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August 6, 2003

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The Honorable Mark Tansil
Presiding Judge
Superior Court of California
County of Sonoma
Hall of Justice
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The Honorable Mark Tansil:

Our office has been requested to respond to the Final Report of the Sonoma County Grand Jury 2002-2003 on behalf of Dr. Carl Wong, the Sonoma County Superintendent of Schools, and on behalf of each of the individual school districts within Sonoma County relating to the Grand Jury Report on Prevailing Wages.

Introduction:

Specifically relating to public agencies, the Grand Jury made two findings:

“F1. Initial Grand Jury inquiries into different county-wide agency’s interpretations of prevailing wage laws indicate that there is a lack of understanding of the law.

“F2. Contract awarding bodies are left with the decision whether to monitor proper wage payment, or to allow the burden of monitoring to be on contractors and labor organizations.”

The Grand Jury made three additional findings relating to the enforcement of prevailing wage laws by the State Department of Industrial Relations (“DIR”) noting that the enforcement is carried out by the DIR, that the statute of limitations for a DIR wage investigation is 180 days and listing the status of specific investigations.

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The Grand Jury made four recommendations relating to Prevailing Wages and has required all public agencies, including the County Superintendent and the individual school districts to respond to the following recommendation:

“R1 Every public agency in Sonoma County shall actively monitor and review payroll records for accurate wage payment, and fully comply with the law by notifying the DIR whenever non-compliance is encountered.”

Response:

We have reviewed Penal Code section 933.05(b) and attempted to respond within this section's guidelines. Unfortunately, it is not possible for the County Superintendent and the Districts to respond within the parameters of section 933.05(b) as none of the four responses are appropriate. Instead, we must respond by explaining the law relating to Prevailing Wage as it existed during the time of the Grand Jury investigation and the law as it exists now.

Our initial response to the Grand Jury's investigation is that the report paints all Sonoma County public entities with the same broad brush – whether the entity is a small one-school district with 50 students or the County of Sonoma. Recommendation R1 starts with the supposition that public agencies, including the County Superintendent and the Districts, are required to actively monitor and review payroll records. While due to the passage of Proposition 47 and beginning April 1, 2003, the County Superintendent and Districts receiving specific State bond funds have been required (and are monitoring) prevailing wage for projects funded by those specific bonds, there was no such requirement during the period of the Grand Jury's investigation.

The remainder of the recommendation appears to assume that public entities, including the County Superintendent and the Districts must be told to follow the law. If the recommendation had been that public entities review their procedures in order to confirm that they were following the law, such a recommendation would be acceptable. This recommendation appears to presuppose that all public agencies are not fully complying with the law and are not notifying DIR whenever non-compliance is encountered. Speaking for the County Superintendent and the Districts, we have no reason to believe this statement is correct. While prior to April 1, 2003 neither the County Superintendent nor the Districts were subject to any requirements for the monitoring of prevailing wage, the County Superintendent and the Districts have always acted in good faith in complying with prevailing wage laws, including, but not limited to, contract language, posting prevailing wage, and promptly responded to requests for certified payroll and to any order received from the California State Department of Industrial Relations (DIR).

Discussion:

a). Status of the law prior to April 1, 2003 and for existing and future projects not funded by Proposition 47.

The Grand Jury correctly points out that the DIR has the ultimate burden of enforcement of prevailing wage law. The Grand Jury is also correct that the laws are poorly written and subject to interpretation. However, as noted above we must begin this discussion with an objection to the Grand Jury's implied conclusion that the County Superintendent and the school districts of Sonoma County have ignored prevailing wage laws. The County Superintendent and each school district use standard construction contracts prepared by our office on all construction projects. Each of these contracts, including our two-page agreement that is designed for the smallest purchase orders¹, includes language stating that prevailing wages must be paid on all public works contracts in excess of \$1,000.00. With the exception of extremely small contracts, all public works contracts used by the County Superintendent and the Districts also include the following language:

"LABOR STANDARDS

- a. *Work Hours: The Contractor shall not permit any worker to labor more than eight (8) hours during any one (1) calendar day or more than forty (40) hours in one calendar week, except in cases of emergency. However, work in excess of such hours shall be permitted upon compensation at not less than 1-1/2 times the basic rate of pay, unless the prevailing wage determination of the California Department of Industrial Relations requires a higher rate of overtime pay, in which case, the higher overtime rate must be paid. The Contractor shall pay each worker, laborer, mechanic or persons performing work under this Contract at a rate not less than the prevailing wage for each craft or classification covering the work actually performed.*
- b. *Penalty: Contractor shall forfeit to District as a penalty the sum of twenty-five dollars (\$25.00) for each workman employed in the execution of this Contract by Contractor or any Subcontractor for each calendar day during which said worker is required or permitted to work more than eight (8) hours in any one (1) calendar day or more than forty (40) hours per calendar week in violation of Article 3, Division 2, Part 7, Chapter 1 of the California Labor Code.*
- c. *Employment of Apprentices: Contractor agrees to comply with Labor Code Sections 1773.3, 1777.5 and 1777.6, and 3077 et. seq., each of which is*

¹ We would note that we created this document after our office received a complaint from DIR on an \$1100.00 computer-wiring contract. While we disagreed that running computer-wiring through a ceiling was a "public work" this case was never decided by DIR but was dismissed due to the expiration of the statute of limitations.

incorporated by reference into this Contract. These Sections require that Contractors and Subcontractors employ apprentices in apprenticeable occupations in a ratio of not less than one (1) hour of apprentice work for every five (5) hours of labor performed by a journeyman, unless an exception is granted and that Contractors and subcontractors shall not discriminate against otherwise qualified employees as apprentices on any public works solely on the ground of race, religious creed, color, national origin, ancestry, sex, or age. Only apprentices who are in training under written apprenticeship occupations shall be employed. The responsibility for compliance with these provisions for all apprenticeable occupations rests with Contractor.

- d. *The Contractor shall be knowledgeable of and comply with California Labor Code Sections 1727, 1773.5, 1775, 1777, 1777.5, 1810, 1813, 1860, including all amendments; each of these sections is incorporated by reference into this Contract.*

"GENERAL RATE OF PER DIEM WAGES

- a. *On File: As required by Labor Code Section 1773.2, the District has on file in its principal office copies of the general prevailing rate of per diem wages for workmen employed on public work as determined by the Director of the Department of Industrial Relations. Said document shall be available to any interested party on request. Contractor shall post a copy of said document at each job site.*
- b. *Prevailing Wage Rate: The Contractor and each subcontractor shall pay each worker performing work under this Contract at a rate not less than the prevailing wage as defined in Labor Code Section 1771 and 1774 and Section 16000(a) of Title 8, California Code of Regulations.*
- c. *Penalty: In accordance with Section 1775 of the California Labor Code, the Contractor shall forfeit to the District as penalty, the sum of fifty dollars (\$50) for each calendar day, or portion thereof, for each workman paid less than the prevailing wage rates, as determined by the Director of the California Department of Industrial Relations, for any work done under this Contract by him or by any subcontractor under him. Contractor shall also pay each workman the difference between the stipulated prevailing wages rates and the amount actually paid to such workman.*

"RECORD KEEPING

The Contractor agrees to comply with the provisions of Sections 1776 and 1812 of the California Labor Code. The Contractor and each Subcontractor shall keep or cause to be kept an accurate record showing the names, addresses, social security numbers, work classifications, straight time and overtime hours worked each day and week of all workmen employed by him in connection with the execution of this Contract or any subcontract thereunder and showing the actual per diem wages paid to each of such workers. These records shall be certified and shall be open at all reasonable hours to the inspection of the District awarding the Contract, its officers and agents, and to the Chief of the Division of Labor Statistics and Law Enforcement of the State Department of Industrial Law Enforcement of the State Department of Industrial Relations, his deputies and agents."

In addition, copies of the above records shall be available as follows:

- a. A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request;*
- b. A certified copy of all payroll records shall be made available for inspection or furnished upon request to the District, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations;*
- c. A certified copy of all payroll records shall be made available upon request by the public for inspection or copies thereof made; provided, however, that a request by the public shall be made through either the District, the Division of Apprenticeship Standards, or the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been previously provided, the requesting party shall, prior to being provided the records, reimburse the costs of the Contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the Contractor.*

The Contractor shall file a certified copy of the records with the entity requesting the records within ten days after receipt of a written request.

Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the District, shall be marked or obliterated in such a manner as to prevent disclosure of an individual's name, address, and social security

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number. The name and address of the Contractor awarded the Contract or performing the Contract shall not be marked or obliterated.

The Contractor shall inform the Owner of the location of the records, including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

In the event of noncompliance with the requirements of this section, the Contractor shall have ten days in which to comply subsequent to receipt of written notice specifying in what respects the Contractor must comply with this section.

Should noncompliance still be evident after the ten day period, the Contractor shall, as a penalty to the District, forfeit twenty-five dollars (\$25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

Responsibility for compliance with this provision shall be with the Contractor.”

The County Superintendent and the Districts do provide prevailing wage information and the County Superintendent and a majority of the districts, depending upon 1) the size of the project; 2) the size of the district; 3) the availability of personnel; and 4) the availability of consultants such as construction managers and architects, require their contractors to provide them with certified payroll. The certified payroll is generally collected as a method of monitoring the contract payments and, until recently, absent an investigation by the DIR or an inquiry by a worker or a union, has not been reviewed for compliance with specific prevailing wage by the Districts.

There are two reasons why the County Superintendent and the Districts did not “actively monitor and review payroll records for accurate wage payment” during the period of time subject to the Grand Jury’s review. First, as discussed more fully below, although AB 1506 now requires the County Superintendent and Districts receiving State bond money pursuant to Proposition 47 to adopt Labor Compliance Programs, previous law did not require such monitoring and review, nor is it now required for projects that are not funded pursuant to Proposition 47. Second, although the State Allocation Board now provides additional funds for construction projects that are subject to AB 1506, for prior projects and for current and future projects not funded by Proposition 47, the County Superintendent and the Districts have not had the funds, staff or expertise to complete such tasks on a voluntary basis.

b) Current projects subject to Labor Compliance pursuant to AB 1506

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As a positive response to the Grand Jury's Recommendation, AB 1506 (Wesson) (Stats. 2002, Chap. 868) requires a school district or county office of education that chooses to use funds derived from the Kindergarten-University Public Education Facilities Bond Act of 2002 on certain state funded public works projects to initiate and enforce, or contract with a third party to initiate and enforce, a Labor Compliance Program, as described in subdivision (b) of Section 1771.5 of the Labor Code, with respect to that public works project.

Since April 1, 2003 the County Superintendent and all Districts receiving State bond funding pursuant to Proposition 47 have adopted or will be adopting Labor Compliance Programs. A copy of the Sonoma County Office of Education's Labor Compliance Program is attached. All the Districts who are receiving or will receive Proposition 47 funding either have adopted or will adopt a Labor Compliance Program. These Programs require:

1. All bid invitations and public works contracts shall contain appropriate language concerning the requirements of Section 1771.5(b) of the Labor Code.
2. A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.
3. Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.
4. The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chapter.
5. The awarding body shall withhold contract payments when payroll records are delinquent or inadequate.
6. The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

The net result of the adoption of such Programs will be that the County Superintendent and the Districts or their consultants will be monitoring contractors' certified payroll and will be fulfilling the requirements of their Labor Compliance Programs for projects funded by State 2002 and 2004 bond funds. Again, we must stress that the State Allocation Board has recognized that Labor Compliance programs are costly and, for that reason, additional funding from Proposition 47 Bonds has been added to project budgets to cover the costs of these programs. In addition, after spending considerable time in studying, amending and adopting Labor Compliance Programs, a majority of the Districts, including the County Superintendent, have determined that they do not have the staff with expertise to comply with the requirements of a Labor Compliance Program. The County Superintendent on behalf of the Sonoma County Office of Education and the Districts and through a request for proposal process has selected a third party provider with the expertise to assist the County Office and districts with their Labor Compliance Programs.

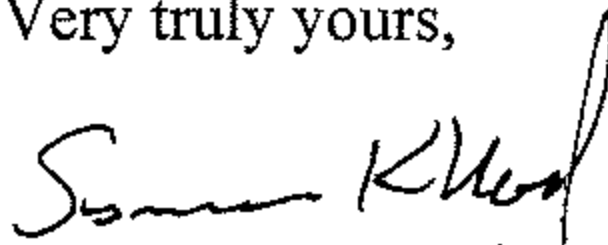
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Conclusion:

While, the County Superintendent and the Districts are legally required and have the requisite funding to meet the Grand Jury's Recommendation R1 for construction projects funded pursuant to Proposition 47 bonds, this implementation of the Recommendation for Proposition 47 projects was not due to the Grand Jury investigation, and, in fact, was accomplished prior to the publication of Grand Jury Report, but was due to changes in the law. The County Superintendent and the Districts were not required to monitor and review payroll records during the period of the Grand Jury investigation. The County Superintendent and the Districts have never turned a "blind eye" to prevailing wage issues and have always used their best efforts to comply with the law. While it may be reasonable to expect that the proliferation of Labor Compliance Programs will make contractors more aware of prevailing wage issues, for non-Proposition 47 funded projects there continues to be no legal requirement for the County Superintendent and the Districts to monitor and review certified payroll nor, in a time of shrinking budgets, is it likely that money would be taken from education programs for this purpose.

The County Superintendent and the Districts will continue to follow the law by providing notice of labor law requirements in their contracts, making records available on request, notifying DIR whenever non-compliance is encountered and to cooperating with DIR to the fullest. However, with the exception of projects subject to a Labor Compliance Program, they will not be able to comply with the Grand Jury's recommendation that they actively monitor and review payroll records.

Very truly yours,



Susanne K. Reed
Associate General Counsel

SKR:dlh

c: Carl Wong, Ed.D., Sonoma County Superintendent
Jerry Johnson, Deputy Superintendent
Superintendents and Boards of Trustees, Sonoma County School Districts

Enclosure: Labor Compliance Program