STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

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John J. Korbol, 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. 2018-029
Glassell Yard Campus Stormwater LID Retrofit
Orange County Flood Control District

Dear Mr. Korbol:

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 1773.5[1] 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 offsite fabrication of pedestrian bridges by Tobo Construction, Inc. for the Glassell Yard Campus stormwater low impact development retrofit project is not subject to prevailing wage requirements.

Facts

The Glassell Yard Campus (Campus or project site) is a 9.4-acre office and warehouse complex owned by the Orange County Flood Control District (District).[2] In 2015, the District undertook the stormwater low impact development (LID) retrofit project to reduce stormwater runoff from the Campus and thereby improve water quality within the Santa Ana River Watershed. The project sought to implement low impact development features to not only reduce stormwater runoff but also to treat water prior to discharge, infiltrate water into the groundwater, and capture stormwater for reuse, among other things.

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

[2] No parties have argued whether the work at issue falls within section 1720, subdivision (a)(2). (See *Kaanaana v. Barrett Business Services, Inc.* (2021) 11 Cal.5th 158.) Even assuming the District is a covered district under section 1720, subdivision (a)(2), the analysis as to the offsite fabrication in this specific situation remains the same.

As part of this retrofit project, the District entered into a construction agreement with Tobo Construction, Inc. (Tobo). Tobo performed various types of work including but not limited to constructing landscape infiltration strips, permeable paving, bioswales, modular wetlands, and cisterns on the Campus. Additionally, Tobo's scope of work included the fabrication and installation of pedestrian bridges to traverse planting depressions and connect pedestrian walkways.

The District specified in part that the pedestrian bridges consist of wood decking surfaces with structural steel wide flange beams. Tobo contracted with Access Steel Fabricating, Inc. (Access Steel) to fabricate the steel frames. Tobo's own employees then performed carpentry work by attaching the wood components onto the Access Steel-fabricated steel frames. The entire fabrication of the bridges was completed offsite at a facility owned by Access Steel in the City of Pacoima, approximately 50 miles from the Campus. Access Steel's shop had been in existence for years and Tobo had a history of working with Access Steel on both public and private projects. Although Tobo's own facility was located closer to the Campus approximately 35 miles away in the City of Torrance, Tobo determined that full fabrication at Access Steel's shop would increase the quality of the bridges. According to Tobo, if the fabrication was performed on the project site, the quality would have greatly suffered, though it did not elaborate on why that would be the case.

Once the bridges were fabricated, they were transported to the Campus where Tobo completed installation and made necessary adjustments. The retrofit project was completed in April 2016.

Discussion

All workers employed on public works projects must be paid at least the applicable prevailing wage rates. (§ 1771.) "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." (§ 1772.) Section 1720, subdivision (a)(1) (hereafter section 1720(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. Section 1720(a)(1) clarifies that "construction" includes "work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work . . . ." (Former § 1720, subd. (a)(1).)[3]

[3] During the pendency of this request, the Legislature passed Assembly Bill 1768 (2019) to amend section 1720(a)(1). Effective January 1, 2020, section 1720 (a)(1) reads 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.

There is no dispute that onsite work performed by Tobo triggered the prevailing wage requirements and that the retrofit project was paid at least in part out of public funds. The only issue presented is whether the offsite fabrication of the pedestrian bridges performed by Tobo employees at Access Steel's shop constitutes covered work.

A. Position of the Parties.

The Division of Labor Standards Enforcement (DLSE)[4] presents three main arguments for why it believes offsite fabrication in this context is covered work. First, DLSE claims that offsite fabrication is covered under section 1772 as work performed "in the execution" of the public works contract. Second, DLSE claims that offsite fabrication of pedestrian bridges by Tobo is covered "preconstruction" under section 1720(a)(1). Third, DLSE, joined by the International Brotherhood of Electrical Workers, Local 6 (IBEW), claims that the Department's longstanding approach of "exempting" offsite fabrication does not apply to the facts of this project since the fabrication was performed at a third party's shop, not Tobo's own permanent offsite manufacturing facility. According to DLSE and IBEW, applying the offsite fabrication "exemption" under this type of factual situation would allow Tobo to evade prevailing wage obligations by simply contracting to use a third party's facility and relocating work to that facility.[5]

Tobo argues that the Department has consistently held that only offsite fabrication which takes place at a temporary shop established specifically for a public works project is covered work and here, the work should not be covered since the offsite fabrication was performed at Tobo's longtime subcontractor's permanent shop 50 miles away from the project site. Tobo argues that Access Steel's shop was established long before the Project was even contemplated, and although the shop was inconveniently located, a determination was made that fabrication at Access Steel's shop would yield better quality bridges for the County. Tobo claims it was not attempting to evade prevailing wage laws.

The County did not submit a position statement.

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

[4] As authorized by section 1741, DLSE conducted an investigation and issued civil wage and penalty assessments against Tobo. In section 1742 proceedings to review the assessments, Tobo disputed coverage of the offsite fabrication under the prevailing wage law. Thereafter, the matter was referred for a coverage determination.

[5] DLSE also argues that Tobo is a general contractor and does not operate as a material supplier of pedestrian bridges. Because Tobo does not argue that it is exempt from coverage as a material supplier, there is no need to address this argument.

B. Section 1772 Does Not Independently Serve as a Basis for Requiring Prevailing Wages for Offsite Fabrication.

Section 1772 states that "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." For the past four decades, the interpretation of this section was based on the framework set forth by Court of Appeal decisions that work "integrated into the flow process of construction" was "in the execution" of a public works contract within the meaning of section 1772 and therefore "deemed" to be covered as public work. (*See O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434 (*Sansone*); *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742 (*Williams*); *Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192 (*Sheet Metal Workers*).)

This framework was expressly disapproved as unworkable by the California Supreme Court in *Mendoza v. Fonseca McElroy Grinding Co., Inc.* (2021) 11 Cal.5th 1118 (*Mendoza*). In answering the Ninth Circuit's question regarding whether mobilization work involving the transportation of heavy machinery to and from the public works site was covered under section 1772 as work performed "in the execution" of a public works contract, the Supreme Court found that section 1772 could not "independently serve as the basis for concluding that the prevailing wage must be paid for mobilization." (*Mendoza, supra,* 11 Cal.5th at p. 1141.)

The Supreme Court reasoned that based on the statutory language and legislative history, section 1772 was never intended to define or expand the categories of covered work to "activities that the Legislature has not otherwise defined as public work." (*Id.* at p. 1121.) Rather, the section was meant to "ensure that nongovernmental laborers were entitled to the prevailing wage whether they worked under a contract directly with a government entity, or under an agreement with a contractor or subcontractor awarded a public works contract." (*Id.* at p. 1126.)

In light of *Mendoza*'s holding, DLSE's argument that Tobo's offsite fabrication work at Access Steel's facility was performed "in the execution" of the public works contract and therefore a type of covered work under section 1772 must be rejected.

C. Offsite Fabrication Under the Facts of this Project is Not Covered Preconstruction Under Section 1720.

Although the *Mendoza* court was clear that section 1772 did not expand coverage to mobilization work, it was careful not to rule out the possibility that mobilization could be covered under "construction, street improvement work, or any other category of 'public works' defined in section 1720 et seq." (*Id*. at p. 1141, fn. 22.) DLSE makes the alternative argument that offsite fabrication is also covered "preconstruction" activity under section 1720(a)(1).

As an initial matter, the terms "construction" and "preconstruction" are not explicitly defined in section 1720. Arguably, "preconstruction phases of construction," in a general sense, could include the entire process of constructing something including the fabrication of materials used in "the action of framing, devising, or forming, by the putting

together of parts." (*City of Long Beach v. Dept. of Industrial Relations* (2004) 34 Cal.4th 942, 951, quoting the definition of "construction" from 3 Oxford English Dict. (2d ed. 1989) p. 794.)

Here, Tobo performed carpentry work in fabricating the pedestrian bridges, which would undoubtedly constitute "construction" if performed on the jobsite. Thus, to properly address DLSE's argument, the Department considers under what circumstances section 1720 extends to work performed away from the project site and to do so, the Department turns to the statutory framework as "words in a statute are not considered in isolation. They are construed in context, honoring the statutory purpose, and harmonizing statutes relating to the same subject to the extent possible." (*Busker v. Wabtec Corporation* (2021) 11 Cal.5th 1147 (*Busker*).)

It is well recognized that the "overall purpose of the prevailing wage law is to 'protect and benefit employees on public works projects.'" (*Busker, supra,* 11 Cal.5th at p. 1156, quoting *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985 (*Lusardi*).) Several specific goals are subsumed within this general objective, but one of the primary purposes is to "protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas." (*Lusardi, supra*, 1 Cal. 4th at p. 987.) In *Busker*, the Supreme Court addressed whether prevailing wage coverage extended to work performed on "rolling stock" like trains, cars, and locomotives.[6] In holding that section 1720 was generally restricted to fixed work on land, the Supreme Court reasoned that work on rolling stock could be "performed almost anywhere, then delivered to wherever it might be used" and thus, it was questionable whether the law's purpose would be served by "paying prevailing wages to workers that may be far away from the government entity paying for the work." (*Busker*, *supra*, 11 Cal.5th at p. 1167.) The Supreme Court also raised practical administrative concerns in determining what the relevant rates would be. (*Id.* at pp. 1167-1168.)

Similarly, fabrication can be performed anywhere in the world in various facilities. Accordingly, an expansive reading of section 1720 to cover all fabrication as "preconstruction" work whether onsite or offsite would not serve the prevailing wage law's purpose of protecting local labor markets. Moreover, as the *Busker* court identified, expanding the reach of the prevailing wage law to offsite facilities could frustrate the law's administration and adversely affect enforcement efforts.

The Supreme Court in *Mendoza* stated that it expressed "no view concerning whether California's prevailing wage law places a geographic limitation on coverage in relation to the public works site." (*Mendoza, supra*, 11 Cal.5th at p. 1138, fn. 19.) The prevailing wage law does, however, repeatedly make reference to "jobsite" or "site of the public work," suggesting that there is a distinction between work performed on the project site and work done elsewhere. For instance, section 1773.3 requires a public entity awarding a public works contract to provide notice of the project to the Department, including the project's "jobsite location." (§ 1773.3, subd. (a)(3).) The public entity must also post the applicable per diem prevailing wages "at each job site" (§ 1773.2), in addition to other "job site notices" required by regulation. (§ 1771.4, subd. (a)(2).) Section

[6] See *Busker*, *supra,* 11 Cal.5th at p. 1154, fn. 5.

1777.5, which governs the employment of apprentices on public works, makes several references to the "site of the public work." (§ 1777.5, subds. (d), (e), (f), (m)(1).) The public entity awarding the public work may not even be aware of work being performed 35, 50, or 1,000 miles away and it would not be able to notify the Department of those offsite locations nor post those required job site notices at those locations. Nor would local apprenticeship programs be equipped to dispatch apprentices to perform public work at far flung locales. The statute's focus on the "jobsite" or "site of the public work" is some indication that the Legislature intended to treat work performed offsite differently from work performed on the project site.

Although the Supreme Court disapproved *Sheet Metal Workers* to the extent it is inconsistent with *Mendoza*'s conclusion that section 1772 does not expand the scope of "public work," *Sheet Metal Workers,* as the only Court of Appeal decision that dealt with offsite fabrication, has some value here. *Sheet Metal Workers* chronicled the Department's consistent, longstanding approach to coverage of offsite fabrication and noted the Department's position that "the California legislature has long been aware of the industry custom and administrative interpretation [governing offsite fabrication], and has not seen fit to mandate coverage for offsite fabrication in permanent shops, despite numerous amendments to the [prevailing wage law] over the past quarter-century." (*Id*. at pp. 213-14, disapproved on other ground by *Mendoza, supra,* 11 Cal.5th at pp. 1135, 1139.) Because the "Legislature is in the best position to judge the effects of extending the prevailing wage law and has done so when appropriate," the Legislature's inaction was indicative of its unwillingness to expand coverage to offsite fabrication. (*Id.* at p. 214.)

As the *Busker* court put it, "[t]he application of the law will necessarily involve line-drawing exercises that distinguish between types of work that may be similar in many respects." (*Busker, supra,* 11 Cal.5th at p. 1167.) Mindful of the *Busker* court's refrain against an overly expansive reading of the prevailing wage law's reach, the Department finds that offsite fabrication under these specific factual circumstances is not covered preconstruction under section 1720.

D. Distinguishing Between Offsite Fabrication at a Subcontractor's Shop and a Contractor's Own Shop in Determining Coverage is Unworkable.

All parties agree that offsite fabrication by a contractor at a permanent, offsite manufacturing facility that is not exclusively dedicated to the public works project is not covered work.[7] However, DLSE, joined by IBEW, claims that the facts in question are distinguishable because Tobo performed fabrication at a third party's facility, not at Tobo's own permanent facility. According to DLSE and IBEW, the permanent offsite manufacturing facility has to be owned by the contractor or subcontractor whose employees perform the work in question. Since the facility was registered to Access Steel, but Tobo's own employees were conducting the fabrication work, the claim is that Tobo was attempting to evade prevailing wage laws by relocating work to a temporary offsite facility when the same could have been performed onsite.

[7] The parties submitted their position statements prior to the California Supreme Court disapproving *Sheet Metal Workers* in *Mendoza*.

This argument is rejected because the line drawn by DLSE and IBEW would lead to confusion rather than clarity. Here, Tobo's own offsite facility was located in the City of Torrance, approximately 35 miles from the project site. According to DLSE and IBEW's argument, had Tobo fabricated the bridges at Tobo's own site, the fabrication work would be exempt, but since Tobo decided to complete fabrication at the steel fabricator's facility much further away from the project site, Tobo was evading prevailing wage laws. As can be seen, this distinction is unworkable.

There is no dispute that both Tobo and Access Steel had permanent offsite facilities. Despite Access Steel's facility being 50 miles away from the project site, Tobo determined that full fabrication of the bridges at Access Steel's shop according to the District's specifications would increase the quality of the product. This was because the bridges consisted of both steel and wood components with Access Steel having the expertise to fabricate steel and with Tobo working on the wood components. DLSE and IBEW are correct that there could be situations where a contractor borrows a facility for a short period of time just to avoid paying prevailing wages, but that is not what happened here. Tobo and Access Steel each worked in conjunction to fabricate the bridges for the Project: Tobo performed carpentry work by attaching the wood components onto the steel frames that Access Steel fabricated. The mere fact that Tobo worked alongside Access Steel at Access Steel's facility does not otherwise turn this permanent facility into a temporary facility specifically established for the Project.

"Parties must be able to predict the public-works consequences of their actions under reasonably precise criteria and clear precedent." (*McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1593, superseded by statute on another ground as stated in *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 307.) An amorphous standard like the one suggested by DLSE and IBEW "could hardly be described as workable." (*Mendoza, supra,* 11 Cal.5th at p. 1139.) For these reasons, their argument that coverage should depend *solely* on whether fabrication was conducted at a subcontractor's offsite facility or at the contractor's own fabrication facility, without considering the underlying factual circumstances, is unconvincing.

Conclusion

For the foregoing reasons, the offsite fabrication of pedestrian bridges by Tobo Construction, Inc. for the Glassell Yard Campus stormwater low impact development retrofit project is not subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Katrina S. Hagen
Director of Industrial Relations