

DEPARTMENT OF INDUSTRIAL RELATIONS

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October 10, 2019

Via E-Mail and U.S. Mail

Steven A. McGinty

Hearing Officer

Office of the Director – Legal Unit

Department of Industrial Relations

355 South Grand Avenue, Suite 1800

Los Angeles, California 90071

Re: Public Works Case No. 2018-032
A.C. Bilbrew Library and Julian Dixon Library Photovoltaic Systems
County of Los Angeles

Dear Mr. McGinty:

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, subdivision (a). This matter was referred to the Director for decision as part of a civil wage and penalty assessment appeal proceeding, wherein the question of coverage under prevailing wage laws was disputed. Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the construction and installation of the A.C. Bilbrew Library and Julian Dixon Library Photovoltaic Systems (Project) in the County of Los Angeles (County) is a public work subject to prevailing wage requirements.

Facts

A. A.C. Bilbrew and Julian Dixon Libraries.

Built in 1974, the A.C. Bilbrew Library is located in an unincorporated area of the County called Willowbrook, northwest of Compton and south of the Watts neighborhood in the City of Los Angeles. The library was designed by Vincent Proby, an African-American architect, and is named for Madame A.C. Bilbrew, an African-American community leader, musician, and poet.

Culver City Library was established April 1, 1915. As it grew in size over the years, the library moved to various locations throughout Culver City, but has been in its present location

¹ Unless otherwise indicated, all further statutory references are to the Labor Code.

since 1970. In January 2001, the Culver City Library was renamed the Culver City Julian Dixon Library in recognition of Julian Dixon, the representative for the 32nd United States Congressional District.

Both libraries are part of the County of Los Angeles Public Library system, which is a special fund department of the County established in 1912 under the County Free Library Act.²

B. The Energy Efficiency Project Services Master Agreement and Work Order Solicitation Governing the Installation of the Photovoltaic Systems.

On May 29, 2014, the County's Internal Services Department issued "Work Order Solicitation EEP123" to solicit bids from qualified Energy Efficiency Project Services Master Agreement (Master Agreement) vendors to install photovoltaic systems at the County's A.C. Bilbrew and Julian Dixon Libraries. On June 10, 2014, RBT Electric, Inc. executed a Master Agreement with the County, granting it qualified vendor status to bid on Work Order Solicitation EEP123.

Through Work Order Solicitation EEP123, the County solicited bids to install a rooftop-mounted 120.7 kW photovoltaic system at the A.C. Bilbrew Library, and to install both a rooftop-mounted 62.8 kW photovoltaic system and a parking lot canopy structure 54.9 kW photovoltaic system at the Julian Dixon Library.

A Statement of Work for Work Order EEP123 describes the scope of work to be performed as follows:

The Contractor shall be responsible for installation of the photovoltaic system, based upon the documents provided by the County for each facility. The Contractor shall be responsible for verifying all of the information provided in the documents, complete final documentation to obtain permit(s). All plan check fees shall be the responsibility of the Contractor. County will issue a no-fee letter to the Department of Public Works, Building and Safety, on behalf of the Contractor to obtain a construction permit and the installation of the PV system.

According to the Master Agreement, a "Work Order shall result from a competitive process, solicited by and tendered to County, by Qualified Contractors," and a contractor or vendor can only perform work "in accordance with validly bid and executed Work Orders. Each Work Order is controlled by the terms and conditions of the Master Agreement." Under Section 5.0 – Contract Sum of the Master Agreement, the contractor "shall not be entitled to any payment by County under this Master Agreement except pursuant to validly executed and satisfactorily performed Work Orders." A contractor must submit separate invoices to County for each work order to receive payment for work performed. Every invoice must contain the "total amount of the invoice" to be paid.

Although Work Order EEP123 and the invoices were not provided to the Department, Exhibits F1 and F2 to the Master Agreement are sample Work Orders, containing the statement:

² The County Free Library Act, originally enacted in 1911, is currently codified as amended in Education Code section 19100, et. seq.

“The Total Maximum Amount that County shall pay Contractor for all Services to be provided under this Work Order shall not exceed _____ Dollars (\$ _____).” A sample Statement of Work required that a Certificate of Acceptance be issued within 10 business days after written notification that the work is complete. After the Certificate of Acceptance is issued, the contractor may request payment of the 10% retention³ amount, and the County pays the contractor within 45 days after the payment request.

C. The County’s Certificate of Acceptance and RBT Worker Records for the Installation of the Photovoltaic Systems.

A March 14, 2016 document entitled “Certificate of Acceptance for Work Order EEP123 and Amendments 1 through 9 – Master Agreement No. I-104462 between County and RBT for ‘Solar Project at Julian/Dixon and AC Bilbrew Libraries’” was signed by Ed Freeman (through another person on his behalf), whose title is Project Manager and who certifies that he is the duly qualified and acting officer of the County. The document states that the “solar project at Julian/Dixon and AC Bilbrew Libraries, has been satisfactorily received as described in the ISD Work Order EEP 123, adhering to the terms and conditions of the Master Agreement, for a contract sum of \$1,220,575.25 on March 14, 2016.” RBT does not dispute the authenticity of the Certificate of Acceptance.

The record also reflects timecards, calendars, daily reports, statements from workers, and other documents that describe work performed between 2015 and 2016 for RBT on the installation of the photovoltaic systems described in Work Order EEP123. In response to requests for information from the Department, the County Counsel’s Office ultimately confirmed that “the County utilized public funds to deliver the above referenced projects.”

Discussion

All workers employed on public works projects must be paid at least the prevailing wage rates applicable to their work. (§ 1771.) 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. The work performed here is indisputably construction or installation done under contract. RBT, however, disputes that the work is “paid for in whole or in part out of public funds.”

A. The Contentions of the Parties.

The Division of Labor Standards Enforcement (DLSE), seeking to enforce the prevailing wage laws as to this Project, points to Work Order Solicitation EEP123, the Master Agreement, and the March 14, 2016 Certificate of Acceptance, as support for its assertion that the Project was paid for out of public funds. DLSE reasons that, because (1) the County clearly solicited bids for

³“Retention amounts are a form of security generally retained by the owner from prior payments due for work previously performed.” (*Yassin v. Solis* (2010) 184 Cal.App.4th 524, 533.) “As is typical in the construction industry, here the contract between the owner of the project and the contractor allowed the owner to withhold as ‘retentions’ a percentage of the payments due pending successful completion of the project.” (*Blois Construction, Inc. v. FCI/Fluor/Parsons* (2016) 245 Cal.App.4th 1091, 1093.)

the Project; (2) the executed Master Agreement dictated payment terms and conditions; and (3) the Certificate of Acceptance listed a contract amount and provided that the County was accepting that the work was completed, there is no question that the County paid RBT for the installation of the photovoltaic systems described in Work Order EEP123.

Despite repeated references in the record pointing to procedures for RBT to be paid by County for the installation of the photovoltaic systems, RBT argues that DLSE presented no evidence “concerning the source of the project’s funding or payment of public funds to RBT” or that “RBT actually received any payment from any source for the project.” RBT insists that “any conclusion drawn” regarding the payment of public funds to RBT “would be the result of pure speculation.” Furthermore, RBT claims that California public libraries rely on a variety of sources of funding, including money from private donors and the federal government. And based on this claim, RBT posits that funding could have come exclusively from the federal government or from private donors, while at the same time refusing to reveal its funding sources for the Project.⁴

B. The County Paid RBT for the Installation of the Photovoltaic Systems at the AC Bilbrew and Julian Dixon Libraries with Public Funds.

Although RBT offers various theories as to how the Project could have been funded, it cannot seriously contend that it installed the photovoltaic systems without remuneration. Though RBT questions whether there is evidence showing it received payment, there can be no doubt that RBT did, indeed, receive payment from some source for the installation work. And while RBT stops short of conceding that it was paid out of County funds for the Project, it cannot deny that it entered into a contract with the County, that it installed photovoltaic systems at two County public libraries for the County, and that the contractual sum for the installation was \$1,220,575.25 as stated in the Certificate of Acceptance issued by the County. RBT also does not, nor can it, challenge the Project documents which show that RBT worked on the Project, that require RBT to request payment from the County using certain procedures, and that require the County to pay RBT for work performed once those payment procedures are followed. The record includes RBT employee timecards and calendars chronicling their work hours on the Project, daily RBT job reports reflecting work on the Project, and sworn statements from employees attesting to the work performed on the Project for RBT. Furthermore, the County confirmed that it “utilized public funds to deliver [the Project].” Given all the documentation pointing to such payments, RBT cannot, in good faith, realistically deny that it was paid by the County for its work on the Project.

⁴ In a passing reference, RBT also argues that the County “did not consider the project to be a public works project,” because Work Order Solicitation EEP123 and the Master Agreement contained no language requiring compliance with prevailing wage requirements. RBT is essentially claiming that the Project is not a public works project, because RBT *believes* the County’s position is that the work is not subject to prevailing wage requirements by not including those requirements in the contract. But the County has expressed no opinion to the Department regarding whether the Project is public work. In any event, RBT’s argument is misguided, because “[t]o construe the prevailing wage law as applicable only when the contractor and the public entity have included in the contract language requiring compliance with the prevailing wage law would encourage awarding bodies and contractors to legally circumvent the law.” (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987.)

Ultimately, RBT's only argument is that the \$1,220,575.25 in funding may have come from anonymous private donors or unnamed federal agencies. This assertion is nothing more than speculation or conjecture, however, and it must be rejected. RBT makes no attempt to substantiate the claim, and there is nothing in the record that suggests the County used any funds from private donors or the federal government for the Project.

Even if there were evidence of such funding, federal funds *are* considered public funds. (Cal. Code Regs., tit. 8, § 16000 ["Public Funds. Includes state, local and/or federal monies."]) And regardless of their original source, once funds enter the County's public coffers, the money is generally considered to be County public funds. (See *Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 23–24 [bond funds held in community facilities district's public coffers constituted public funds, where the district authorized expenditures and controlled disbursements of the money]; see also PW 93-054 *Tustin Fire Station – Tustin Ranch* (June 28, 1994) [money collected for, or held in coffers of, public agency constitutes "public funds" under section 1720].) When the County pays money from its public coffers for installation, the County is paying for the installation "out of public funds." (§ 1720, subd. (a)(1).)

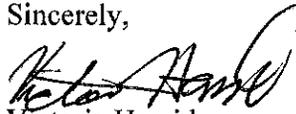
As the County paid more than a million dollars to RBT for the installation of photovoltaic systems at two County public libraries, it is not only incorrect, but disingenuous, for RBT to argue that the funding did not constitute public funds within the meaning of section 1720, subdivision (b).

Conclusion

For the foregoing reasons, the construction and installation of the A.C. Bilbrew Library and Julian Dixon Library Photovoltaic Systems in the County of Los Angeles is a public work and therefore subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,


Victoria Hassid
Chief Deputy Director⁵

⁵ See Government Code sections 7 and 11200.4.