

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
Bureau of Field Enforcement - Public Works
2031 Howe Avenue, Suite 100
Sacramento, California 95825



November 6, 2015

Fort Ord Reuse Authority
Attention: Michael A. Houlemard, Jr., Executive Officer
920 2nd Avenue, Suite A
Marina, California 93933

Re: Request for Determination of SB 854 Applicability to FORA Projects

Dear Mr. Houlemard,

I have attached my responses to your questions pursuant to your July 10, 2015 letter addressed to Gary O'Mara, Department of Industrial Relations' attorney. These written answers are consistent or our answers we provided during our June 26, 2015 teleconference.

Thank you for your interest in California Labor Code and specifically the public works statutes.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric Rood".

Eric Rood
Assistant State Labor Commissioner

cc: Gary O'Mara

Enclosure(s)

Questions for Eric Rood, Assistant Labor Commissioner

1. In review of the recently enacted SB 854, Fort Ord Reuse Authority (FORA) staff noted that SB 854 encompasses public works projects, as specified, to be paid the general prevailing wage as determined by the Director of the Department of Industrial Relations (DIR). In reviewing the FORA Master Resolution prevailing wage provisions, First Generation Construction on the former Fort Ord is required, by FORA covenant, to pay not less than general prevailing rate of wages as determined by the Director of DIR. FORA's prevailing wage provisions define First Generation Construction projects as public works projects subject to SB 845. Does DIR agree with this determination?

Answer: SB 854 did not expand the definition of public works. It does require all contractors has defined in Labor Code section 1722.1, to register, pay a \$300 fiscal annual fee and be of good legal standing in order to perform public works.

Labor Code section 1722.1 defines a contractor as:

For the purposes of this chapter, "contractor" and "subcontractor" include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works pursuant to this article and Article 2 (commencing with Section 1770).

In short, a contractor/vendor who is subject to public works laws as defined in Labor Code sections 1720 through 1861, would be required to register.

Labor Code section 1720(a)(1) defines what comprises a public works. It states:

(a) As used in this chapter, "public works" means:

(1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph, "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, including, but not limited to, all cleanup work at the jobsite. For purposes of this paragraph, "installation" includes, but is not limited to, the assembly and disassembly of freestanding and affixed modular office systems. [emphasis added]

In addition, for the project to be defined as a public work there must be construction, alteration, demolition or repair work, and the project must contain public funds. Labor Code section 1720(b) further defines public funds to include:

(b) For purposes of this section, "paid for in whole or in part out of public funds" means all of the following:

(1) The 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.

(2) Performance of construction work by the state or political subdivision in execution of the project.

(3) Transfer by the state or political subdivision of an asset of value for less than fair market price.

(4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, 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.

(5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis.

(6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision.

Labor Code section 1771 brings in the term maintenance to be included in a public work and sets a minimum dollar threshold for projects over \$1,000. Section 1771 states:

*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.***

The general rule to determine if a project is subject to public works is:

- Is the project construction, alteration, demolition, installation, repair or maintenance work;
- Is the project paid out by public funds;
- Is the project over \$1,000

In our previous telephonic discussions, you have confirmed that First Generation Projects have public funds and are construction projects over \$1,000. As such, there would be a statutory obligation to treat these projects as a public works and ensure all contractors performing this work were subject to the public works statutes (Labor Code sections 1720-1861), which would include contractor registration.¹

Please note that if the Federal government is administering any FORA projects, this could change the determination. If there are federal administrated projects, you should make a request to the DIR's Director's Legal Unit for a determination.²

If a state agency or private developer is overseeing a construction project where there is public monies; the project would more than likely be subject to California public works labor laws.

Please note FORA can provide stricter contractual obligations for private work where there are no public funds. This may include requiring contractor registration, filing CPRs, and paying prevailing wages; however, any enforcement would have to go through the courts as a breach of contract.

2. Does FORA need to follow a formal process for DIR to consider whether or not FORA is subject to SB 854?

Answer: In most instances, you will not need to request a formal determination to DIR's Office of the Director's (OD) Legal Unit. In most instances, formal determinations are made when there is controversy on what comprises public funds. Section 1720(b) of the

¹ Please note that in *Monterey/Santa Cruz County Bldg. and Const. Trades Council v. Cypress Marina Heights LP* (2011) 191 Cal.App.4th 1500. In that case, the developer bought the land (at FMV) from FORA and argued that it did not have to pay prevailing wages, because there was no public money and the purchase agreement did not specify that prevailing wages were required on the construction. The local building trades brought suit and won. Court found that FORA's Master Resolution (requiring prevailing wages) and deed covenants (also requiring prevailing wages) applied to downstream government entities and developers, even on non-public works projects, as it was a contractual requirement to pay prevailing wages that ran with the land. So, it is DIR's understanding that the prevailing wage requirements apply to both public and private projects under the FORA Master Resolution are subject to prevailing wage projects. Only those projects that are statutory public works can be enforced by DLSE.

² See also *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 Cal.App.4th 873.

Labor Code which I provided in the last answer, is the statute to determine if a project contains public funds.

Labor Code section 1720(b), reproduced above, defines public funds.

3. If yes, to whom should FORA address its request for a determination?

Answer: There are two types of determinations: (1) a request for a craft/classification wage rate and (2) a coverage determination to determine if a project is subject to public works laws. A written **request for a wage rate** should be sent to the following address:

DIR- Office of Policy, Research and Legislation
455 Golden Gate Boulevard, 9th Floor
San Francisco, California 94102

You may also send an email to DIR at statistics@dir.ca.gov.

A formal **request for a coverage determination** should be in writing and sent to the following address:

DIR- Office of the Director
Attention: Legal Unit
1515 Clay Street, 7th Floor
Oakland, California 94612

Labor Code section 1773.4 and 1773.5 provides the legal mechanisms to request a determination for wage rates under section 1773.4, and to determine if a project is subject to public works under section 1773.5.

Section 1773.4 and 1773.5 state:

Labor Code 1773.4.

Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body may, within 20 days after commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code. Within two days thereafter, a copy of

such petition shall be filed with the awarding body. The petition shall set forth the facts upon which it is based. The Director of Industrial Relations or his authorized representative shall, upon notice to the petitioner, the awarding body and such other persons as he deems proper, including the recognized collective bargaining representatives for the particular crafts, classifications or types of work involved, institute an investigation or hold a hearing. Within 20 days after the filing of such petition, or within such longer period as agreed upon by the director, the awarding body, and all the interested parties, he shall make a determination and transmit the same in writing to the awarding body and to the interested parties.

Such determination shall be final and shall be the determination of the awarding body. Upon receipt by it of the notice of the filing of such petition the body awarding the contract or authorizing the public work shall extend the closing date for the submission of bids or the starting of work until five days after the determination of the general prevailing rates of per diem wages pursuant to this section.

Upon the filing of any such petition, notice thereof shall be set forth in the next and all subsequent publications by the awarding body of the call for bids. No other notice need be given to bidders by the awarding body by publication or otherwise. The determination of the director shall be included in the contract.

Labor Code section 1773.5:

(a) The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter.

(b) When a request is made to the director for a determination of whether a specific project or type of work awarded or undertaken by a political subdivision is a public work, he or she shall make that determination within 60 days receipt of the last notice of support or opposition from any interested party relating to that project or type of work that was not unreasonably delayed, as determined by the director. If the director deems that the complexity of the request requires additional time to make that determination, the director may have up to an additional 60 days if he or she certifies in writing to the requestor, and any interested party, the reasons for the extension. If the requestor is not a political subdivision, the requester shall, within 15 days of the request, serve a copy of the request upon the political subdivision, in which event the political subdivision shall, within 30 days of its receipt, advise the director of its position regarding the request. For projects or types of work that are otherwise private development projects receiving public funds, as specified in subdivision (b) of Section 1720, the director shall determine whether a specific project or type of work is a public work within 120 days of receipt of the last notice of support or opposition relating to that project or type of work from any interested party that was not unreasonably delayed, as determined by the director.

(c) If an administrative appeal of the director's determination is made, it shall be made within 30 days of the date of the determination. The director shall issue a determination

on the administrative appeal within 120 days after receipt of the last notice of support or opposition relating to that appeal from any interested party that was not unreasonably delayed, as determined by the director. The director may have up to an additional 60 days if he or she certifies in writing to the party requesting the appeal the reason for the extension.

(d) The director shall have quasi-legislative authority to determine coverage of projects or types of work under the prevailing wage laws of this chapter. A final determination on any administrative appeal is subject to judicial review pursuant to Section 1085 of the Code of Civil Procedure. These determinations, and any determinations relating to the general prevailing rate of per diem wages and the general prevailing rate for holiday, shift rate, and overtime work, shall be exempt from the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

4. If subject to SB 854, FORA staff would continue to monitor prevailing wage compliance on former Fort Ord. How would FORA staff access online prevailing wage compliance information in the future?

Answer: For all projects awarded on or after April 1, 2015, contractors are required to directly enter their certified payroll data directly to the DIR online CPR or to upload their data using an xml upload. Today, all certified payroll records are available on our website at <https://efiling.dir.ca.gov/eCPR/pages/search>. The records today are fully redacted and do not provide the public with the employee's name, address and social security number. All other CPR data is available.

Awarding bodies will be required to provide DIR notice of its public works project in our PWC 100 at <https://www.dir.ca.gov/pwc100ext/LoginPage.aspx>. Labor Code section 1773.3 states:

*(a) (1) An awarding agency shall provide notice to the Department of Industrial Relations of any public works contract subject to the requirements of this chapter, **within five days of the award.***

(2) The notice shall be transmitted electronically in a format specified by the department and shall include the name of the contractor, any subcontractor listed on the successful bid, the bid and contract award dates, the contract amount, the estimated start and completion dates, job site location, and any additional information the department specifies that aids in the administration and enforcement of this chapter.

(c) *In lieu of responding to any specific request for contract award information, the department may make the information provided by awarding bodies pursuant to this section available for public review on its Internet Web site. [Emphasis added]*

An awarding body is defined in the Labor Code under section 1722, which states:

“Awarding body” or “body awarding the contract” means department, board, authority, officer or agent awarding a contract for public work.

Awarding bodies should have language within its bid and/or contract documents the specific Labor requiring the contractor to be registered pursuant to Labor Code section 1771.1(a), as well as, the following Labor Code sections: 1720, 1771, 1772-1776 and 1810-1815. In addition, the contractor should be advised apprenticeship laws apply if the project is over \$30,000 pursuant to Labor Code section 1777.5.

Please note, contractors can only provide DIR certified payroll data if the awarding body has provided DIR notice of the project using our PWC 100 online notification. The PWC 100 will generate a unique DIR project ID number, which the contractor can use to submit certified payroll data.

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DIVISION OF LABOR STANDARDS ENFORCEMENT
2031 Howe Ave, Suite 100
Sacramento, CA 95825
Phone: (916) 928-2742
Fax: (916) 263-2853



March 9, 2016

Ms. Jane Haines
601 Ocean View Boulevard, Apt. #1
Pacific Grove, California 93950

Dear Dr. Haines:

I am in receipt of your letter dated February 17, 2016, regarding whether certain first generation projects are subject to the public works provisions for the Fort Ord Reuse Authority (FORA). Specifically, you reference in your letter the February 12th FORA Board report which states:

“It is staff’s interpretation that, since FORA and the jurisdictions accept reduced land sales revenue from nearly every historical Fort Ord private sector project (based on the economic analysis performed by the jurisdictions that assess costs of FORA mitigation fees, building removal, prevailing wage, and other costs) individual development projects may qualify as a public work.”

Ultimately, the Department of Industrial Relations’ (DIR) Director determines if projects are subject to public works laws and the Labor Commissioner’s office enforces the public works laws if necessary.

In determining if a project is subject to public works, DIR establishes that the work is construction, alteration, demolition, installation, repair or maintenance work; the cost is over \$1,000 and contains a public fund (Labor Code sections 1720 and 1771).

In our meetings with FORA representatives, DIR determined that FORA land transfers are below the fair market value to the local jurisdictions creating a public benefit equating to public funds. In addition, any public benefit received with second generation contracts could also trigger public works laws.

In reviewing these FORA cases with DIR attorneys, the only missing element was determining if the first generation construction projects received public funding. If the answer is yes, then the public works statutes apply. Conversely, if there were no public funding/benefit, public works laws would not apply.

In the instant matter, the contract amount has been significantly reduced because the land may be valued at \$20 million dollars, but the land is being transferred to the local jurisdictions at \$5 million. The local jurisdictions are then passing on these cost savings to private developers at reduced costs. In

this scenario, public funds would apply. Please note, FORA could still require local agencies to pay prevailing wages on a contractual basis even if there was no public fund triggers. The Labor Commissioner's office would not enforce those contractual obligations; however, there would be nothing unlawful to require contractors to be registered with DIR, be in good legal standing and to pay prevailing wages.

Please let me know if you have any follow up questions.

Best Regards,

A handwritten signature in black ink, appearing to read 'ERood', written in a cursive style.

Eric Rood
Assistant State Labor Commissioner

cc: Julie A. Su, State Labor Commissioner
Gary O'Mara, Office of the Director Attorney
Michael Houlemard, FORA Chief Executive Officer