

FORT ORD REUSE AUTHORITY BOARD REPORT		
BUSINESS ITEMS		
Subject:	Prevailing Wage Compliance Update	
Meeting Date:	December 8, 2017	INFORMATION/ACTION
Agenda Number:	8b	

RECOMMENDATION(S):

Receive a Fort Ord Reuse Authority (FORA) prevailing wage compliance report providing information requested at the November 17, 2017 FORA Board of Directors meeting.

BACKGROUND/DISCUSSION:

At the November 17, 2017 Board meeting, comments were made about the nature and extent of civil wage and penalty assessments (CWPA's) upon numerous Fort Ord projects by the Department of Industrial Relations (DIR). This Board might recall that it directed FORA's Executive Officer and staff to meet with DIR Deputy Commissioner to seek clarification of the California Labor Laws/public works revision (SB854) and other recent changes in California Labor Laws as it may pertain to construction projects on the former Fort Ord. Since March 2016, the DIR has begun review of information and prior decisions regarding the applicability of California Labor Laws/public works laws to projects being built on Fort Ord, resulting in an interpretation that Fort Ord projects are considered a public work to be regulated by the state. The below listed CWPA's were imposed after the DIR's shift in its interpretation (2016) about the application of public works laws to Fort Ord projects. CWPA's are no longer accessible on the DIR's web page and requests to them for an exhaustive list have gone unanswered. These are the following formal CWPA's that have been provided to FORA.

The Dunes – Sea House	Prosiding, Inc.	\$1,826,297.64
Springhill Suites	Covenant Construction	\$ 769,590.75
Promontory	Garcia Flooring	\$13,334.37
	Ross Masonry	\$94,398.85
	RC Flooring	\$139,332.00
Heritage at East Garrison	CVC Construction	\$19,544.88

It should be noted that the East Garrison project has a County applied wage assessment in the amount of \$86,033.66 (ACS) imposed as a result of their auditing and monitoring of the East Garrison project.

Historically, there have been multiple issues related to payment of fringe benefits (e.g. Santa Cruz Plumbers) or the failure to comply with apprentice utilization requirements. However, many of these compliance issues occurred prior to state law changes that expanded what constitutes a public work and shifted enforcement from local jurisdictions to the state.

The legal and advocacy efforts of the Monterey/Santa Cruz Counties Building & Construction Trades Council (M/SC BCTC) (and others) in the traditional pursuit of workers' rights to wages and benefits, resulted in multiple lawsuits being filed including Monterey/Santa Cruz BC. Trades Council v. Cypress Marina Heights LP (2011) 191 Cal. App. 4th 1500; Monterey/Santa Cruz BCTC, et al. v. MCP, Shea Properties, et al. Monterey Superior Court M81343 (2008)

[Settlement Agreement]. Additionally, there are a number of lawsuits pending between individual employees and contractors.

It is important to point out that the Department of Industrial Relations has not admonished, penalized or assessed any public agency with lands on Fort Ord for failure to monitor or pay prevailing wages.

ISSUES:

Please note this is not an exhaustive list of issues, and may need future interpretation by DIR and/or assistance from the legislative offices in addressing these issues. FORA staff is not requesting Board action on any one of these issues at this time, but provide these as a basis for future discussion and direction.

Reporting and Access to Information. As was noted in public comment at the Board hearing on November 17, 2017, your prevailing wage report is only as good as the currency and accuracy of the information reported. This Board approved acquisition of software for use by the jurisdictions on their Fort Ord projects (and other projects) to aid in compliance efforts and to provide a base of information about the utilization of the local workforce. Although jurisdictions have “signed” up they do not require projects within their jurisdictions to utilize the Elation software provided by FORA or authorize access to their reported information. As a result, our Board reports are based upon reporting parties (governmental and contractors/project developers) responding to FORA staff requests. Some do not report. Currently, there is no labor code provision which provides FORA with the same standing as a labor union to receive copies of information from the DIR such as certified payroll or special notices to information.

The threshold issue is whether a project is a “public work” as Labor Code section 1720, subdivisions (a) and (b) uses that term. FORA contends that certain projects, if not all development projects, are “public works.” However, the DIR has yet to make that determination across the former Fort Ord. If a project is a public work, there are three classes of persons entitled to inspect payroll records under Labor Code section 1776.

- First, the employee or employee’s representative can inspect the documents. FORA is not the employee or the employee’s representative.
- Second, the DIR or the “body awarding the contract” can inspect documents. FORA is not the DIR and is not a party to the development or construction contracts.
- Third, any member of the public can inspect the employment documents. However, records produced to the public must be redacted and may therefore be less useful and are difficult in the accessed form to interpret. In fact, there are now so many eCPR records that unless a public member knows enough specific information about a project, they are not able to be accessed through DIRs web page access.

Currently, the DIR does not identify the jurisdiction entering into a Development and/or Disposition Agreement as the “body awarding the contract.” Which hinders the ability of FORA and the member jurisdictions from obtaining documents pursuant to the Labor Code.

Additionally, there is some issue or confusion about the authorization of FORA to enforce prevailing wages given the language of the Authority Act. Authority Counsel has opined that

FORA's ability to enforce is limited solely to consistency determinations. On the other hand, there is language in the Authority Act (GC 67684) which indicates FORA may take action to ensure rapid and successful conversion of the area in a way that provides maximum benefits to the communities of the Monterey Bay.

Requirement for Jurisdictions to Monitor Prevailing Wage/Public Works Compliance.

The Cities of Marina, Seaside, Del Rey Oaks, Monterey and the County of Monterey are required by the terms of the FORA Master Resolution to comply with the FORA Prevailing Wage provisions. The FORA Prevailing Wage compliance provisions are specifically referenced in each and every land use and project level entitlement Fort Ord Reuse Authority Base Reuse Plan consistency determination. Currently, the DIR does not identify the jurisdiction entering into a Development and/or Disposition Agreement as the "body awarding the contract." Instead, DIR relies upon the master developer and/or subsequent contractor building a project to be the awarding body. This has perpetuated ongoing issues as to prevailing wage enforcement and monitoring by member jurisdictions and FORA.

Interpretation of new legislation and application to projects at Fort Ord

The FORA Board adopted an amendment to the Master Resolution on Friday January 8, 2016 that adds a requirement that all contractors register with DIR. Additionally, 2017 legislation expands DIRs enforcement authority for local jurisdictions and awarding bodies that do not comply with the new requirements.

DIR's interpretation of traditional public works rules and administrative interpretations to the unique construction activities at Fort Ord.

DIR presented a training on public works rules and their application in September 2017. However, some questions which were presented to DIR were unable to be answered because the presenters did not authority to answer questions. Attached as Exhibit A are some of the questions which were presented to the DIR prior to the training. To date, these questions have not been answered by DIR.


FUTRE ACTIONS:

Staff anticipates that assistance from Senator Monning's office and others will be able to produce responses from DIR on these issues above that will further inform this process and Board deliberations. Therefore, staff requests that the Board/Executive Committee provide direction and support for scheduling an in-depth update in these PW issues early in 2018.

FISCAL IMPACT:

Reviewed by FORA Controller 

Staff time for this item is included in the approved annual budget.

Prepared by 
Sheri Damon

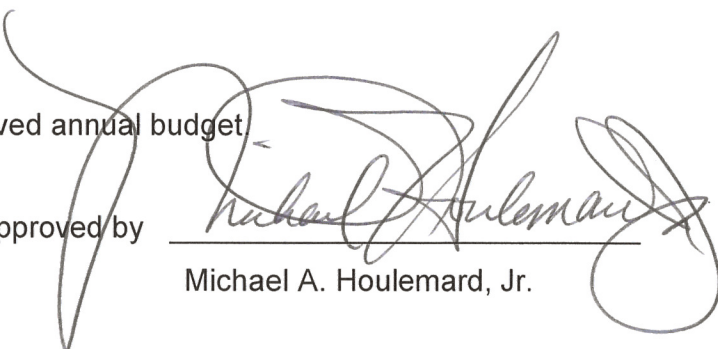
Approved by 
Michael A. Houlemard, Jr.

EXHIBIT A

FORA specific questions to California Department of Industrial Relations

1. How will the Department of Industrial Relations (“DIR”) define “awarding body?”

To date the Fort Ord Reuse Authority (“FORA”) has assumed that an awarding body is the entity that enters a contract for a development or other project that qualifies as a public work. At times that is also the project owner.

On Fort Ord, as has been on the case elsewhere, a Master Developer enters a contract with the individual jurisdiction that governs implementation of a multi-year project (20-years). In most cases, the Master Developer has been supported by an individual jurisdiction or by FORA under terms requiring payment of Prevailing Wages. Subsequently, the Master Developer uses private money to develop plans and maps and subsequently sells property to other project level developers or contractor/owners who use private money to purchase said property and construct projects.

- Who is considered the Awarding Body?
- How long do the public works rules apply?
- Is each individual project treated as a new public works project?

If a Developer uses only private money and takes possession of property only after roads and other public improvements have been made, is his construction project still considered a public works? What is the best way to minimize the risk that a project will be considered a public work after construction/project has started?

2. Do workers on a project after and during the period that a stop work order is issued continue to be paid?

3. If a private entity is considered the awarding body, does the Department take any enforcement or other action to the jurisdiction authorizing such project?

4. If a Project Owner is in doubt about paying prevailing wage, what are best practices to minimize compliance risk?

5. If a jurisdiction sells land under terms that recognize value impacts of prevailing wage, does the jurisdiction have responsibility to monitor compliance with Prevailing Wage compliance?

6. Who can report labor compliance problems, and how much discretion does DIR have where a contractor/developer self-reported and corrected a PW violation?

7. Are there common problems you see reported on Fort Ord projects and are there best practices to address those types of issues?