

Prevailing Wage Not Required for Permanent Offsite Fabricators

Recently, a California Appellate Court held in *Sheet Metal Workers International Association, Local 104 v. Duncan (Russ Will Mechanical, Inc.)* (August 27, 2014) that a subcontractor who fabricates materials for a public works project at a permanent, offsite manufacturing facility that is not exclusively dedicated to the project is not required to pay prevailing wages to his employees at the offsite facility even if they are specially fabricating materials for the public works project.

This case of first impression is significant because it not only validates a number of the Department of Industrial Relations' ("department") coverage determinations concluding that offsite fabrication for public works projects is not subject to prevailing wage requirements, but goes a step further by establishing that subcontractors need not sell materials they fabricate to the general public—a requirement for material supplier exemption under the prevailing wage laws—to avoid paying their offsite fabricators local prevailing wages.

Discussion of Sheet Metal Workers International Association, Local 104 v. Duncan (Russ Will Mechanical, Inc.)

Russ Will Mechanical, Inc. (Russ Will) was the HVAC subcontractor for the modernization of an administration building at a community college in Santa Clara County. The subcontract required Russ Will to pay not less than the applicable prevailing wage to all laborers, workmen, and mechanics employed by him in the execution of the work at the project site. For many years leading up to its involvement on the project, Russ Will had been fabricating materials at its permanent, offsite facility in Hayward for various private and public projects. Russ Will did not sell materials it fabricated to the general public.

An employee at Russ Will's Hayward facility who fabricated sheet metal ducts, flashing, square rounds, and fittings for the project filed a complaint with the Department of Industrial Relations, Department of Labor Standards Enforcement (DLSE) alleging that he should have been paid prevailing wages for his work related to the project. The DLSE issued a civil wage and penalty assessment against Russ Will for failing to pay prevailing wages. In response to Russ Will's request for review, the Department of

Industrial Relations (department) issued a coverage determination concluding that the DLSE's assessment was proper because Russ Will did not sell supplies to the general public, a requirement for material supplier exemption under the prevailing wage law.

On administrative appeal, the department reversed its decision, reasoning that consistent with federal regulations (there was no directly applicable California case law), although Russ Will did not qualify for the material supplier exemption, prevailing wages nevertheless did not apply because the project had no bearing on the existence or location of the facility. Sheet Metal Workers' International Association, Local 104 (Local 104) filed a petition for a writ of mandate in the superior court, arguing that the work should have been covered by the prevailing wage law because fabrication of customized sheet metal items in accordance with specifications "was an integral part of the project and was performed in the execution of a public works contract" pursuant to Labor Code sections 1772 and 1774. The superior court granted the writ, reasoning that the department "applied an incorrect legal standard by relying exclusively on federal law," and asserted that the correct standard is set forth in *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742. Russ Will appealed.

The appellate court agreed with Russ Will's contention that Local 104's interpretation of "in the execution of" in sections 1772 and 1774 was overly expansive, stating that focusing exclusively on this language would lead to potentially broader application of the prevailing wage law than the Legislature intended. The appellate court disagreed with Local 104's contention that the prevailing wage law contains no geographical restriction and explained that a reasonable interpretation of select provisions of the Labor Code suggests that prevailing wages apply to "the site of the public works project and not any site, wherever located, at which a worker is employed in the execution of some aspect of the public works contract." Notwithstanding its interpretation of the select provisions, the court concluded that the Legislature's intent regarding geographical limitations was ambiguous.

To resolve the ambiguity, the appellate court gave great weight to the department's consistent coverage determinations dating as far back as 1984 concluding that offsite fabrication performed at permanent facilities is not subject to prevailing wage requirements. The court was persuaded by the department's arguments that extending coverage to offsite fabrication would not significantly protect local labor markets and that expanding the prevailing wage law to apply to potentially distant fabrication facilities would "frustrate the law's administration and adversely affect enforcement." The court conceded that the department's prior determinations turn on the application of the material supplier exemption and do not address the specific issue of whether an employer that does not sell supplies to the general public (one of the three requirements of the material supplier exemption) is covered by the prevailing wage law. However, the court reasoned that there is no valid basis for distinguishing between offsite facilities that meet all the requirements of the exemption and offsite facilities that meet all but the sale of supplies to the public requirement. In reaching its holding in favor of the subcontractor, the appellate court praised the department's position for providing certainty and clarity, and sharply criticized the material supplier exemption standard for creating confusion and uncertainty.

What Does This Mean?

This decision makes clear that subcontractors are not required to pay prevailing wages to their employees who perform work related to public works projects at permanent fabrication facilities. Although the case could be appealed to the California Supreme Court, it seems unlikely that any reasonable basis would be found for requiring prevailing wages to be paid to employees of offsite fabricators simply because the fabricated items are not sold to the public.

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