

DEPARTMENT OF INDUSTRIAL RELATIONS

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January 2, 2020

Misha Ramadev
General Counsel
Geocon Consultants, Inc.
6960 Flanders Drive
San Diego, California 92121-2974

Re: Public Works Case No. 2018-033
Del Rio Trail Environmental Assessment
City of Sacramento

Dear Ms. Ramadev:

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 onsite sampling work for the Del Rio Trail Environmental Assessment is public work and therefore subject to prevailing wage requirements.

Facts

The Del Rio Trail project is a planned 4.8 mile multi-use trail consisting of a bicycle path, together with an adjacent pedestrian walking trail in the City of Sacramento. The trail is located in the corridor occupied by the former Sacramento Southern Railroad's Walnut Grove Branch Line. Because the trail project is located along a historical railroad corridor, there is potential for hazardous substances to be present in the soil.

The entire Del Rio Trail project is estimated to cost \$15 million. For the planning, environmental clearance, and design phase, the Sacramento Area Council of Governments² awarded \$1,106,000 in federal funds from the Active Transportation

¹ Unless otherwise indicated, all further statutory references are to the California Labor Code and all subdivision references are to the subdivisions of section 1720.

² The Sacramento Area Council of Governments is a joint powers agency created under the Joint Exercise of Powers Act, codified at Government Code sections 6500 et seq.

Program,³ and the City secured matching local transportation funds, for a total of \$2.2 million in initial funding. Funding for the construction phase has not yet been secured.

Dokken Engineering, Inc. entered into an agreement with the City to provide services related to the Del Rio Trail project, including “Hazardous Waste Investigation” services as part of Phase I and Phase II Environmental Site Assessments (ESA). Dokken, in turn, contracted with Geocon Consultants, Inc. to perform some of these services. According to Dokken’s agreement with the City and a Geocon document entitled “Project Understanding and Approach,” Geocon understood that it was tasked with performing a “Limited Phase II ESA” that called for Geocon to, among other things:

Mark the project limits in white paint and provide 48-hour notification to Underground Service Alert (USA) prior to job site mobilization.

Advance 10 borings using hand auger sampling techniques along the proposed Del Rio Trail alignment. One ballast sample will be collected at each location, and one soil sample will be collected beneath the ballast at each location. Ballast and soil samples will be collected in stainless steel liners from soil contained in the hand auger. The liners will be capped with Teflon® sheets and polyethylene end caps, and subsequently labeled and placed in a chilled ice chest pending delivery to ATL. The borings will be backfilled with excess soil from the sampling. Soil types, PID readings and observations of apparent contamination will be noted on the daily field log.

Perform quality assurance/quality control (QA/QC) procedures during the field exploration activities. These procedures will include decontamination of sampling equipment before each sample is collected, and providing chain-of-custody documentation for each soil sample submitted to the laboratory. The soil sampling equipment will be cleansed between each sample by washing the equipment with an Alconox® solution followed by a double rinse with deionized water. The rinsewater will be discharged to ground surface areas within the right-of-way which do not slope to drainage inlets or surface water bodies.

As a part of its Limited Phase II ESA responsibilities, Geocon was also to analyze the soil samples collected to detect specific types of hazardous materials and prepare a comprehensive report on its findings and conclusions. Geocon further describes the soil sample collection work as follows: “the samples were collected by hand by the professional geologist and he did not use any drilling equipment (and a drilling subcontractor was not needed). Also, the professional geologist used his professional discretion in determining where to take the samples.”

³ The Active Transportation Program was created by Senate Bill 99 (2013) and Assembly Bill 101 (2013) to encourage increased use of active modes of transportation, such as walking and biking. A sizable portion of the program’s funding comes from federal sources.

Following the ESA work and completion of other components of the design and preconstruction phase, actual construction of the Del Rio Trail project will commence when funding is secured.

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. “Construction” also includes “work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work . . .” (§ 1720, subd. (a)(1).)⁴

There is no dispute that the future construction of the Del Rio Trail will be public work. Nor is there any dispute that the environmental site assessment work performed before construction is done under contract and paid for out of public funds. Geocon has a contract with Dokken to complete the soil sampling work required under Dokken’s agreement with the City, which will be paid out of funds from the Active Transportation Program and local transportation funds. The only issue presented in this coverage request is whether the soil sample collection work done for the Limited Phase II ESA constitutes “work performed during the design and preconstruction phases of construction” for purposes of the prevailing wage law. (*Id.*)

A. The Positions of the Parties.

Geocon, the requester, “do[es] not believe the actual work undertaken by Geocon falls within the applicable statutory language of California Labor Code § 1720(a).” While it recognizes that the statutory definition of public work includes “work performed during the design and preconstruction phases of construction, including but not limited to, inspection and land surveying work,” Geocon’s opinion is that the statutory language is “not

⁴ During the pendency of this request, the Legislature passed Assembly Bill 1768 (2019) to amend subdivision (a)(1). Effective January 1, 2020, subdivision (a)(1) will read, in relevant part:

For purposes of this paragraph, “construction” includes work performed during the *design, site assessment, feasibility study, and other preconstruction phases of construction*, including, but not limited to, inspection and land surveying work, *regardless of whether any further construction work is conducted*, and work performed during the postconstruction phases of construction, including, but not limited to, all cleanup work at the jobsite.

(Stats. 2019, ch. 719, § 1, italics added). Because A.B. 1768 operates prospectively, it would not apply to this case. (See *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840.) Even if retroactive, A.B. 1768 would not change the conclusion here.

applicable to the instant scenario/Geocon's scope of work," which involves a professional geologist collecting samples by hand using his or her professional discretion in deciding where to collect the samples. As support for that opinion, Geocon states that Dokken's agreement with the City was for "preliminary engineering for CEQA⁵ and NEPA⁶ approval," and that Geocon's work was to help carry out this preliminary engineering. Geocon further emphasizes that the "development of plans, specifications, and estimates was to be solicited under a future RFP." The most forceful argument made by Geocon is that actual construction of the trail will be awarded under a separate City contract, and prevailing wages would be required only for *that* separate contract.

The City did not expressly state a position as to whether the environmental site assessment work was a public work, but it did refer to Geocon's request for coverage determination when asked about its position, implying that the City adopts Geocon's arguments against coverage.

Operating Engineers Local Union No. 3 (Local 3) and International Union of Operating Engineers, Local 12 (Local 12) (collectively, "Operating Engineers") argue that the work at issue is considered "work performed during the design and preconstruction phases of construction" under section 1720, subdivision (a)(1).

Local 3 takes issue with Geocon's suggestion that work should not be subject to prevailing wages just because a professional geologist is performing that work, arguing that "whether prevailing wages apply is determined by the 'work done' and not by the qualifications of the individuals performing the work." Local 3 contends that the work at issue is a type of work that is included in the Department's prevailing wage determinations for the classification of Field Soils and Materials Tester since Senate Bill 1999 amended the statute to expressly include "inspection and land surveying" in subdivision (a)(1)'s definition of "construction." The prevailing wage determinations for Field Soils and Materials Tester in Northern California are predicated on the wage rates established by Local 3's collective bargaining agreements. (See § 1773.)

Local 12 similarly argues that, in Southern California, the prevailing wage determinations for this type of work are predicated on the wage rates established by

⁵ CEQA is an abbreviation for the California Environmental Quality Act, which "establishes a comprehensive scheme to provide long-term protection to the environment." (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1092.) "With narrow exceptions, CEQA requires an EIR [environmental impact report] whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390.)

⁶ NEPA is an abbreviation for the National Environmental Policy Act, which sets forth "a national policy of environmental protection and placed a responsibility upon the Federal Government to further specific environmental goals by 'all practicable means, consistent with other essential considerations of national policy,'" including requiring the preparation of environmental impact statements. (*Kleppe v. Sierra Club* (1976) 427 U.S. 390, 409.)

Local 12's collective bargaining agreements. Local 12 notes that if a "civil engineer or other professional is performing field work or work that is primarily physical or manual in nature, then such work is covered by" prevailing wage laws, and contends that the work described by Geocon as the "manual boring and sampling of soils is quintessentially work that is manual or physical in nature." Local 12 also claims that Geocon's representation that the professional geologist did not use any drilling equipment is "misleading," because according to a publication from the American Society of Civil Engineers, each field technician performing geotechnical testing, observation, and documentation must be familiar with and carry "tools of the trade," such as a geologist pick,⁷ a shovel, a probe, a pocket penetrometer,⁸ a nuclear gauge,⁹ and measuring tape. All of the work described, Local 12 argues, is taught as a part of the state-approved apprenticeship program that Local 12 sponsors, and to support its argument, Local 12 provided the program's training materials, course descriptions, and excerpts from the International Building Code that are taught to apprentices.

B. Field Soil Sampling Work is Covered Work Performed During the Preconstruction Phase.

Geocon portrays the work at issue as being performed by a professional geologist, who collects soil samples by hand. Dokken's agreement with the City provides more detail: the samples are to be collected by hand augers and placed in an ice chest. Each "boring" will be backfilled with excess soil from the sampling.

Local 12 points out that the actual collection of the soil samples is primarily physical or manual in nature, as is most other work covered by the prevailing wage law. The described work is, in fact, a type of work historically considered subject to prevailing wage requirements, even before Senate Bill 1999 amended the statute to include work done during preconstruction. (See PW 2000-03, *Soils Testing, California Street Water Pipeline Project – Yucaipa Valley Water District* (Sept. 13, 2000) [finding soil testing covered where the "tests involved taking samples of the soil with hand tools and occasionally inserting a steel rod to detect density of the soil."]) To codify the Department's determinations with respect to preconstruction work, Senate Bill 1999 amended subdivision (a)(1) to "explicitly include preconstruction activities that previously were not referenced." (*Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 548 (*Oxbow*)). Soil sampling is a type of work performed during the *preconstruction phase*, as that term is used in subdivision (a)(1).

⁷ A geologist pick or hammer is used for splitting and breaking rocks. (See *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.* (1965) 15 N.Y.2d 443, 465.)

⁸ "A penetrometer is a device used for measuring the penetrability of a solid." (*Riley v. Dow Corning Corp.* (M.D.N.C. 1992) 876 F.Supp. 728, 730, n. 1.)

⁹ According to the U.S. Office of Homeland Security & Emergency Coordination, Radiation Safety Division, a "nuclear gauge (also called a nuclear density gauge, a soil moisture gauge, or a moisture density gauge) is a tool used for civil engineering projects and construction that measures soil density or soil water content."

Despite this authority, Geocon puts stock in the fact that the construction of the Del Rio trail will be awarded under a separate contract in the future and that the contract it works under does not call for construction. Yet work that is covered by the prevailing wage laws, as in this case, does not lose its coverage merely because it was awarded under a different contract. The sampling work is still being done under contract and paid for out of public funds. No further inquiry need be conducted.

In cases where parties attempted to apportion public funds only to specific portions of a project funded by both public and private funds, and pay prevailing wages for only those portions they deemed to be publicly-funded, courts have warned that allowing the mere existence of separate contracts to determine whether work constitutes public works would “incentivize gamesmanship” (*Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 216), and “encourage parties to contract around the prevailing wage law by breaking up individual tasks into separate construction contracts.” (*Oxbow, supra*, 194 Cal.App.4th at p. 550.) While the same issue does not present itself in this case (all parties agree that the preconstruction work is publicly-funded), the principle – that the mere existence of separate contracts does not dictate whether work is subject to the prevailing wage law – is similarly applicable here.

Accordingly, the soil sampling work is subject to prevailing wage requirements, as it is done during the “preconstruction phases of construction.” (§ 1720, subd. (a)(1).) Given this conclusion, it is unnecessary to address the Operating Engineers’ argument that soil sampling is subject to prevailing wages as public work because the Operating Engineers’ collective bargaining agreements cover soil sampling work.

Conclusion

For the foregoing reasons, the onsite sampling for the Del Rio Trail Environmental Assessment is public work subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

/s/ Victoria Hassid
Victoria Hassid
Chief Deputy Director¹⁰

¹⁰ See Gov. Code, §§ 7, 11200.4.