states:

(d) Residential Projects. Residential projects consisting of *single family homes and apartments up to and including four stories* are subject to payment of prevailing wages when paid for in whole or in part out of public funds, including federally-funded or assisted residential projects controlled or carried out by an awarding body. (*Emphasis added.*)

Further, the term “residential” is certainly understood, both in general parlance and in the law, to refer to residences, i.e., to places where individuals live. See, e.g., Merriam-Webster.com, defining “residential” as: “1a: used as a residence or by residents; b: providing living accommodations for students <a residential prep school>; 2: restricted to or occupied by residences <a residential neighborhood>; 3: of or relating to residence or residences; 4: provided to patients residing in a facility <residential drug treatment>; also: being a facility providing such treatment <a residential treatment center>.” (See also Civil Code section 1675: “(a) As used in this section, “residential property” means real property primarily consisting of a dwelling that meets both of the following requirements: . . .”; Insurance Code section 12740: “(d) “Home” or “residential property” as used in this part means any single or multiple unit or units, including mobilehomes, (as defined in Health and Safety Code Section 18211) used primarily for residential purposes;” Revenue and Taxation Code section 20508: ““Residential dwelling” means a dwelling occupied by the claimant as the principal place of residence, and so much of the land surrounding it as is reasonably necessary for use of the dwelling as a home,”)

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As noted above, this Project not only includes no residential component, the applicable Lease provisions expressly bar any overnight accommodations, specify that the hours of the facility will be limited to normal business hours, and state the parties' mutual understanding and agreement that the uses of the facility "meet the definition of 'professional services' and 'basic retail sales' as defined in the Long Beach Municipal Code." (Lease, at paragraph 4, page 2.) It is clear that the planned facility does not constitute or involve "the construction or rehabilitation of privately owned residential projects," and accordingly, under the plain language of the statute, the exemption set forth in subdivision (c)(5) does not, and cannot, apply. The argument by MHA that the Project will involve the provision of "shelter" (in the form of showers and lockers) and "ancillary services" is inapposite in that the provisions of subparagraph (D) do not even come into play if the Project does not meet the broader threshold specification in subdivision (c)(5) that the exemption applies only to residential projects.

Lastly, and although the determination is not made on this basis, it is also unclear that the Project would meet the additional criteria in subdivision (c)(5)(D) that the nonprofit organization must provide "not less than 50 percent of the total project cost" from nonpublic sources. MHA has projected the total project cost at approximately \$4.9 million. The City has or will contribute \$1.2 million toward the rehabilitation, but has also contributed, without cost to MHA, the real property, which was purchased for \$2.8 million, and which will be leased to MHA for ten years at no charge, with an option to purchase for \$1.00 at the close of the ten-year lease term. Arguably, the total public contributions to the Project may exceed fifty percent of the total project cost.

For the foregoing reasons, the Project at issue constitutes a public works project that 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".

Christine Baker
Director