

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050



May 28, 2008

Chad T. Wishchuk, Esq.
Marks, Golia & Finch, LLP.
3900 Harney Street, First Floor
San Diego, CA 92110-2825

Re: Public Works Case No. 2008-008
Sunset Garden Apartments, Imperial Valley Housing Authority

Dear Mr. Wishchuk:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced work under California's prevailing wage laws and is made pursuant to 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 off-site manufacture of components such as trusses and wall panels for the construction of the Sunset Garden Apartments ("Project") is not subject to prevailing wage requirements. The hauling of such components from the factory to the Project site by employees of a subcontractor, however, is subject to prevailing wage requirements.

Facts

The Project entails the construction of multifamily housing in the community of Heber in Imperial County, California. The awarding body, Imperial Valley Housing Authority ("Authority") contracted with Erickson-Hall Construction Co. ("Erickson") to construct the apartments. Erickson, as general contractor, subcontracted with HNR Framing Systems, Inc. ("HNR") to perform certain construction work, including providing and installing prefabricated roof trusses, prefabricated wood joist systems, and factory-glued structural units. These components are to be manufactured by TWF Construction, Inc. ("TWF") at its factory in Indio, California. The components will then be hauled to the Project site by truck drivers employed by HNR.

HNR and TWF are related companies, in that both are owned by SelectBuild Construction, Inc., ("SelectBuild") a subsidiary of Building Materials Holding Corporation, but are separate legal entities. TWF's Indio factory was not established for this Project and will not close upon completion of the Project. It has been in operation for many years, and manufactures trusses, wall panels and other components for sale not only to SelectBuild companies, but also to large home builders and other unrelated contractors.

Discussion

Labor Code section 1720(a)(1)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” It is undisputed that the Project is a public work within this definition.

Section 1771 provides:

Except for public works projects of one thousand dollars (\$1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This 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.

Section 1772 provides that: “Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.” Section 1774 provides that: “The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.”

The statutory term “execution” recently was interpreted by the First District Court of Appeal in *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, 749-750:

In determining legislative intent, courts are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. [Citations and quotation marks omitted.] The familiar meaning of “execution” is “the action of carrying into effect (a plan, design, purpose, command, decree, task, etc.); accomplishment” (5 Oxford English Dict. (2d ed.1989) p. 521); “the act of carrying out or putting into effect,” (Black's Law Dict. (8th ed.2004) p. 405, col. 1); “the act of carrying out fully or putting completely into effect, doing what is provided or required.” (Webster's 10th New Collegiate Dict. (2001) p. 405.) Therefore, the use of “execution” in the phrase “in the execution of any contract for public work,” plainly means the carrying out and completion of all provisions of the contract.

The analysis in *O.G. Sansone Co. v. Department of Transportation* [1976] 55 Cal.App.3d 434, 127 Cal.Rptr. 799 (*Sansone*) of who is, and who is not, a subcontractor obligated to comply with the state's prevailing wage law also

¹Subsequent statutory references are to the Labor Code unless otherwise indicated.

informs our assessment of the intended reach of the prevailing wage law to “[w]orkers employed ... in the execution of any contract for public work.” (§ 1772.)

Williams and *Sansone* recognized an exemption for material suppliers, basing their analyses in part on a federal case that applied to truck drivers the criteria for distinguishing material suppliers from subcontractors for purposes of federal prevailing wage coverage. As stated in *Sansone*, 55 Cal.App.3d at p. 442:

In *H. B. Zachry Company v. United States* (1965) 344 F.2d 352 [170 Ct.Cl. 115], the federal court considered whether a trucking company was a subcontractor under the provisions of the Davis-Bacon Act (40 U.S.C. §§ 276a to 276a-7), the federal prevailing wage statute. In *Zachry* the plaintiff was the prime contractor for the United States with respect to two construction projects at Holloman Air Force Base. ... To perform the contracts plaintiff had to acquire certain materials including “base material, concrete aggregate, hot mix and sand.” It is stated in the court's opinion that these materials were “standard commercial materials and were not specially designed for this project.” (344 F.2d at p. 354.) Since local suppliers of these materials were unable to make delivery, plaintiff contracted with Glover Distributing Company to transport the materials to the project site. ... Glover contracted with other truck owners to supply all the necessary transportation to complete the performance of its contract. In determining whether Glover was a subcontractor under the Davis-Bacon Act, the court looked to the administrative interpretations of the statute by the Secretary of Labor. The court noted (344 F.2d at p. 359): “Beginning as early as 1942 [fn. omitted], the Solicitor [of the Department of Labor] has excluded from statutory coverage the employees of bona fide materialmen who sell to a contractor engaged in construction contracts covered by the Davis-Bacon Act. The exemption has been qualified to the extent that the materialman must be selling supplies to the general public, the plant must not be established specially for the particular contract, and the plant is not located at the site of the work. [Fn. omitted.] The Solicitor has always held that truck drivers employed by materialmen (exempt from statutory coverage) to transport supplies to the jobsite are no more subject to the provisions of the Davis-Bacon Act and the Eight-Hour Laws than are other employees of the materialmen. [Fn. omitted.]”

The exemption for material suppliers also applies under California law because by its terms, section 1772 requires prevailing wages only for “[w]orkers employed by contractors or subcontractors in the execution of any contract for public work” (Emphasis supplied.) Applying the *Zachry* analysis, *Sansone* held that the on-hauling of aggregate subbase materials for highway construction was subject to prevailing wage requirements where the materials did not come from an established independent material supplier, but rather “from locations not on the project site but located adjacent to and established exclusively to serve the project pursuant to private borrow agreements between plaintiffs and third parties.” *Id.* at pp. 439, 445.

Here, in contrast, the manufacturing work was done not at a dedicated site, but rather at a permanent, general use, off-site facility. Thus, TFW is a material supplier under *Sansone* and *Williams*.

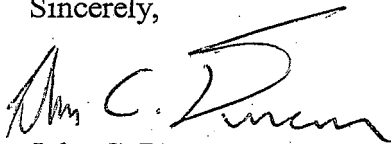
With regard to the hauling of the manufactured components from the factory to the Project site, there is a general rule that workers employed in the execution of a public works contract by a construction contractor or subcontractor are entitled to the payment of prevailing wages. *Sansone*, as interpreted by *Williams*, establishes a "delivery exemption" for truck drivers employed by entities other than the on-site construction contractors who do not perform work "in the execution of the contract." (*Ibid*, 156 Cal.App.4th at p. 752.)

Here such is not the case. The drivers are employed not by an independent trucking company, but rather by an on-site construction subcontractor. The "delivery exemption" therefore does not apply.

For the foregoing reasons, the off-site manufacture of building components by TWF is not subject to the prevailing wage requirements of the California Labor Code, but the hauling of these components to the Project site by employees of HNR is subject to such prevailing wage requirements.

I hope this letter satisfactorily responds to your inquiry.

Sincerely,



John C. Duncan
Director