

DEPARTMENT OF INDUSTRIAL RELATIONS

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September 14, 2017

Graham Champion
Labor Compliance and Facilities Supervisor
San Diego Unified School District
4860 Ruffner St.
San Diego, CA 92111

RE: Furniture and Equipment Moving
Scripps Ranch High School Modernization
San Diego Unified School District
Public Works Case No. 2016-041

Dear Mr. Champion:

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, subdivision (a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the furniture and equipment moving performed as part of the modernization of Scripps Ranch High School (the School) constitutes public works subject to prevailing wage requirements.

Facts

On January 11, 2017, San Diego Unified School District (SDUSD) began a project at the School to modernize existing classroom facilities and to construct a new classroom building. SDUSD contracted with a general contractor for the classroom modernization and new building and admits this work is covered by prevailing wage laws. A material term of the contract between SDUSD and its general contractor is that the construction work must cause the least possible disruption to teaching and learning at the School.

The School has multiple buildings on campus, with at least eight buildings currently in use by students and staff for classes and activities. To avoid disruption, a phasing plan has been included in the agreement between SDUSD and its general contractor, which contains start and end date requirements for sixteen individual construction phases over the period from January 11, 2017 through January 18, 2019. The phasing plan requires that construction take place almost entirely over school breaks in the summer and winter.

The construction contract also requires the general contractor for the project to be directly responsible for the movement, storage, and temporary relocation of classroom furniture. Under

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

the contract, furniture must be moved, at a minimum, at the start and end of each of the sixteen phases of construction over the course of two years, with additional moves into and out of temporary classrooms over the course of construction. The general contractor must hire a professional, experienced mover to perform the work, but final responsibility for coordinating the furniture moving in an efficient manner in keeping with the contract rests with the general contractor.

The phasing plan requires the general contractor to work with the architect, SDUSD, on-site staff at the School, and the professional mover on an ongoing basis to coordinate furniture moving with the phases of construction. The phasing plan includes instructions for furniture moving, including start and end dates for the moves, directly in the instructions for each phase of construction.

The scope of work for the furniture and equipment moving is as follows:

- 1.) Preparing by wrapping furniture, books, supplies, and equipment
- 2.) Moving the furniture, books, supplies, and equipment to a new location. This location may be a portable classroom, office, storage container on site or an offsite storage location.
- 3.) Storing the furniture, books, supplies and equipment both on and off site.
- 4.) Setting up classrooms after moving to a temporary location on site. This typically involves unwrapping, unpacking, and setting up the furniture, books, supplies and equipment for teaching or for other purposes like an office or similar space.
- 5.) Setting up the rooms in their permanent location after construction has been completed. This typically involves unwrapping, unpacking, and setting up the furniture, books, supplies and equipment for teaching or for other purposes like an office or similar space.
- 6.) The moving contractor will take pictures and video of the classrooms before and after the moves for inventory and set up purposes.
- 7.) Assembly and disassembly of modular and system furniture.²

Before and after each move, the general contractor must meet with the professional mover, SDUSD, and the onsite staff to discuss issues with specific items and timing for the move. Items that cannot be moved must be covered and protected from damage during construction by the movers, and all items must be cleaned and placed back in place following each move by the professional mover in keeping with the pictures and video taken prior to the move. Floor-mounted copy machines are excluded from the contract. Movers are not required to use any tools other than boxes, tape, tarps, blankets, pads, dollies, book carts, trucks and storage equipment.

Positions of the Parties

SDUSD does not take a position regarding the applicability of the prevailing wage law. SDUSD states that its research into the application of the prevailing wage law has been unable to confirm whether items one through six discussed above are covered in this context.

Laborers International Union of North America, Local Union 89 (Laborers) contend that the work in question constitutes “preconstruction” and “postconstruction” work under section 1720.

² SDUSD acknowledges that item seven is public work as it constitutes “the assembly and disassembly of freestanding and affixed modular office systems.” (§ 1720, subd. (a)(1).)

Laborers argue that the language in section 1720 describing preconstruction work as “design,” “inspection,” or “land surveying,” is not exclusive and should be read broadly to include all work involved in preparing the site for construction. Similarly, Laborers argue that “postconstruction” under section 1720 should not be limited to job site cleanup of dust and debris, and should include the replacement of furniture to restore a space to the arrangement it had prior to construction. Laborers also contend that, because the Laborers and Related Classifications general prevailing wage determination for public works projects in San Diego (SD-023-102-4-2016-1) includes scope of work provisions that cover “jobsite distribution of . . . furniture,” furniture moving is covered work. Laborers do not cite any authority in support of these arguments.

MEK Enterprises (MEK), a professional furniture mover that has worked with SDUSD in the past, was also given the opportunity to submit a position statement. MEK presented argument regarding the appropriate rate of compensation if the work is found to be covered, citing cases involving rate determinations for covered work. (See, e.g., *Sheet Metal Workers Intern. Ass'n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1085 [denying a writ to overturn the Director’s decision to permit a contractor to choose the lower of two overlapping prevailing wage rates due to a union’s failure to exhaust its administrative remedies].) MEK made no argument in support or opposition to a coverage determination.

Discussion

All workers employed on public works projects must be paid at least the prevailing wage rates applicable to their work. (§ 1771.) Labor Code section 1720, subdivision (a)(1) defines “public works” to mean: construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds. In addition, section 1772 deems all workers employed by a contractor or subcontractor “in the execution of any contract for public work” to be employed on public work. Workers “employed in the execution of the contract” must also be paid prevailing wages. (§ 1774.) The furniture and equipment moving will be done under contract and be paid for with SDUSD funds. The issue presented is whether the furniture and equipment moving amounts to “construction, alteration, demolition, installation, or repair work” or whether the work is covered because it is performed in execution of the public works contract.

Furniture Moving Is Not Construction or Installation Unless the Furniture Is Affixed to the Realty

On its own, the moving, assembly, and disassembly of furniture is not covered work unless the furniture is affixed to the realty. (PW 2013-027, *Los Angeles Community College District Furniture Contracts* (November 5, 2014) (*LACCD Furniture*) [discussing the effect of AB 1598, which covered modular office systems³ under section 1720, subdivision (a)(1), and prior determinations regarding furniture moving].) Furniture that is freestanding, and not bolted down, secured, or mounted to the realty, does not become a part of a building’s structure, and moving it does not constitute “construction” or “installation” within the meaning of section 1720. (*LACCD Furniture, supra*, PW 2013-027 at p. 5; see also PW 2008-035, *Open Item Contract WA00023961-Modular Furniture-County of Sacramento* (November 24, 2009) [discussing prior determinations applying the “affixed to the realty” principle and its origin in Civil Code section 660].)

³ Because SDUSD concedes that moving modular office furniture is covered work, it is not addressed here.

Neither SDUSD's contract nor the phasing plan directly addresses whether the furniture to be moved is affixed to the realty. It is likely the contract is designed to exclude items affixed to the realty because the contract does not require the movers to use any construction tools, excludes floor-mounted copiers, and contemplates leaving behind large items, which must be covered for protection from dust and debris. However, to the extent any furniture covered by the contract is affixed to the realty by cement, plaster, nails, bolts, or screws, moving that furniture, which requires detaching the furniture from the realty, constitutes covered work under section 1720. (See *LACCD Furniture, supra*, PW 2013-027 at p. 5.)

Furniture Moving Is Not Preconstruction or Postconstruction Activity

Laborers claim the furniture moving in this context constitutes preconstruction and postconstruction activity, and is therefore covered work. Section 1720, subdivision (a)(1), defines "construction" to include "work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work, and work performed during the postconstruction phases of construction, including, but not limited to, all cleanup work at the jobsite." Laborers contend that the language "including, but not limited to," in section 1720 means that preconstruction and postconstruction activity can mean any activity that necessarily occurs before or after construction. Under this argument, when furniture is moved out of the way before construction, it constitutes preconstruction activity, and when furniture is replaced after construction, it constitutes postconstruction activity.

The Department, however, has previously found that placing freestanding furniture into a structure is an activity "quite independent of construction" because the work is not structurally integrated with the construction project. (PW 2005-017, *Western Contract Services Assembly and Disassembly of Free-Standing Modular Furniture* (December 16, 2005).) Other determinations have similarly found that the work of moving an object that happens to be in the way of a construction project, but is not a part of the structure, is not covered work. (See PW 2011-029, *Boat Removal During Replacement of Slip Piling-Santa Cruz Harbor* (February 8, 2012) [tugboat operators who towed and stored boats that were obstructing access to docks being repaired with federal funds and then returned the boats to the docks were not engaged in public works].)

Although these prior decisions are not binding, their reasoning is convincing. Moving and replacing freestanding furniture is generally too remote from actual construction to be considered preconstruction or postconstruction activity. Furniture moving is generally a wholly separate activity that can take place at any time, and may take place absent construction. Furniture, people, electronic equipment, and other items may need to be moved out of a structure before construction can begin, but those actions are not integrated into the construction process in the same way as surveying the site or erecting a protective fence, which are direct precursors to construction. Similarly, replacing furniture or placing new furniture after construction is not an integrated part of the postconstruction phase in the same way as cleaning up construction debris and dust, which is necessary to present the structure as a completed project. Consequently, furniture moving in most instances is not covered as preconstruction or postconstruction activity.

The Unique Terms of SDUSD's Contract Require Coverage in this Case

Under section 1772, work may be covered if the terms of a public works contract require the work, and the work is integrated into the flow of construction. (*Williams v. SnSands* (2007) 156 Cal.App.4th 742, 752 (*Williams*); *Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan*

(*Russ Will*) (2014) 229 Cal.App.4th 192, 206.) Due to the unique terms of SDUSD's contract, the work is covered as the furniture moving is required in the execution of the public works contract.

In this case, SDUSD admits that its agreement with the general contractor is a contract for public works. SDUSD further admits that the terms of its public works contract make the general contractor directly responsible for furniture moving in order to ensure that construction proceeds with the least disruption to teaching and learning at the School. As a result, the public works contract explicitly requires furniture moving.

Typically, furniture moving can happen at any time prior to or after construction and is not integrated into the flow of construction. However, the furniture moving in this case is integrated into the flow of construction by the phasing plan in the public works contract. Work can be integrated into the flow of construction if there is an immediate temporal or geographic connection between the work and the actual construction. (See *Russ Will, supra*, 229 Cal.App.4th at p. 206 [discussing geographic and temporal connections as factors in determining whether work is integrated into the flow of construction]; see also *O.G. Sansone Co. v. Dept. of Transportation* (1976) 55 Cal.App.3d, 444 [concrete aggregate that had to be immediately incorporated upon arrival at the jobsite was integrated into the flow of construction]; *Williams, supra*, 56 Cal.App.4th at p.742 [off-hauling of concrete that can happen at any time is not integrated into the flow of construction]⁴.) In the instant case, the SDUSD phasing plan includes detailed, specific instructions for the timing and scope of furniture moving on campus part of each phase of construction. Under the terms of the phasing plan, furniture moving must proceed continuously and in close coordination with the ongoing construction to meet the contract's goal of preventing construction from impairing teaching and learning at the School. At a minimum, the phasing plan requires thirty-six moves to take place on the jobsite over a two-year period, immediately before and after of each of the sixteen phases of construction. Additional moves are likely due to the need to assemble and disassemble temporary classroom space. As a result, the furniture moving has an immediate temporal and geographic connection to the ongoing construction, and is integrated into the flow of construction at the School.

Conclusion

For the foregoing reasons, the furniture and equipment moving for the Scripps Ranch High School Modernization project is performed in the execution of the public works contract within the meaning of Labor Code section 1772, and is subject to prevailing wage requirements.

I hope this letter satisfactorily answers your inquiry.

Sincerely,



Christine Baker
Director

⁴ Effective January 1, 2012, AB 514 rendered this specific type of off-hauling public works under section 1720.3. The reasoning from *Williams* is still sound for the application of section 1772.