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OPINION	:	No. 99-804
	:	
of	:	October 23, 2000
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THE HONORABLE JACK O'CONNELL, MEMBER OF THE STATE SENATE,
has requested an opinion on the following question:

Was the California Department of Transportation the “awarding body” for purposes of the prevailing wage law with respect to a contract executed by Amtrak and a private contractor for construction of a passenger rail station on property leased by Amtrak and owned by a private railroad company where the project was funded by a grant from the department awarded under provisions of the Clean Air and Transportation Improvement Act of 1990?

CONCLUSION

Under the circumstances presented, the California Department of Transportation was not the “awarding body” for purposes of the prevailing wage law with respect to a contract executed by Amtrak and a private contractor to construct a passenger rail station on property leased by Amtrak and owned by a private railroad company where the project was funded by a grant from the department awarded under provisions of the Clean Air and Transportation Improvement Act of 1990.

ANALYSIS

On June 5, 1990, the voters of the state approved Proposition 116, the Clean Air and Transportation Improvement Act of 1990 (Pub. Util. Code, §§ 99600-99696; “Act”), authorizing the funding of rail transportation projects from the proceeds of state general obligation bonds issued and sold under the Act’s provisions. We are asked whether the California Department of Transportation (“Department”) was the “awarding body” for purposes of the prevailing wage law (Lab. Code, §§ 1720-1780) with respect to a construction contract executed by the National Railroad Passenger Corporation (“Amtrak”) and a private contractor for construction of a passenger rail station on property leased by Amtrak and owned by a private railroad company. We conclude that the Department was not the “awarding body” of the contract, although it funded the project under the Act’s provisions.

Examining first the requirements of the prevailing wage law, we note that the Legislature generally requires “prevailing wages” to be paid to those who are employed on “public works” that are performed by a private contractor and paid for in whole or in part with public funds. “The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects.” (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985; see generally *Universities Research Assn. v. Coutu* (1981) 450 U.S. 754, 774; *People v. Hwang* (1994) 25 Cal.App.4th 1168, 1177; *Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345, 356.)

The general directive to pay prevailing wages is contained in section 1771:

“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.”

Here, the work on the passenger rail station was “performed under contract” by a private contractor. (See *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63-64; *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 459; 69 Ops.Cal.Atty.Gen. 300, 305 (1986).)

The basic definition of a “public work” is found in section 1720:

“As used in this chapter, ‘public works’ means:

“(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds

“.....”

The grant money in question constituted “public funds.” The California Transportation Commission controls and allocates the grants (Pub. Util. Code, § 99613) to serve the Act’s purposes of using “state general obligation bonds to finance rail infrastructure” (Pub. Util. Code, § 99601, subd. (b)), resulting “in implementation of part of an overall transportation plan which will provide cleaner air and better transportation options for all Californians” (Pub. Util. Code, § 99601, subd. (c)).

“Awarding body” is defined in Labor Code section 1722 as the “department, board, authority, officer or agent awarding a contract for public work.” The Legislature has directed the “awarding body” of the contract to perform various tasks. These duties include obtaining from the Director of the Department of Industrial Relations (“Director”) the prevailing wage rate in the locality for each worker and assisting the Division of Labor Standards Enforcement of the Department of Industrial Relations (“DLSE”) in recovering any unpaid wages. As explained by the Supreme Court in *Aubrey v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967:

“The public works laws (Lab. Code, § 1720 et seq.) impose a variety of responsibilities on public entities awarding contracts for public works. Among its duties, an awarding body must obtain from the Director the prevailing wage rate in the locality for each craft, classification or type of worker needed to carry out the contract (Lab. Code, § 1773); it must then either specify in the call for bids, the bid specifications and in the contract itself what the prevailing wages are, or it must state that those rates are available at the public entity’s office. (Lab. Code, § 1773.2.) The awarding body is also required to cause to

be inserted into the contract stipulations that, in the event that the contractor fails to pay the prevailing wages, the contractor is liable for penalties and for the shortfall in wages. (Lab. Code, § 1775.) Additionally, the awarding body is required to ‘take cognizance of violations’ in the execution of the contract (Lab. Code, § 1726) and is expected to assist the DLSE if necessary in court actions to recover unpaid wages and penalties, either where there is insufficient money due the contractor to cover the full amount, or where the awarding body does not owe money directly to the contractor. (Lab. Code, § 1775.) Thus, the awarding body has a variety of responsibilities designed to help ensure that workers are paid the prevailing wages on public works.”

With respect to the construction project in question, the Department’s function was to reimburse Amtrak for its expenses in having the passenger rail station constructed. The Department neither reviewed nor approved the contract between Amtrak and its contractor to perform the work and had no responsibility in supervising the contractor. Amtrak did not act on behalf of the Department when it executed the contract. Indeed, Amtrak could have performed the work with its own employees. In either case, Amtrak received the grant from the Department as an owner-operator performing a self-help improvement project.

Accordingly, in no sense was the Department the “awarding body” of the contract for the construction of the passenger rail station. The Department had limited responsibilities in reimbursing Amtrak for its costs. In so characterizing the Department’s duties, we may distinguish the present situation from the circumstances described in a recent Supreme Court case and in one of our prior opinions.

In *Lusardi Construction Co. v. Aubry*, *supra*, 1 Cal.4th 976, a public agency entered into a contract with a private corporation for the construction of an addition to a hospital owned by the public agency. The corporation was responsible for building the addition, and the public agency acted as its agent in hiring a construction contractor and for all other purposes of the project. (*Id.*, at pp. 981, 991.) After noting that the definition of an “awarding body” included the “agent awarding a contract for public work,” the Supreme Court concluded that the public agency was the awarding body since it acted as the agent of the corporation in executing the contract. (*Id.*, at p. 991, fn. 6.) Here, in contrast, the Department did not enter into the contract with the private contractor on behalf of Amtrak and did not act as the agent of Amtrak for any purposes of the construction project.

The situation in our opinion in 69 Ops.Cal.Atty.Gen. 300, *supra*, may also be distinguished from the present circumstances. In our 1986 opinion, we were concerned with the construction of a county fire station and a county library by a private land developer as a condition of the county approving the developer’s subdivision maps. No public funds were used for the two projects. However, we found that the prevailing wage law applied because

“[t]he county’s agreement with the developer gives the county ultimate direction, supervision, and authority over the work performed by the developer” (*Id.*, at p. 304.) In the present situation, in contrast, the Department had no review authority over the private contractor’s work and was not the “awarding body” of the contract as defined in the statutory scheme, although the prevailing wage law in general was applicable due to the public funding of the project.

Finally, although the Department was not the “awarding body” of the contract, the workers on the project are nevertheless protected. DLSE has the legal authority and responsibility “to recover unpaid wages and penalties, either where there is insufficient money due the contractor to cover the full amount, or where the awarding body does not owe money directly to the contractor.” (*Aubrey v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at p. 967.) For example, workers who were not paid by a subcontractor due to the insolvency of the prime contractor may look to DLSE for recovery of their unpaid wage claims.

We thus conclude that under the circumstances presented, the Department was not the “awarding body” for purposes of the prevailing wage law with respect to a contract executed by Amtrak and a private contractor for construction of a passenger rail station on property leased by Amtrak and owned by a private railroad company where the project was funded by a grant from the Department awarded under provisions of the Act.
