

DEPARTMENT OF INDUSTRIAL RELATIONS

Katrina S. Hagen, Director

Office of the Director

1515 Clay Street, 17th Floor

Oakland, CA 94612

Tel: (510) 286-7087 Fax: (510) 622-3265



December 30, 2020

Howard Wien, 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. 2016-035
Spring Park Senior Villa
City of Gardena

Dear Mr. Wien:

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). Based upon my review of the facts of this case and an analysis of the applicable law, it is my determination that the Spring Park Senior Villa project in the City of Gardena is not subject to the prevailing wage requirements of the California Labor Code.

Facts

The Spring Park Senior Villa project (Project) is an affordable senior housing project consisting of thirty-seven units in the City of Gardena. The housing project was constructed for owner and developer Spring Park Senior Villa, Inc., a California non-profit public benefit corporation. Waset, Inc., another California non-profit public benefit corporation, is also named as a developer. The general contractor was LTD Construction Services GP DBA Walton Construction Services, and KB Engineering, Inc. was a subcontractor on the Project.

The City of Gardena sold the land for the Project to the non-profit developer. The City of Gardena also obtained financing for the non-profit developer on this Project in the form of a Home Investment Partnerships Program (HOME) loan of \$2,874,100.15 and HOME activity delivery costs grant funding of \$50,000. The \$50,000 HOME funds could be spent on, inter alia, engineering, or related professional services, staff costs directly related to carrying out the Project, and costs of environmental review. (24 C.F.R. §

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.

92.206(d) (2013).) The California Department of Housing and Community Development (HCD) awarded the City of Gardena the funds for this loan on March 19, 2013, although the money was originally awarded by the U.S. Department of Housing and Urban Development (HUD) to HCD.

There is also a HUD Section 202 program loan in the amount of \$6,039,200 and a HUD Section 202 Demonstration Pre-Development Program grant of \$400,000 of August 2012, which apparently were received by the non-profit developer directly from HUD. Use of the grant's funds are restricted by HUD,² but on this Project, they were spent on a variety of activities, including appraisals, architectural services, cost analysis, legal fees, impact fees, other fees, building permits, site control, consultant, and environment site assessments. The Project's total funding is \$9,363,415 (\$2,874,115 HOME loan + \$50,000 HOME activity delivery costs + \$6,039,300 HUD 202 loan + \$400,000 HUD predevelopment grant).

The following information is from the City of Gardena HOME Regulatory Agreement (Regulatory Agreement) of August 8, 2013. Thirty-six of the units in this housing project are to be occupied by low-income households of seniors, and one unit is for the occupancy of an apartment manager. At all times (for fifty-five years), 20 percent of the units must be rented to very low income households, which is 50 percent average median income (AMI) or lower. In addition, at initial occupancy, no less than 90 percent of the units shall be occupied by households whose incomes are 60 percent AMI or lower. Following initial occupancy, up to 80 percent of the units may be occupied by households whose incomes are 80 percent AMI or lower. Presumably, 80 percent AMI or lower is the maximum AMI permitted.³

Contentions of the Parties

The general contractor and subcontractor argue that there are only two sources of public funding for this Project's construction: the HOME Program loan and the HUD Section 202 loan. They argue that the Project fits the exemption of subdivision (c)(5)(E) because both of these loans are below-market interest rate loans and the Project meets the low income and occupancy requirements of the exemption. The contractors further argue that while the HUD predevelopment grant is public funding, the grant does not cover construction because it is limited to paying for predevelopment soft costs, including consulting fees, legal fees and other fees, required to determine whether the Project was feasible. They claim the grant cannot be used for preconstruction or construction costs and, therefore, is not payment for "construction" out of public funds within the meaning of

² There is a restricted list of activities approved by HUD for use of this grant's funds, which includes appraisals, architectural fees, cost analysis, legal fees, other fees, impact fees, building permits, variance fees, engineering services, consultant services, site control, market studies, organization expenses, relocation expenses and environmental site assessments.

³ This Regulatory Agreement's terms regarding income requirements are not clearly written, but these seem to be the terms that were intended by the parties to the agreement.

subdivision (a)(1). Furthermore, they contend that the \$50,000 HOME activity delivery costs were provided by HCD to the City for various City-incurred “soft costs.”

Division of Labor Standards Enforcement (DLSE)⁴ argues that the public funding on the Project was not all in the form of below-market rate interest loans. DLSE points out that a document entitled “Spring Park Predevelopment Draw Detail Summary” lists the allocation of the HUD predevelopment grant money, and shows the grant financed building permits, variance fees, site control and environmental site assessments. As such, DLSE argues that a portion of the HUD predevelopment grant was used for construction, because the definition of construction in subdivision (a)(1) includes work performed during a project’s design and preconstruction phases. DLSE also calls attention to the existence of the \$50,000 HOME activity delivery costs funds.

Discussion

Workers employed on public work 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” as “[c]onstruction, alteration, demolition, installation, or repair work done under contract, and paid for in whole or in part out of public funds” Construction includes “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” (former § 1720, subd. (a)(1).)⁵ However, pursuant to subdivision (c)(5)(E), despite public funding, a residential project with “public funding in the form of below-market interest rate loans . . . in which occupancy of at least 40 percent of the units is restricted for at least 20 years, by deed or regulatory agreement, to individuals or families earning no more than 80 percent of the area median income” is exempted from prevailing wage requirements. It is undisputed that this Project entails “construction” that is “done under contract.”

A. The Project is Paid for in Part Out of Public Funds.

As previously mentioned, there are two loans that funded this Project. One is a HOME loan, funded through the City of Gardena, and the other is a HUD 202 loan, provided by HUD directly to the non-profit developer. The contractors concede the

⁴ As authorized by section 1741, DLSE conducted an investigation and issued civil wage and penalty assessments against the contractors. After coverage of the work under the prevailing wage law was disputed in section 1742 proceedings to review the assessments, the matter was referred for a coverage determination.

⁵ This is the statutory language at the time of this Project initiation in 2012 and 2013, before A.B. 1768, which went into effect in January 1, 2020. Currently, the statutory language reads “. . . ‘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. . . .” (§ 1720, subd. (a)(1).) The change in the statute does not affect the analysis here.

interest rates of the loans are below market rate and constitute public funds. (§ 1720, subd. (b)(4) [paid for in public funds means “loans, interest rates . . . charged at less than fair market value.”]) In addition to these low-interest loans, DLSE points to the HUD predevelopment grant and the \$50,000 in HOME activity delivery costs funds as other sources of public funding.

The contractors’ claim that the HUD predevelopment grant cannot be used for construction costs and, for that reason, cannot be public funds is incorrect both factually and legally. The grant was provided to the Project with a list of approved activities for the grant’s use. Some of these listed uses are not considered preconstruction (such as building permits). However, other activities approved for the grant include work covered under the prevailing wage law. For example, engineering services include the “actual cost of boundary survey, topographic survey, soil borings, and tests,” which are “preconstruction” activities. (See § 1720, subd. (a)(1); 8 Cal. Code of Regs. § 16001, subd. (c) [field survey work may be subject to prevailing wage]; see also 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.”]) As the grant funds were approved for and available to pay for preconstruction on the Project, such as surveys, it is considered public funding under section 1720 regardless of the choices made by the developer in allocating the various financial sources, and the funds “serve to reduce a developer’s project costs.” (*Hensel Phelps Construction Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, 1034). A decision to the contrary would enable private developers to engage in creative accounting efforts solely to circumvent the requirement to pay prevailing wages on publicly-funded projects and “incentivize gamesmanship.” (See *Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 216.) Under the specific factual circumstances of this case, however, the predevelopment grant is not considered “paid for in whole or in part out of public funds” within the meaning of the prevailing wage law for a different reason, as the funds were provided directly from the federal government to the non-profit developer. While federal monies are considered public funds, the funding typically has to be provided by a state or local public entity.

With respect to the \$50,000 HOME activity delivery costs, DLSE does not provide any argument to contradict the contractors’ assertion that the funding was provided to, and retained by the City for project-related “soft costs.” HCD regulations governing the HOME program confirm that HOME grant funds for activity delivery costs are provided to local agencies and nonprofits, but not to developers.⁶ Based on the information provided to the Department, the Project did not receive any subsidies from the HOME activity delivery funds, which were used by the City for administrative costs.

⁶ Funds used for activity delivery costs eligible under federal regulations “shall be provided in the form of a grant.” (Cal. Code Regs., tit. 25, § 8205, subd. (c)(2)(G).) However, “[u]nder the Department’s administered HOME program, any funding to a Developer will be in the form of a loan.” (Cal. Code Regs., tit. 25, § 8205, subd. (g).)

B. The Project is Not Subject to Prevailing Wage Requirements.

Subdivision (c)(5)(E) exempts construction or rehabilitation of privately owned residential projects if the “public participation in the project . . . is public funding in the form of below-market interest rate loans for a project in which occupancy of at least 40 percent of the units is restricted for at least 20 years, by deed or regulatory agreement, to individuals or families earning no more than 80 percent of the area median income.”


As previously mentioned, there are two loans that funded the Project. One is a HOME loan, funded through the City of Gardena, and the other is a HUD 202 loan. The contractors concede the interest rates of the loans are below market rate. The Project’s Regulatory Agreement states that, at all times (for fifty-five years), 20 percent of the units must be rented to very low-income households, which is 50 percent AMI or lower. In addition, at initial occupancy, no less than 90 percent of the units shall be occupied by households whose incomes are 60 percent AMI or lower. Following initial occupancy, up to 80 percent of the units may be occupied by households whose incomes are 80 percent AMI or lower. This also includes the all-time requirement that 20 percent of the units be occupied by households of 50 percent AMI or lower. Presumably, the units have to stay within this range – at all times, 20 percent of the units will be occupied by households of 50 percent AMI or lower, and, after initial occupancy, the remaining units will be occupied by households of, at the most, 80 percent AMI or lower. Therefore, the Project meets the criteria to qualify for the exemption in subdivision (c)(5)(E).

Conclusion

For the foregoing reasons, the Spring Park Senior Villa project in the City of Gardena is not subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Katrina S. Hagen
Director of Industrial Relations