

DEPARTMENT OF INDUSTRIAL RELATIONS

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February 5, 2016

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Re: Public Works Case No. 2014-041
Site Work for New Modular Classroom Building at LPS Hayward Campus
Leadership Public Schools

Dear Interested Parties:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws (CPWL) 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 "Site Work for New Modular Classroom Building at LPS Hayward Campus" constitutes an essential part of a single, integrated public works project and therefore subject to the prevailing wage requirements of the California Labor Code.

Facts

Leadership Public Schools, Inc. (LPS) is a tax exempt non-profit, public-benefit corporation that manages five charter schools including LPS Hayward (LPS Hayward). On June 11, 2014, LPS entered into an agreement with Flory Construction (Flory) for work described in the Notice to Bidders as "Site Work for New Modular Classroom Building at LPS Hayward Campus." The

¹ All further statutory references are to the California Labor Code unless otherwise indicated.

initial contract amount was for seven hundred twenty-five thousand six hundred forty-nine dollars (\$725,649).²

The work performed by Flory under its June 11, 2014 contract (Flory Contract) included interior and exterior improvements: site work (demolition and site grading, electrical trenching, fire service/hydrant, storm drain, sewer, water, striping and signage, tree protection), concrete (sidewalks), flooring (carpet), plumbing (building connections), fire protection, electrical systems, and parking revisions (collectively, Site Work). (*See, e.g.*, Flory's October 1, 2014 document entitled "Billing Seven"). The electrical and fire alarm system equipment that Flory installed connect the existing campus buildings to the new modular building. (February 6, 2015 Schorr email). The Flory Contract was funded by LPS general operating revenues and from the unrestricted funds/net assets account. LPS contends the work performed under the Flory Contract is not subject to CPWL because it was not "paid for in whole or in part out of public funds." (December 15, 2014 Schorr letter).³

The Flory Contract did not require the installation of the new modular classroom building. This work was instead performed by another contractor, American Modular Systems (AMS) under a separate contract with LPS (AMS Contract). AMS was paid approximately one million three hundred thousand dollars (\$1,300,000.00) with the California State Charter School Facilities Incentive Grants Program funding to install the new modular classroom building units. These funds in turn came from a "federal grant program designed to assist California charter schools in meeting their facility needs."⁴ LPS does not seem to deny that these funds are public funds.

² This amount was later reduced to six hundred seventy-seven thousand three hundred fifty dollars (\$677,350) because LPS was given credit for some of the work that it chose to perform on its own. Flory's October 1, 2014 document entitled "Billing Seven" details the credits (mainly for deletion of certain work, i.e. landscaping and irrigation, fencing and gates).

³ LPS contends that although Flory was paid out of LPS's general operating revenues and the primary source of those funds are public funds, "the public funds paid to LPS by the state cannot be deemed payment for construction within the meaning of section 1720(a)(1) because the purpose of such payments is the education of children, not the construction of school facilities." (December 15, 2014 Schorr letter, citing Director's Determination in PW Case No. 2008-026). LPS further states it received eight hundred thirty-three thousand three hundred thirty-two dollars (\$833,332) in philanthropic contributions from individual donors and private foundation grants for the year ending June 30, 2014. LPS contends these contributions "alone were sufficient to cover the Flory contract." (January 2, 2015 Schorr email). It is unnecessary to determine whether the funds used to pay Flory are or are not public funds within the meaning of section 1720(a)(1) because, as explained on pp. 3-5, *infra*, this work is covered by CPWL irrespective of this fact. For simplicity's sake and without analysis, the determination assumes, for argument's sake, that the funds paid to Flory are not public funds.

⁴ *See, e.g.*, California State Treasurer's website describing the funding programs overseen by the California School Finance Authority. (<http://www.treasurer.ca.gov/csfa/index.asp>, accessed January 12, 2016.)

Unlike the Flory Contract which did not require the payment of prevailing wages,⁵ LPS required AMS to pay prevailing wages for the installation of the modular classroom building.

Discussion

Labor Code section 1771 requires, with certain exceptions, the payment of prevailing wages to workers employed on public works. Under Section 1720, subdivision (a)(1), “public works” generally consists of three elements: (1) “Construction, alteration, demolition, installation, or repair work,” (2) “done under contract,” and (3) “paid for in whole or in part out of public funds...” Section 1720, subdivision (b), defines the phrase “paid for in whole or in part out of public funds” to include “payment of money or the equivalent of money by the state or political subdivision . . .” Section 16000 of title 8 of the California Code of Regulations provides that “public funds” includes “state, local and/or federal monies.”

Applying the section 1720(a)(1) definition of public works to the case here, it cannot be disputed that the work done under the AMS Contract constituted construction work paid for out of public funds and subject to CPWL.⁶ (*See, e.g., Installation of Pre-Manufactured Modular Classrooms-San Diego Unified School District*, PW Case No. 2001-050 (June 23, 2002) [installation work necessary to install modular buildings, including constructing and anchoring foundations, supports, building ramps, and installing skirting constituted construction work subject to CPWL]). The question is whether the work done under the Flory Contract is also subject to the CPWL. If the Site Work falls within the scope of the construction project that was “paid for in whole or part out of public funds” then it also falls within the definition of “public works,” and is subject to the prevailing wage requirements.

LPS argues that the modular classroom building installation and the Site Work are two separate, independent, stand-alone projects, that public funding only paid for the installation of the modular classroom building itself, and that the Site Work is not a public work subject to CPWL. (*See, e.g.,* February 6, 2015 Schorr email and December 15, 2014 Schorr letter.) This argument is unavailing. The work performed under both the AMS Contract and Flory Contract together constitute a single, integrated construction project since a functional and operational classroom building is the purpose and end result of such work. The construction project is a public works project since at least a part of the project (construction work involved in installing the modular classroom building) was paid for in part out of public funds. The Site Work performed under the Flory Contract is therefore subject to CPWL.

In *Oxbow Carbon & Minerals, LLC v. Department of Indus. Relations* (2011) 194 Cal.App.4th 538 (*Oxbow*), the court of appeal upheld the Director’s determination that the construction of a conveyor system (not paid for with public funds) and the storage roof (paid for with public funds) “is a single integrated public works project subject to prevailing wage

⁵ However, the Notice to Bidders pursuant to which the Flory Contract was awarded contained a requirement that contractors pay prevailing wages pursuant to CPWL.

⁶ AMS was paid with funds that originated from a federal grant program and were administered by the California School Finance Authority, a state agency created to finance educational facilities.

requirements.” (*Id.* at 544). *Oxbow* relied on various definitions of the term “construction,” including the following:

‘[t]he act of putting parts together to form a complete integrated object,’ ...

. . . ‘...the entire process, including construction of basements, foundations, utility connections and the like, all of which may be required in order to erect an above-ground structure.’

(*Id.* at 549 quoting Webster’s 3d New Internat. Dict. (2002) p. 489 and *Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 756). These definitions focus on the “concept that construction is the creation of the whole – the ‘complete integrated object’ – which is composed of individual parts.” (*Id.*) Applying this analytical framework to the facts before it, the *Oxbow* court found that the facility construction not paid for with public funds (a conveyor system) was “interdependent” with the part that was paid for with public funds (a storage roof) to enable the facility as a whole, a petroleum coke storage and handling facility, to be both functional and compliant with air quality control rules. (*Id.* at 549, 551.)

Oxbow is instructive here. As in *Oxbow*, the work that was arguably⁷ not paid for with public funds (Site Work) is also interdependent with the part of the construction project paid with public funds (installation of the modular classroom building) to enable the classroom building as a whole to be functional and usable.⁸ The Site Work included both work that was necessary for the installation of the classroom building (demolition and site grading, trenching, etc.) and work necessary for the functionality and operation of the classroom (utility connections and other work providing necessary electricity, plumbing, fire protection services to the classroom building).

Moreover, as the Director found and the court of appeal affirmed in *Oxbow*, the Site Work here was “designed as an essential element” of the functional and operational classroom building and “not as a stand-alone undertaking.” (*Oxbow, supra*, 194 Cal.App.4th at 544.) The work performed under both the Flory Contract and the AMS Contract constitute “parts that are put together to form a ‘complete integrated object,’” and “[w]ithout the performance under both contracts, construction would be incomplete and not viable.” (*Id.* at 545.)

Finally, as in *Oxbow*, it is immaterial that the installation of the modular classroom building and the Site Work were done under two separate contracts and that the Flory Contract did not require compliance with CPWL. Under the California Supreme Court’s holding in *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, the parties’ contract does not control the statutory analysis and parties may not contract around the statutory obligation to pay prevailing wages. (*See also Azusa Land Partners v. Department of Indus. Relations* (2010) 191 Cal.App.4th 1, 15, 35 [also

⁷ See discussion at footnote 3.

⁸ That the Site Work is interdependent with the installation of the modular classroom building is supported by language of the Flory Contract which describes the project as “[t]wo new modular classroom buildings and associated site work.”

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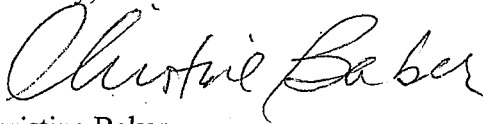
rejecting a “contract-based analysis that would allow a developer and public entity to agree to allocate all public funds to one piece of improvement work instead of applying it, in part, to pay for all required improvements.”). “[S]ection 1720 require[s] a ‘project’ based analysis.” (*Id.*, at p. 36).

Conclusion

For the foregoing reasons, the Site Work (performed under the Flory Contract) and the installation of the modular classroom building (performed under the AMS Contract) together constitute a single, integrated public works project. Thus, the Site Work is subject to the prevailing wage requirements of the California Labor Code.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Christine Baker".

Christine Baker
Director