

DEPARTMENT OF INDUSTRIAL RELATIONS

Christine Baker, Director

Office of the Director

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January 25, 2016

Martin Tuttle
City Manager
City Manager's Office
1110 West Capitol Avenue
West Sacramento, CA 95691

Re: Public Works Case No. 2015-010
Washington Firehouse Rehabilitation/Re-use
Project located at 317 3rd Street
City of West Sacramento

Dear Mr. Tuttle:

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 rehabilitation of the Washington Firehouse located at 317 Third Street in West Sacramento (Project), is a public work. In this case, however, the requirement to pay prevailing wages is restricted to the construction of infrastructure improvements associated with the Project.

Facts

The City of West Sacramento (City) is interested in the successful rehabilitation and adaptive reuse of the real property located at 317 Third Street, West Sacramento (commonly referred to as the Firehouse Building). Specifically, City has entered into a Purchase, Sale and Development Agreement (Agreement) with D&S Development, Inc. (Developer) wherein Developer will build a ground floor restaurant/bar and second floor banquet room.

City currently owns and maintains the Firehouse Building, which is currently both vacant and uninhabitable. As set forth in the Agreement, City intends to sell all of its rights, title and interest in the Firehouse Building to Developer, and Developer intends to purchase the same. City hired a certified and experienced real property appraiser to provide an appraisal of the Firehouse Building.²

¹ Unless otherwise indicated, subsequent statutory references are to the California Labor Code

² City hired Bender Rosenthal, Inc. to provide the appraisal. Licensing and certification information can be accessed through the official website of the California Department of Consumer Affairs, Bureau of Real Estate Appraisers. (See <http://www.orea.ca.gov/html/SearchAppraisers.asp>.)

The appraisal sets the fair market value of the Firehouse Building at twenty-four thousand dollars (\$24,000.00), which is the purchase price set forth in the Agreement.

The Agreement further provides that City will provide Developer seventy-four thousand dollars (\$74,000.00) in purchase money financing to cover both the purchase and all required project development and permit fees. In exchange, Developer will deliver to City a promissory note secured by a deed of trust on the Firehouse Building, which shall be subordinate to any private construction financing procured by Developer. City has submitted a letter from MFC, Inc. (MFC), which City represents to be a consultant and independent expert on commercial loans in the greater Sacramento area. MFC represents that it contacted and interviewed commercial lenders throughout the Sacramento region. MFC concludes as a result that the proposed financing terms are consistent with the terms that would be available to Developer from commercial lenders. Accordingly, MFC finds that City is providing purchase money financing at fair market value.

As a condition of regulatory approval, City is requiring that Developer construct certain public improvements along the property's Third Street frontage. The public improvements include the construction of a new sidewalk, curb and gutter; installation of new domestic and fire water connections; and general landscaping. Developer shall construct the public improvements at its own cost. However, City will thereafter reimburse Developer up to one hundred forty-four thousand dollars (\$144,000.00) in approved construction costs upon the submission of invoices to City for approval. In no circumstances will the amount to be reimbursed exceed the actual out-of-pocket costs of the public improvements. City engineer estimates that the public improvements will cost one hundred thirty-two thousand six hundred three dollars and seventy cents (\$132,603.70).

In summary, Developer has secured roughly one million eighteen thousand dollars in financing from all sources (\$1,018,000.00). Additionally, Developer is required to invest seven hundred thousand dollars (\$700,000.00) of its own money to complete the project, for a total cost of one million seven hundred eighteen thousand dollars (\$1,718,000.00).

Discussion

Labor Code section 1720(a)(1) generally 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... ." ³ Section 1720 subdivision (b) defines "paid for in whole or in part out of public funds" to mean the following: "[t]he payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer" (§ 1720(b)(1)); a "[t]ransfer by the state or political subdivision of an asset of value for less than fair market price" (§ 1720(b)(3)); "[f]ees ... loans ... or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision" (§ 1720(b)(6)).

Lastly, section 1720, subdivision (c)(2) sets forth the following exemption:

³ Unless otherwise indicated, subsequent statutory references are to the California Labor Code.

(c) Notwithstanding subdivision (b):

- (2) If the state or political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

In this case, the City's reimbursement of money expended on the public improvements is "[t]he payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer." (§ 1720(b)(1)). Accordingly, the entire Project is a public work within the meaning of section 1720 subdivision (a)(1). (*Azusa Land Partners v. Department of Industrial Relations* (2011) 191 Cal.App.4th 1, 29 ("*Azusa*").)

At issue in this determination is whether the partial exemption set forth in section 1720, subdivision (c)(2) applies. The exemption applies only if four elements are met: (1) the public improvement work is a condition of regulatory approval of the project; (2) the project is an otherwise private development; (3) the public entity contributes no more money, or the equivalent of money, to the overall project than is required to construct the public improvement; and (4) the public entity maintains no proprietary interest in the overall project. (*Azusa, supra*, 191 Cal.App.4th at p. 29.)

For the reasons stated below, all four elements are met. First, the Agreement expressly states that Developer must construct the public improvements as a condition of regulatory approval. Second, the Project is an otherwise private development. City is selling the Firehouse Building at a fair market price. The Department has consistently found in prior determinations that appraisals performed by certified and experienced real estate appraisers and are presumed to be correct absent a contrary credible appraisal (e.g., see at Public Works Case No. 2008-017, *Rialto Municipal Airport/Redevelopment Agency of the City of Rialto* (August 15, 2008), p. 3.) City is offering purchase price financing at fair market value consistent with the terms available to Developer from commercial lenders in the region. Developer will otherwise finance the project by procuring a construction loan from a private lender and its own capital investment, *i.e.*, not from a political subdivision or the State. Third, City will only reimburse the actual costs Developer incurs constructing the public improvements. Fourth, City maintains no proprietary interest in the property.

Conclusion

For the foregoing reasons, the partial exemption in section 1720, subdivision (c)(2) applies to the Project and only the construction of the public improvements required by City as a condition of regulatory approval are subject to prevailing wage requirements.

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I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script, appearing to read "Christine Baker".

Christine Baker
Director