

DEPARTMENT OF INDUSTRIAL RELATIONS

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January 17, 2017

Mark Beuhler

General Manager

Willow Springs Water Bank

1672 W Avenue J, Suite 207

Lancaster, CA 93534

Re: Public Works Case No. 2016-007
Antelope Valley Water Storage
California Energy Commission

Dear Mr. Beuhler:

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 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 work to redevelop a high-production water well for the study referred to as "Groundwater Bank Energy Storage Systems – A Feasibility Study" is public work and is therefore subject to prevailing wage requirements.

Facts

On March 3, 2016, the California Energy Commission (CEC) issued a Notice of Proposed Award of a grant to Antelope Valley Water Storage, LLC (Antelope Valley). The CEC grant provides funding for a study to assess the potential for an experimental energy storage technology. The study, referred to as the "Groundwater Bank Energy Storage Systems – A Feasibility Study" (Project), involves the production of a feasibility study and a related field test to be performed at an Antelope Valley owned site, Willow Springs Water Bank (Willow Springs). In order to perform the field test, Antelope Valley must redevelop a high-production water well. The redevelopment of the well requires the installation of equipment and permanent electrical service. The Project is being funded through the CEC grant in the amount of \$197,300, and "matching funds" from Antelope Valley in the amount of \$200,000.

Antelope Valley requested a coverage determination on April 4, 2016 (Request for Determination), contending that the Project should be bifurcated for purposes of public works analysis. Specifically, Antelope Valley contends that the portion of the Project involving the redevelopment of the Willow Springs high-production well is to be funded solely by means of \$200,000 in matching funds provided by Antelope Valley, and that the work performed in relation to the

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

Willow Springs high-production well does not involve the expenditure of public funds, and cannot be subject to the requirement to pay prevailing wages.

Discussion

Section 1720, subdivision (a)(1) 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.”

Section 1771 provides that “all workers on ‘public works projects’ must be paid at least the general prevailing rate of wages.” (*Oxbow Carbon & Minerals, LLC v. Department of Indus. Relations* (2011) 194 Cal.App.4th 538, 547 (hereafter *Oxbow*)). The obligation to pay prevailing wages does not derive from the explicit terms of the parties’ agreement, but is instead a product of the purpose and the end result of the parties’ construction agreement. (*Id.*, at p. 550.) A construction project that is paid for with public funds cannot seek to limit the allocation of those funds to a particular portion of the overall project. (See *ibid.*, citing *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 988.)

A. The Redevelopment of the High-Production Well Constitutes Construction for Purposes of the California Prevailing Wage Law (CPWL).

The Court of Appeal in *Oxbow* engages in a lengthy discussion of the term “construction” as it is applied in the CPWL, concluding, inter alia, that the “... plain meaning of the term ‘construction’ includes not only the erection of a new structure but also the renovation of an existing one.” (*Oxbow, supra*, 194 Cal.App.4th at p. 549, quoting *Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083, 1089.) The installation of “utility connections” has been held to fall within the definition of “construction.” (*Priest v. Housing Authority of City of Oxnard* (1969) 275 Cal.App.2d 751, 756.) In the instant matter, Antelope Valley’s redevelopment of the Willow Springs high-production well involves the installation of new equipment and permanent electrical service and thus constitutes construction for purposes of the CPWL.

B. The Project Constitutes Work Done Under Contract.

Antelope Valley’s Request for Determination specifies the work anticipated to be performed in relation to the field test. The specified work will be performed by private contractors, and not by employees of any public entity. As such, the work is being performed under contract. (See *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63-64; see also *Azusa Land Partners v. Department of Indus. Relations* (2010) 191 Cal.App.4th 1, 20 (hereafter *Azusa*)).

C. The Various Components of the Project Constitute a Single Project under the CPWL, and the Project is Funded in Part Through Public Funds.

The total budget for the Project is \$397,300. The public subsidy consists of a grant from CEC in the amount of \$197,300, representing 49.6 percent of the overall funding for the Project. In its Request for Determination, Antelope Valley seeks to bifurcate the funding of the Project as follows: \$200,000 in private matching funds to be allocated solely to the construction necessary for the redevelopment of the Willow Springs high-production well; and \$197,300 in CEC grant

funds to be allocated to the analysis of field test results and the administration of the feasibility study.²

Notwithstanding Antelope Valley's characterization of the allocation of funding for the Project, contractual circumvention of prevailing wage law is contrary to established legal authority. (*Lusardi, supra*, 1 Cal.4th at pp. 987-988.) When considering funding from public sources, Section 1720 requires a project based analysis rather than a contract based analysis. (See *Oxbow, supra*, 194 Cal.App.4th at pp. 552-553; see also *Azusa, supra*, 191 Cal.App.4th at p. 37.) The obligation to pay prevailing wages flows from the statutory duty embodied within the prevailing wage law and cannot be based solely on contractual provisions. (*Lusardi, supra*, 1 Cal.4th at pp. 986-988.)

Analyzing the scope of the Project as a whole, it is clear that all of the various components of the Project are to be performed with the goal of completing a feasibility study. The components of the Project – redevelopment of the Willow Springs high-production well; field testing; and preparation of a feasibility study – are not separate and discrete projects. In fact, the Notice of Proposed Award issued by CEC does not allocate funding to specific components of the Project based on distinct sources of funding. Moreover, the components of the Project are highly inter-related. The work performed in the redevelopment of the Willow Springs high-production well is a necessary prerequisite to the field testing upon which the feasibility study will be based. Thus, the redevelopment of the Willow Springs high-production well must be performed in order to attain the overall objectives of the Project. Under a project based analysis, the work necessary to achieve the objectives of the Project cannot be separated into discrete components funded from disparate sources.

Because the Project constitutes a single project for purposes of the CPWL, is paid for in part by public funds, and involves construction that is done under contract, it is public work.

Conclusion

For the foregoing reasons, Antelope Valley's redevelopment of the high-production water well at the Willow Springs site is public work subject to prevailing wage requirements.

I hope this letter satisfactorily answers your inquiry.

Sincerely,



Christine Baker
Director

² A budget prepared by Antelope Valley allocates specific funding to distinct components of the Project, but the budget is not referenced in the explicit terms of CEC's Notice of Proposed Award.