

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR

455 Golden Gate Avenue, Tenth Floor

San Francisco, CA 94102

(415) 703-5050



October 5, 2010

Paul V. Simpson, Esq.
Simpson, Garrity, Innes & Jacuzzi
Attorneys at Law
601 Gateway Boulevard, Suite 950
South San Francisco, CA 94080

Re: Public Works Case No. 2009-055
Ecosystem Restoration and Flood Attenuation Project, San Joaquin River
County of Stanislaus, California Department of Water Resources

Dear Mr. Simpson:

This constitutes the determination of the Director of Industrial Relations regarding coverage of certain types of work on the Ecosystem Restoration and Flood Attenuation Project (the "Project") under California's prevailing wage laws and is made pursuant to section 16001(a) of title 8 of the California Code of Regulations. Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that only the planting work and the well pump repair or replacement work undertaken in connection with the Project is subject to prevailing wage requirements.

Facts

The Project, which is being undertaken on the San Joaquin River's left bank, builds on earlier work funded by the California Department of Water Resources ("DWR"), the CALFED Bay-Delta Program and the United States Army Corps of Engineers to restore habitat and improve flood management on the San Joaquin River National Wildlife Refuge (the "Refuge"). The Project will create 633 acres of restored riparian habitat on the floodplain within the Refuge and provide 1,535 acres for transient floodwater storage. The Project is being undertaken by River Partners, a 501(c)(3) nonprofit corporation, and is being funded by a \$3,171,344 grant from DWR and a \$250,000 grant from the United States Bureau of Reclamation through the Central Valley Project Improvement Act. River Partners is contributing \$144,152 of its own funds.

In 2006, a flood breached the berm on the West Stanislaus Canal allowing floodwater to enter the Refuge's Hagemann Tract. To reduce the risk of fish stranding, the Refuge installed a 36 inch pipe, which drains the entire Hagemann Tract. The pipe is small relative to the amount of water that accumulates behind it. Drainage of the site after the 2006 event took four months. This posed several risks to migratory fish, including insufficient current to signal the fish where or how to exit the ponded water and changes in water temperatures lethal to salmonids.

The Project is designed to remedy this problem. Through this Project, River Partners is proposing to breach a nearby levee on Hospital Creek. This will provide sufficient current to signal the fish which direction to exit the floodplain safely. Additionally, the breach will allow water to flow back into the river before water temperatures climb to lethal levels. Without taking this type of action, the Refuge may be required to prevent fish stranding by permanently closing the breaches on the West Stanislaus Canal, which would then cut off the river from its floodplain and remove over 1,535 acres of floodwater attenuation from the San Joaquin River system.

The Project will benefit the State of California by reducing flood risk liability, enhancing the ecosystem and reducing operation and maintenance costs on the San Joaquin River in the following ways:

- Improving flood management;
- Reducing floodwater levels in the San Joaquin River at peak flow;
- Permanently providing over 1,535 acres of floodwater attenuation;
- Improving water quality and reliability;
- Providing an off main-channel sediment deposition site during peak flows;
- Increasing groundwater recharge potential;
- Providing 633 acres of restored habitat harboring threatened and endangered species such as riparian brush rabbit and riparian wood rat, neo-tropical birds, waterfowl and upland game birds;
- Increasing educational opportunities for children and our communities;
- Enhancing public access to the San Joaquin River; and
- Supporting the Lower Tuolumne River Parkway and other regional efforts to enhance environmental quality and public safety.

Five tasks that are the subject of this determination will be performed after the levee is breached and the floodplain is tilled and disked. The Restoration Unit Plan (the "Plan") will be created to guide the planting process; native plants will be collected and then prepared in off-site commercial nurseries; the planting field will be designed using bamboo markers; trees, shrubs and native grass will be planted; and, after planting, the new growth will be monitored. In addition, at least two existing well pumps will be repaired or replaced.

Discussion

Section 16001, subdivision (a)(1) of title 8 of the California Code of Regulations states in relevant part: "[a]ny interested party enumerated in Section 16000 of these regulations may file with the Director of Industrial Relations . . . a request to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which that interested party believes may be subject to or excluded from coverage as public works under the Labor Code." Labor Code section¹ 1720, subdivision (a)(1) defines public works in relevant part as "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds For purposes of this paragraph, 'construction' includes

¹ All undesignated section references are to the Labor Code unless otherwise specified.

work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.” Section 1723 states: “[w]orker” includes laborer, worker, or mechanic.” Section 1771 states in relevant part: “[t]his section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.”

There is no dispute that the overall Project is a public work in that it entails alteration and construction paid for in part out of public funds and done under contract within the meaning of section 1720, subdivision (a)(1). The question presented by River Partners is whether the tasks described above, performed in connection with the overall Project, are types of work subject to prevailing wage obligations.

The creation of the Plan, the collection of native plant species for preparation in off-site commercial nurseries, the field design work,² and the post-planting monitoring work are not covered work as none of these activities involve construction, alteration, installation, demolition, repair or maintenance work within the meaning of section 1720, subdivision (a)(1) or 1771. These activities also do not constitute preconstruction activities as described in the last sentence of section 1720, subdivision (a)(1) because they will be performed after the work constituting public work is completed.

In contrast to the four tasks not subject to prevailing wage obligations as described above, the on-site planting work is covered work. The planting work is considered alteration as that term is used in section 1720, subdivision (a)(1) because it is modifying a particular characteristic of the land. This work is similar to work found to be covered as discussed in a previous coverage decision.³ (See Public Works Case No. 2002-096, *Request for Proposals: Planting, Operation, Maintenance and Monitoring of Owens Lake Southern Zones Managed Vegetation Project/Los Angeles Department of Water and Power* (December 16, 2005/June 1, 2005).) In addition, the repair or replacement of the existing well pumps is covered as “repair” or “installation” within the meaning of section 1720, subdivision (a)(1).

River Partners contends that the planting work is restoration work and that restoration is not a term included in the definition of public work and therefore the statute should not be read to include it. It should be noted, however, that when the Legislature wished to exempt habitat restoration projects from prevailing wages it has shown its ability to do so. (See, Fish & G Code, § 1501.5(c) exempting certain habitat restoration projects from prevailing wages.) This section refers to work related to planting trees or other habitat vegetation. (See Fish & G Code, § 1501.5(d)(6)(G).) Here,

² These activities are to be performed or supervised by a team of River Partners biologists, and agricultural and agronomic specialists.

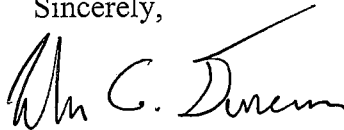
³ The Department has discontinued its prior practice of designating certain public works coverage determinations as “precedential” under Government Code section 11425.60. Public notice of the Department’s decision to discontinue the use of precedent decisions can be found at [http://www.dir.ca.gov/dlsr/Notices/09-04-2007\(pwcd\).pdf](http://www.dir.ca.gov/dlsr/Notices/09-04-2007(pwcd).pdf). Consequently, prior determinations are discussed herein only for purposes of addressing the arguments and are not cited as precedent.

Letter to Paul V. Simpson, Esq.
Re: Public Works Case No. 2009-055
Page 4

the Project is being done under the auspices of DWR and not the California Department of Fish and Game, so it does not qualify for the exemption.

I hope this determination satisfactorily answers your inquiry.⁴

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Duncan", with a long, sweeping horizontal line extending from the end of the name.

John C. Duncan
Director

⁴ Based on the description of the planting work, it appears that it may be performed under the Landscape Maintenance Laborer Determination for Stanislaus County (NC-LML-2008-1) instead of the Construction Laborer and Related Classifications Determination (NC-23-102-2009-2).