

FORT ORD REUSE AUTHORITY BOARD REPORT

CONSENT AGENDA

Subject: Prevailing Wage Status Report

Meeting Date: March 9, 2018

Agenda Number: 7f

INFORMATION/ACTION

RECOMMENDATION(S):

Receive Prevailing Wage Status Report

DISCUSSION:


From October 1, 2017 – December 31, 2017, construction workers were employed on multiple Fort Ord reuse projects. From the reported information (California State University Monterey Bay/County of Monterey/FORA/Seahaven-Layia/Villosa/Larkspur/Shops at Dunes), approximately 158,793 worker hours were utilized and approximately 2,547 workers employed. An average of 53% of those workers were from the tri-County area. (Santa Cruz, Monterey and San Benito Counties). In addition, Marina Coast Water District is moving ahead on the Regional Urban Water Augmentation Program (RUWAP) project. Based upon certified payroll records filed with the state, the RUWAP project employed 5 people for a total of approximately 143.25 hours for the period October 1, 2017 through December 31, 2017. The percentage of those workers from the tri-County area was unable to be determined from Department of Industrial Relations records. These reported numbers do not include Dunes on Monterey Bay (Dunes) housing project worker hours.

During the December 2017 Board update on prevailing wage compliance it was noted that we might need assistance from our legislative offices to clarify some issues related to prevailing wages. To that end on January 12, 2018, Senator Monning directed a letter to Christine Baker, the Director of the California Department of Industrial Relations (DIR) asking for clarification of obligations of contractors, cities and FORA when a project is deemed a public works project and when a project is not deemed a public works project. On February 12, 2018, Director Baker responded as to the DIR position on the obligations for enforcement of prevailing wages on Fort Ord. **A copy of Senator Monning's request letter and Director Baker's response are attached to this report.**

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.

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TELEPHONE NUMBER
(408) 847-6101

January 12, 2018

Christine Baker, Director
California Department of Industrial Relations
1515 Clay Street, Suite 1700
Oakland, CA 94612

Dear Director Baker:

This letter is to express my concerns about the enforcement of Prevailing Wage within the boundaries of the former Fort Ord United States Army post, which includes portions of the City of Marina, the City of Seaside, the City of Monterey, the City of Del Rey Oaks, and the County of Monterey. All these jurisdictions are members of the Fort Ord Reuse Authority (FORA), a multi-agency entity that oversees the redevelopment of the former Fort Ord through the implementation of and compliance with the Base Reuse Plan.

It has been brought to my attention that there have been numerous violations of prevailing wage on projects within the boundaries of FORA. Additionally, there seems to be confusion and conflict among the numerous local jurisdictions and FORA about prevailing wage compliance and enforcement.

I would like the California Department of Industrial Relations' clarification on the following questions pertaining to prevailing wage and the former Fort Ord.

1. What are the obligations of the contractors, cities, and FORA when a project is deemed a public works project?
2. When a project is not deemed a public works project, yet is still subject to a prevailing wage written agreement as specified within the Base Reuse Plan, what are the obligations of the contractors, cities, and FORA?

Director Baker
January 12, 2018
Page 2

My concern is that workers on various projects within the former Fort Ord have pursued litigation in order to receive the appropriate prevailing wages they are entitled to and that this is unacceptable. Employees have a right to be paid without engaging in litigation, which is costly and time consuming. Clarification by the California Department of Industrial Relations will help to avoid this problem in the future.

Thank you for your attention to this matter.

Sincerely,

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WILLIAM W. MONNING
Senator, 17th District

WWM:tuv/jf

cc: Luis Alejo, Supervisor, Chair Monterey County
Jane Parker, Supervisor Monterey County
Mary Adams, Supervisor, Monterey County
Bruce Delgado, Mayor, City of Marina
Ralph Rubio, Mayor, City of Seaside
Jerry Edelen, Mayor, City of Del Rey Oaks
Michael Houlemard, Executive Officer of Fort Ord Reuse Authority
Ron Chesshire, Monterey/Santa Cruz Counties Building & Construction Trades Council

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TELEPHONE NUMBER
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February 26, 2018

Dear FORA Stakeholder:

As you know, in January I sent a letter to the Department of Industrial Relations (DIR) to express my concerns and seek clarification regarding the enforcement of Prevailing Wage within the boundaries of the former Fort Ord. Attached is the letter I received in response from the DIR.

My office will be in touch with you and FORA staff regarding any necessary next steps. In the meantime, please do not hesitate to contact my office with any immediate questions.

Thank you for your attention to this matter.

Sincerely,

WILLIAM W. MONNING
Senator, 17th District

WWM:nh

DEPARTMENT OF INDUSTRIAL RELATIONS

Christine Baker, Director

Office of the Director

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February 12, 2018

The Honorable William M. Monning
California State Senate
State Capitol, Room 303
Sacramento, California 95814

Re: Fort Ord Prevailing Wage Requirements.

Dear Senator Monning:

I received your letter seeking clarification on the obligations of contractors, cities, and the Fort Ord Reuse Authority on redevelopment projects located on former Fort Ord land.

As the Director of the Department of Industrial Relations (DIR), I share your concerns regarding the prevailing wage violations that are occurring on these projects. As you are aware, it is California's expressly stated public policy "to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions . . . and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (Lab. Code, § 90.5.) The California Supreme Court has stated: "Delay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obligations to others, and, in many cases may make the wage-earner a charge upon the public." (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 326.) California wage earners, law-abiding employers, and the taxpaying public all lose when prevailing wage laws are violated.

Obligations on Statutory Public Works Projects

The overall purpose of the prevailing wage law is to benefit and protect employees on public works projects. "Public works" is generally defined as construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds. (Lab. Code, § 1720.) A public subsidy for the purposes of the prevailing wage law means not only a payment of cash from a public entity, it also includes a public entity's transfer of an asset of value for less than fair market price or a public entity's waiver or reduction of fees or costs normally required in the execution of the project. Once a project is deemed to be public works, all the prevailing wage requirements in the California Labor Code apply.

A contractor must pay at least the prevailing wage to workers on public works projects. To bid or work on a public works project, the contractor must be registered with DIR. For most public works projects, the contractor is also required to send contract award notification to local apprenticeship programs, request dispatch of apprentices, and hire a minimum number of apprentices. Payroll

records that document the work classification, hours worked, and identifying information about apprentice and journeyman workers must be maintained and certified to be true and correct under penalty of perjury. These certified payroll records must also be electronically submitted to DIR. A general contractor must ensure that its subcontractors are complying with prevailing wage requirements, as the general contractor is potentially jointly and severally liable for wages and penalties assessed against a subcontractor that has violated the prevailing wage law.

Cities and other public entities considered awarding bodies “shall take cognizance” of prevailing wage violations and “shall promptly report any suspected violations to the Labor Commissioner.” (Lab. Code, § 1726.) Awarding bodies must include in the contract various provisions notifying the contractor of prevailing wage obligations. Furthermore, upon award of a contract, the awarding body must electronically notify DIR within 30 days, but in no case later than the first day work is performed on the project. Awarding bodies are also required to ensure that all contractors and subcontractors working on the project are properly registered with DIR. Failure to comply with these requirements may result in monetary penalties against the awarding body. Deliberate, repeat offenders may have their state funding for public works projects withdrawn.

The Labor Commissioner’s Office within DIR is authorized to seek wages and penalties against contractors and public entities for violations of the prevailing wage law on public works projects. (See, e.g., Lab. Code, §§ 1741, 1771.1, 1773.3.)

Obligations on Projects in which Prevailing Wage Requirements are Imposed by Contract

If a project does not receive any public subsidies, it may not meet the statutory definition of “public works” in the Labor Code. Such a project, however, may still be subject to prevailing wage requirements as a matter of contract, as explained by the Court of Appeal in *Monterey/Santa Cruz etc. Trades Council v. Cypress Marina Heights LP* (2011) 191 Cal.App.4th 1500. In *Cypress Marina Heights*, the Court held that the FORA Master Resolution is the “originating source of any prevailing wage requirement that applies.” Its provisions clearly state that cities and other agencies that entered into “an Agreement with FORA for the acquisition, disposition, or development of property at Fort Ord” were obligated “to ensure that any other entity employing workers in connection with the development of the property acquired . . . must pay the prevailing wage.” (*Id.* at p. 1515.) Stated differently, cities that acquired land from FORA were required under the Master Resolution to ensure that developers and contractors on those projects paid their workers prevailing wages. The FORA Master Resolution and other associated implementation agreements imposed the obligation to pay prevailing wages on all “First Generation Construction” which was defined as “construction performed during the development of each parcel of real property at the time of transfer from the public agency” to a developer “until issuance of a certificate of occupancy by the initial owners or tenants of each parcel.” (*Id.* at p. 1510.)

The Court further clarified that “FORA’s goal was to ensure that the prevailing wage was paid on all development projects on FORA land so that local contractors would not be displaced by cheaper labor imported from elsewhere. Providing well-paying jobs for local contractors served FORA’s purpose, which was the revitalization of the local economy.” (*Id.* at p. 1522-23.)

Given this judicial precedent, cities that acquired land from FORA are obligated to ensure that the developers and contractors pay prevailing wages to their workers. Contractors themselves are also

Letter to Senator William M. Monning
Re: Fort Ord Prevailing Wage Requirements
Page 3

obligated to make sure their workers are paid prevailing wages on these projects. These requirements effectuate FORA's purpose to revitalize the local economy.

An employee has the option of filing a lawsuit against his or her employer for nonpayment of contractually-agreed upon wages, like those at issue in the development projects on former Fort Ord land. (Lab. Code, § 218; *see also* *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1115; *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 177 (employee authorized to recover payment of unlawfully withheld wages as a restitutionary remedy in an action under the Unfair Competition Law) The Labor Commissioner's Office within DIR is also authorized to investigate employee complaints regarding nonpayment of contractually agreed upon wages and, where appropriate, seek penalties and liquidated damages against employers. (Lab. Code, § 98.)

My Department and I look forward to working with you to ensure that full compliance with all of California's wage laws, including the prevailing wage laws on public works projects.

Sincerely,

A handwritten signature in blue ink that reads "Christine Baker". The signature is written in a cursive, flowing style.

Christine Baker
Director