ITEM 9

TEST CLAIM
FINAL STAFF ANALYSIS

Labor Code
Sections 1720, 1720.3, 1720.4, 1726, 1727, 1735, 1742, 1770, 1771, 1771.5, 1771.6, 1773.5

Statutes 1976, Ch. 1084 (SB 2010)
Statutes 1976, Ch. 1174 (AB 3365)
Statutes 1980, Ch. 992 (AB 3165)
Statutes 1983, Ch. 142 (AB 1390)
Statutes 1983, Ch. 143 (AB 1949)
Statutes 1989, Ch. 278 (AB 2483)
Statutes 1989, Ch. 1224 (AB 114)
Statutes 1992, Ch. 913 (AB 1077)
Statutes 1992, Ch. 1342 (SB 222)
Statutes 1999, Ch. 83 (SB 966)
Statutes 1999, Ch. 220 (AB 302)
Statutes 2000, Ch. 881 (SB 1999)
Statutes 2000, Ch. 954 (AB 1646)
Statutes 2001, Ch. 938 (SB 975)
Statutes 2002, Ch. 1048 (SB 972)

Title 8, California Code of Regulations,
Sections 16000-16802
(Register 56, No. 8; Register 72, No. 13; Register 72, No. 23; Register 77, No. 02; Register 78, No. 06; Register 79, No. 19; Register 80, No. 06; Register 82, No. 51; Register 86, No. 07; Register 88, No. 35; Register 90, No. 14; Register 90, No. 42; Register 91, No. 12; Register 92, No. 13; Register 96, No. 52; Register 99, No. 08; Register 99, No. 25; Register 99, No. 41; Register 00, No. 03; Register 00, No. 18)

Prevailing Wages

03-TC-13

City of Newport Beach, Claimant

TABLE OF CONTENTS

ITEM 9

TEST CLAIM
FINAL STAFF ANALYSIS

Labor Code
Sections 1720, 1720.3, 1720.4, 1726, 1727, 1735, 1742,
1770, 1771, 1771.5, 1771.6, 1773.5

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Prevailing Wages

03-TC-13

City of Newport Beach, Claimant

EXECUTIVE SUMMARY

This test claim addresses changes to the California Prevailing Wage Law (CPWL). The CPWL is a comprehensive statutory scheme that is designed to enforce prevailing wage standards on projects funded in whole or in part with public funds. Private contractors under contract to public agencies for public works projects are required to pay local prevailing wages to construction workers on public works projects that exceed $1,000. Local prevailing wage rates are set by the Director of the Department of Industrial Relations. The CPWL does not apply to work carried out by a public agency with its own forces.

The Test Claim Statutes and Regulations Do Not Impose a Reimbursable State-Mandated Program on Local Agencies Within the Meaning of Article XIII B, Section 6 of the California Constitution

The provisions of the CPWL are only applicable when a local agency contracts with a private entity to carry out a public works project. The test claim statutes and regulations modified several provisions of the CPWL, and local agencies that contract out for their public works projects are affected by these changes. However, the cases have consistently held that when a local agency makes an underlying discretionary decision that triggers mandated costs, no state mandate is imposed.

Public works projects can arise in a myriad of ways, but there is no evidence in the record or in law to demonstrate that the test claim statutes and regulations legally or practically compel a local agency to undertake a public works project, with a private contractor, subject to the CPWL. In fact, like the exercise of eminent domain in *City of Merced*, the local agency has discretion to undertake public works projects. The courts have underscored the fact that a state mandate is found when the state, rather than a local official, has made the decision that requires the costs to be incurred. Therefore, staff finds that the test claim statutes and regulations do not mandate a new program or higher level of service, and thus do not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6.

Conclusion

Staff finds that the test claim statutes and regulations do not constitute a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution.

Recommendation

Staff recommends the Commission adopt this analysis to deny this test claim.

STAFF ANALYSIS

Claimant

City of Newport Beach

Chronology

09/26/03	The City of Newport Beach filed test claim with the Commission
10/16/03	The Department of Industrial Relations requested a 90-day extension to file comments on the test claim, to February 2, 2004
10/22/03	Commission staff approved 90-day extension
02/02/04	The Department of Finance filed comments on the test claim with the Commission
03/03/04	The Department of Industrial Relations filed comments on the test claim with the Commission
07/11/07	Commission staff requested additional information regarding claimed regulations, due on August 1, 2007
07/23/07	The Department of Industrial Relations requested postponement of the hearing on the test claim to January 2008
07/26/07	Commission staff denied the request to postpone the hearing on the test claim
10/05/07	The City of Newport Beach filed additional information regarding claimed regulations
10/11/07	Commission staff issued draft staff analysis
11/05/07	The Department of Industrial Relations filed comments on the draft staff analysis with the Commission
11/07/07	The City of Newport Beach filed comments on the draft staff analysis
11/07/07	The Department of Finance filed comments on the draft staff analysis
11/19/07	The Department of Industrial Relations filed comments on the draft staff analysis with the Commission
11/21/07	Commission staff issued final staff analysis

Background

This test claim addresses changes to the California Prevailing Wage Law (CPWL),[1] which is "a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds."[2] Private contractors under contract to public agencies for public works projects are required to pay local prevailing wages to

[1] Labor Code sections 1720 et seq.

[2] *Road Sprinkler Fitters, Local Union 669 v. G & G Fire Sprinkler, Inc.* (2002) 102 Cal.App.4th 765, 776.

construction workers on public works projects that exceed $1,000.[3] Local prevailing wage rates are set by the Director of the Department of Industrial Relations.[4] The requirement to pay prevailing wages does not apply to work carried out by a public agency with its own forces.[5]

In addition to state agencies, the CPWL applies to "political subdivisions," which include any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts.[6] The agency or authority awarding the private contract for public work is known as the "awarding body."[7]

The overall purpose of the CPWL is to benefit and protect employees on public works projects.[8] Its specific goals are to: 1) protect employees from substandard wages that might be paid if contractors could recruit from cheap-labor areas; 2) permit union contractors to compete with nonunion contractors; 3) benefit the public through the superior efficiency of well-paid employees; and 4) compensate nonpublic employees with higher wages for the absence of job security and benefits enjoyed by public employees.[9]

The CPWL does not cover federal projects. Those projects are addressed in the federal Davis-Bacon Act (40 USC § 276a, subdivision (a)), which was enacted for a similar purpose, i.e., to protect local wage standards by preventing federal contractors from basing their bids on wages lower than those prevailing in the area.[10]

Public Works Defined

The Labor Code generally defines "public works" as construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds,[11] and includes: 1) design and preconstruction work;[12] 2) work done for irrigation, utility, reclamation and improvement districts;[13] 3) street, sewer, or other improvement work for public agencies;[14] 4) laying of carpet;[15] 5) certain public transportation demonstration projects;[16] and 6) hauling of refuse from a public works site to an outside disposal location.[17]

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[3] Labor Code section 1771.

[4] Labor Code section 1770.

[5] Labor Code section 1771.

[6] Labor Code section 1721.

[7] Labor Code section 1720.

[8] *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987.

[9] *Ibid.*

[10] *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 Cal.App.4th 873, 882-883.

[11] Labor Code section 1720, subdivision (a)(1).

[12] *Ibid.*

[13] Labor Code section 1720, subdivision (a)(2).

[14] Labor Code section 1720, subdivision (a)(3).

[15] Labor Code section 1720, subdivisions (a)(4) and (a)(5).

The Labor Code also defines "paid for in whole or in part out of public funds" as payment of funds directly to or on behalf of a public works contractor, subcontractor or developer,[18] including various other types of payments,[19] and provides several types of projects that are excluded from that definition.[20]

Prevailing Wage Rates

Prevailing wage rates are set by the Director of the Department of Industrial Relations (DIR),[21] generally by reviewing local wage rates established by collective bargaining agreements and rates that may have been predetermined for federal public works.[22] The awarding body for any contract for public works is required to specify in the call for bids, the bid specifications and the contract itself, what the prevailing wage rate is for each craft, classification or type of worker needed to execute the contract.[23] In lieu of specifying the wage rates in the call for bids, bid specifications and the contract itself, the awarding body may include a statement in those documents that copies of the prevailing wage rates are on file at its principal office, which shall be made available to any interested party on request.[24] The awarding body is required to post at each job site a copy of the determination by the DIR Director of the prevailing wage rates.[25]

Prospective bidders, representatives of any craft classification or type of worker involved, or the awarding body may challenge the declared prevailing wage rates with DIR within 20 days after commencement of advertising of the bids.[26] The Director of DIR begins an investigation and within 20 days, or longer if agreed upon by all the parties, makes a determination and transmits it in writing to the awarding body and the interested parties, which delays the closing date for submitting bids or starting of work until five days after the determination.[27] The Director's determination is final, and shall be considered the determination of the awarding body.[28]

Payroll Records

Contractors and subcontractors subject to the CPWL are required to keep accurate payroll records showing name, address, social security number, work classification, straight time and

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[16] Labor Code section 1720, subdivision (a)(6).

[17] Labor Code section 1720.3.

[18] Labor Code section 1720, subdivision (b)(1).

[19] Labor Code section 1720, subdivisions (b)(2) through (b)(6).

[20] Labor Code section 1720, subdivision (c).

[21] Labor Code section 1770.

[22] Labor Code section 1773.

[23] Labor Code section 1773.2.

[24] *Ibid.*

[25] *Ibid.*

[26] Labor Code section 1773.4.

[27] *Ibid.*

[28] *Ibid.*

overtime hours worked each day and week and actual wages paid to each worker in connection with the public work,[29] and provide certified copies or make such records available for inspection, upon request of the employee, the awarding body, Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards.[30] Requests by the public are required to be made through the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement,[31] and shall be redacted to prevent disclosure of an individual's name, address and social security number.[32] The requesting party is required to reimburse the costs of preparing the records by the contractor, subcontractors, and the entity through which the request was made.[33] The awarding body is required to insert stipulations in the contract to effectuate these provisions.[34]

Discrimination on Public Works Employment Prohibited

Labor Code section 1735 prohibits contractors from discriminating on public works employment for particular categories of persons, and every contractor violating the section is subject to all the penalties imposed for a violation of the CPWL.

Enforcement of CPWL

The awarding body is required to "take cognizance" of violations of the CPWL committed in the course of the public works contract, and shall promptly report any suspected violations to the Labor Commissioner.[35]

The Labor Commissioner is charged with enforcing the CPWL.[36] If the Labor Commissioner determines after an investigation that there has been a violation of the CPWL, the Labor Commissioner issues a civil wage and penalty assessment to the contractor or subcontractor or both.[37] Prior to July 1, 2001, the only way to challenge such an assessment was in court. On and after July 1, 2001, contractors or subcontractors may obtain review of a civil wage and penalty assessment through an informal settlement meeting with the Labor Commissioner,[38] or via an administrative hearing.[39] Until January 1, 2009, hearings are conducted before the DIR Director with an impartial hearing officer; thereafter the hearing will be conducted by an administrative law judge.[40] An affected contractor or subcontractor may appeal the administrative decision

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[29] Labor Code section 1776, subdivision (a).

[30] Labor Code section 1776, subdivision (b).

[31] Labor Code section 1776, subdivision (b)(3).

[32] Labor Code section 1776, subdivision (e).

[33] Labor Code section 1776, subdivision (b)(3).

[34] Labor Code section 1776, subdivision (h).

[35] Labor Code section 1726.

[36] Labor Code section 1741.

[37] *Ibid.*

[38] Labor Code section 1742.1, subdivision (b).

[39] Labor Code section 1742, subdivisions (a) and (b).

[40] Labor Code section 1742, as amended by Statutes 2004, chapter 685.

within 45 days of service of the decision by filing a petition for writ of mandate under Code of Civil Procedure section 1094.5.[41] This process provides the exclusive remedy for review of a civil wage and penalty assessment by the Labor Commissioner.[42]

When the Labor Commissioner issues a civil wage and penalty assessment, the awarding body is required to withhold and retain such moneys from contractor payments sufficient to satisfy the assessment.[43] The amounts withheld cannot be disbursed until receipt of a final order that is no longer subject to judicial review.[44] The awarding body that has withheld funds in response to a civil wage and penalty assessment, upon receipt of the final order, shall remit withheld funds to the Labor Commissioner.[45]

Labor Compliance Program

The awarding body can avoid paying prevailing wages for public works projects of $25,000 or less when the project is for construction, and $15,000 or less when the project is for alteration, demolition, repair or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program (LCP) for all of its public works projects.[46] As part of its duties as an LCP, the awarding body is required to do the following: 1) place appropriate language concerning CPWL in all bid invitations and public works contracts; 2) conduct a pre-job conference with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract; 3) review and audit payroll records (that the contractor is required to keep) to verify compliance with CPWL; 4) withhold contract payments when payroll records are delinquent or inadequate; and 5) withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.[47]

If the awarding body enforces the CPWL as an LCP, the awarding body is entitled to keep any penalties assessed. Before taking any action, the awarding body is required to provide notice of the withholding of any contract payments to the contractor and any subcontractor.[48] The same process for review of a civil wage and penalty assessment made by the Labor Commissioner, as set forth in Labor Code sections 1742 and 1742.1, is invoked.[49] Any amount recovered from the contractor shall first satisfy the wage claim, before being applied to penalties, and if insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.[50]

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[41] Labor Code section 1742, subdivision (c).

[42] Labor Code section 1742, subdivision (g).

[43] Labor Code section 1727, subdivision (a).

[44] Labor Code section 1727, subdivision (b).

[45] Labor Code section 1742, subdivision (f).

[46] Labor Code section 1771.5, subdivision (a).

[47] Labor Code section 1771.5, subdivision (b).

[48] Labor Code section 1771.6, subdivision (a).

[49] Labor Code section 1771.6, subdivisions (b) and (c).

[50] Labor Code section 1771.6, subdivision (d).

Wages for workers who cannot be located are placed in the Industrial Relations Unpaid Wage Fund and held in trust.[51] Penalties of not more than $50 per day for each worker paid less than the prevailing wage rates[52] are paid into the general fund of the awarding body that enforced the CPWL.[53]

Awarding bodies for a public works project financed in any part with funds from the Water Security, Clean Drinking Water, Coastal Beach Protection Act of 2002,[54] are required to adopt and enforce an LCP or contract with a third party to adopt and enforce an LCP.[55]

Employment of Apprentices on Public Works Projects

Properly registered apprentices are allowed to work on public works projects and must be paid prevailing wages for apprentices in the trade.[56] Apprenticeship standards are established by the DIR Division of Apprenticeship Standards,[57] and ratios of apprentices to journey level workers in a particular craft or trade on the public work are established by the particular apprenticeship program.[58] Contractors must meet various requirements with regard to employing apprentices, and the awarding body is required to include stipulations to that effect in the contract.[59]

Contracting Out for Public Works Projects

The Public Contract Code establishes contracting requirements for various types of public projects.[60] Depending on the type of local agency, purpose of the project, and estimated dollar amount, the local agency may be required to contract out to the lowest responsible bidder to accomplish the project. The major requirements are outlined below.[61]

1. Cities

For general law cities, when the expenditure for a public project, as defined,[62] will exceed $5,000, the project must be contracted for and let to the lowest responsible bidder.[63] In the case

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[51] Labor Code section 1771.6, subdivision (e).

[52] Labor Code section 1775.

[53] Labor Code section 1771.6, subdivision (e).

[54] Approved by the voters at the November 5, 2002 statewide general election.

[55] Labor Code sections 1771.7 and 1771.8.

[56] Labor Code section 1777.5, subdivisions (a) and (b).

[57] Labor Code section 1777.5, subdivision (c).

[58] Labor Code section 1777.5, subdivision (g).

[59] Labor Code section 1777.5, subdivision (n).

[60] The Local Agency Public Construction Act (Pub. Contract Code, § 20100 et seq.).

[61] Throughout the Local Agency Public Construction Act there are specified requirements on public entities that deal with such projects as street and highway improvements, street lighting, bridges and subways, which are not addressed here.

[62] Public Contract Code section 20161 defines "public project" as:
(a) A project for the erection, improvement, painting, or repair of public buildings and works.
(b) Work in or about streams, bays, waterfronts, embankments, or other work for protection

of an emergency, however, the legislative body may pass a resolution by a four-fifths vote declaring that the public interest and necessity demand the immediate expenditure of public money to safeguard life, health or property, in which case complying with the contracting and bidding requirements is not required.[64]

In its discretion, the city may reject any bids presented and readvertise; if no bids are received on the public project, the city may perform the project without further complying with the Public Contract Code provisions.[65] Moreover, after rejecting bids, the city's legislative body may pass a resolution by a four-fifths vote declaring that the project can be performed more economically by day labor, or the materials or supplies furnished at a lower price in the open market, in which case the city may have the project done in the manner stated in the resolution without further complying with the Public Contract Code provisions.[66]

For charter cities, the Public Contract Code provisions for general law cities are applicable in the absence of an express exemption, or where a city charter provision or ordinance conflicts with the relevant provision of the Public Contract Code.[67] In several instances, the courts have declared the charter city project a matter of municipal concern thereby rendering the state statutes inapplicable.[68]

2. Counties

Counties containing a population of less than 500,000 are required to contract out for specified public projects when the cost of the project exceeds $4,000.[69] Counties with a population of 500,000 or more are required to contract out for the specified public projects when the estimated cost of the project is $6,500 or more,[70] but in counties containing a population of 2,000,000 or more, there is no requirement to contract out for alteration or repair work of a county-owned

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against overflow.

(c) Street or sewer work except maintenance or repair.

(d) Furnishing supplies or materials for any such project, including maintenance or repair of streets or sewers.

[63] Public Contract Code section 20162.

[64] Public Contract Code section 20168.

[65] Public Contract Code section 20166.

[66] Public Contract Code sectin 20167.

[67] Public Contract Code section 1100.7.

[68] *Piledrivers' Local Union No. 2375 v. City of Santa Monica* (1984) 151 Cal.App.3d 509; *R & A Vending Services, Inc. v. City of Los Angeles* (1985) 172 Cal.App.3d 1188.

[69] Public Contract Code section 20121; projects include: "construction of any wharf, chute, or other shipping facility, or of any hospital, almshouse, courthouse, jail, historical museum, aquarium, county free library building, branch library building, art gallery, art institute, exposition building, stadium, coliseum, sports arena or sports pavilion or other building for holding sports events, athletic contests, contests of skill, exhibitions, spectacles and other public meetings, or other public building ... or ... any painting, or repairs thereto ..."

[70] Public Contract Code section 20122.

building if the cost of the work is less than $50,000.[71] In cases of emergency, however, when repair or replacements are necessary to permit the continued conduct of county operations or services, the board of supervisors by majority consent may proceed at once to replace or repair any and all structures either by day labor under the direction of the board, by contract, or by a combination of the two.[72]

The county board of supervisors may reject all bids if advised by the county surveyor or engineer that any wharf, chute, or other shipping facility can be constructed or repaired for a cost less than the lowest responsible bid, in which case the board may order the work done by day labor under the supervision and direction of the surveyor or engineer.[73] Moreover, the county may, at its discretion, reject any bids presented and readvertise; if after readvertising the county rejects all bids presented, the county may proceed with the project by using county personnel or again readvertise. If no bids are received, the county may have the project done without further complying with the Public Contract Code provisions.[74] For projects estimated at less than $75,000 in which the county has rejected all bids, the county may, after reevaluating its cost estimates for the project, pass a resolution by a four-fifths vote of its board that the project can be performed more economically by county personnel, or a contract can be negotiated with the original bidders at a lower price, or the materials or supplies can be furnished at a lower price on the open market.[75] Upon adoption of the resolution, the county may have the project done in the manner stated in the resolution without further complying with the Public Contract Code provisions.[76]

Similar to charter cities, the provisions of county charters – or regulations enacted pursuant to the charter – supersede the aforementioned general laws, but where the charter is silent with regard to whether a project must be let to competitive bid, then the general laws will control.[77]

3. Special Districts

The Public Contract Code also establishes a variety of requirements for special districts to contract out to accomplish public projects. There are nearly 120 articles in the Public Contract Code addressing such projects in the various types of districts, including specifically named local districts. In general, the requirements are similar to those for cities and counties.

The Uniform Public Construction Cost Accounting Act[78]

The Uniform Public Construction Cost Accounting Act was enacted to "promote uniformity of the cost accounting standards and bidding procedures on construction work performed or

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[71] Public Contract Code section 20123.

[72] Public Contract Code section 20134, subdivision (a).

[73] Public Contract Code section 20130.

[74] Public Contract Code section 20150.9.

[75] Public Contract Code section 20150.10.

[76] *Ibid.*

[77] 59 California Attorney General Opinions 242, 245-246 (1976).

[78] Public Contract Code sections 22000 et seq.

contracted by public entities in the state."[79] The Act provides for developing such cost accounting standards by the California Uniform Construction Cost Accounting Commission, and an alternative method for the bidding of public works projects by public entities.[80] A public agency whose governing board has by resolution elected to become subject to this Act may use its own employees to perform public projects of $25,000 or less.[81]

Test Claim Statutes and Regulations

The test claim statutes encompass changes to the CPWL in the Labor Code, starting in 1976, wherein new types of projects have been added to the definition of public works and certain new activities are imposed on awarding bodies. The relevant provisions of these statutes are summarized below.

Statutes 1976, Chapter 1084: Added Labor Code section 1720.3 which makes hauling refuse from a public works site for state contracts (including California State Universities and Colleges and University of California) a public works project for purposes of CPWL. This statute did not affect local agencies.

Statutes 1976, Chapter 1174: Amended Labor Code section 1735 to prohibit discrimination on public works employment for particular categories of persons, and every contractor violating the section is subject to all the penalties imposed for violations of the chapter.

Statutes 1980, Chapter 142: Amended Labor Code section 1735 to modify the categories and names for categories of those persons for whom discrimination is prohibited.

Statutes 1983, Chapter 142: As statutory cleanup, amended Labor Code section 1720.3 to update California State Universities and Colleges to California State University. This statute did not affect local agencies.

Statutes 1983, Chapter 143: This bill is an alternate version of Chapter 142, and the language for Labor Code section 1720.3 is identical.

Statutes 1989, Chapter 278: Amended Labor Code section 1720 to add public transportation demonstration projects authorized pursuant to Streets and Highways Code section 143 to the definition of public works. The statute thus added a new type of public works project that became subject to the CPWL.

Statutes 1989, Chapter 1224: Added Labor Code sections 1720.4, 1771.5 and 1771.6; amended Labor Code section 1773.5.

New *Labor Code section 1720.4* excluded from the CPWL public works performed entirely by volunteer labor for private non-profit community facilities upon approval by the Director of DIR.

New *Labor Code sections 1771.5 and 1771.6* established the ability of an awarding body to elect to initiate and enforce a Labor Compliance Program (LCP). In exchange, payment of prevailing wages is not required for any public works project of $25,000 or less when the project is for construction, or for any public works project of $15,000 or less when the project is for alteration,

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[79] Public Contract Code section 22001.

[80] *Ibid.*

[81] Public Contract Code section 22032.

demolition, repair or maintenance work. An awarding body that establishes an LCP is also allowed to keep any fines or penalties assessed when it takes enforcement action. As part of its duties as an LCP, the awarding body is required to do the following: 1) place appropriate language concerning CPWL in all bid invitations and public works contracts; 2) conduct a prejob conference with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract; 3) review and audit payroll records (that the contractor is required to keep) to verify compliance with CPWL; 4) withhold contract payments when payroll records are delinquent or inadequate; and 5) withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

Labor Code section 1773.5, which previously gave the Director of DIR authority to establish rules and regulations, was amended to add "including, but not limited to, the responsibilities and duties of awarding bodies under this chapter."

Statutes 1992, Chapter 913: Amended Labor Code section 1735 to modify the categories of individuals for whom discrimination is prohibited. The statute affected many state programs; the bill's stated legislative intent was to strengthen California law in areas where it is weaker than the federal Americans with Disabilities Act ("ADA") and retain California law when it provides more protection than the ADA.

Statutes 1992, Chapter 1342: Amended Labor Code section 1727 to change the word "amounts" to "wages and penalties," and to change the name "Division of Labor Law Enforcement" to "Division of Labor Standards Enforcement."

Statutes 1999, Chapter 83: As code maintenance, no relevant changes were made.

Statutes 1999, Chapter 220: Amended Labor Code section 1720.3 to add the requirement to pay prevailing wages on public works projects for the removal of refuse from the public works construction site, which was previously only applicable to state agencies. The statute added a new category of public works projects subject to the CPWL for local agencies.

Statutes 1999, Chapter 881: Amended Labor Code section 1720 to include design and preconstruction, including inspection and land surveying, within the definition of public works. The Senate Rules Committee Analysis[82] stated that the bill codified current DIR practice and regulation by including construction inspectors and land surveyors among those workers deemed to be employed upon public works and by insuring that workers entitled to prevailing wage during the construction phase of a public works project will get prevailing wage on the design and pre-construction phases of a project.

On June 9, 2000, the DIR issued a decision (Public Works Case No. 99-046) finding that construction inspectors hired to do inspection for compliance with applicable building codes and other standards for a public works project were deemed to be employed upon public works and therefore entitled to prevailing wage. This DIR decision was the subject of a lawsuit, *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, which held that even though the DIR had interpreted preexisting statute to include the preconstruction activities as public works and argued that the new statute merely clarified existing law, the Supreme Court

[82] Senate Rules Committee, Office of Senate Floor Analyses, SB 1999, August 29, 2000, page 2.

found the change in the statute operated prospectively only. Therefore, pursuant to the Supreme Court's interpretation, this statute added a new category of public works projects subject to the CPWL.

Statutes 2000, Chapter 954: Amended Labor Code sections 1726 and 1727, and added section 1742.

In *Labor Code section 1726* a requirement was added for the awarding body (which was already required to "take cognizance" of violations) to promptly report suspected violations to the Labor Commissioner; if the awarding body determines as a result of its *own* investigation, i.e., if it has an LCP, that there has been a violation and withholds its own contract payments, the LCP procedures in section 1771.6 shall be followed.

Labor Code section 1727 was changed to state that if the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a *subcontractor's* violations, the *contractor* is required to withhold money upon request of the Labor Commissioner and transfer that money to the awarding body. In either case, the awarding body is limited to disbursing such withheld assessments until after receipt of a final order that is no longer subject to judicial review.

Pre-existing law allowed for challenges to wage and penalty assessments in court only; new *Labor Code section 1742* provides for an administrative process. Specifically, the new section provides that contractors or subcontractors may obtain review of a civil wage and penalty assessment by the Labor Commissioner, and establishes procedures and additional appeal provisions. Based on this statute pled, the hearing is conducted before the DIR Director with an impartial hearing officer until January 1, 2005; thereafter the hearing is conducted by an administrative law judge. This provision was amended in 2004 to extend the first scenario until January 1, 2007, and again in 2007 to extend the first scenario to January 1, 2009. Subdivision (f) provides that the awarding body that has withheld funds in response to a civil wage and penalty assessment, upon receipt of the final order, shall remit withheld funds to the Labor Commissioner. Subdivision (g) provides that the section is the exclusive remedy for review of a civil wage and penalty assessment by the Labor Commissioner or the awarding body pursuant to section 1771.5.

The bill's declared legislative intent is to provide contractors and subcontractors with prompt administrative hearing if they disagree with alleged violations of the CPWL. The Senate Rules Committee analysis stated that its supporters intended the bill to cure a defect in current law which a federal court found to be an unconstitutional violation of a subcontractor's due process rights (*G & G Fire Sprinklers v. Bradshaw* (1998) 156 Fed.3d 893 (now vacated)).[83] Even though the Labor Commissioner, as a result of that case, already adopted regulations to allow for such an administrative hearing, the sponsor still wanted to go forward.[84] The bill provides that the exclusive remedy for challenging an administrative decision is a Code of Civil Procedure section 1094.5 writ. The bill was intended to streamline the procedures for review of a decision to withhold funds, reduce existing layers of litigation by providing for an administrative hearing

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[83] Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis, AB 1646, September 19, 2000, page 5.

[84] *Id.* page 6.

and mandamus action but no right to a de novo trial in court, thus providing a more streamlined and efficient process while protecting due process rights of all parties.

Statutes 2001, Chapter 938: Amended Labor Code section 1720 to add "installation" to the definition of public works, to add a definition for "paid for in whole or in part out of public funds" and provided for exemptions. The bill was intended to close a loophole that exempted from CPWL projects financed through Industrial Development Bonds issued by the California Infrastructure and Economic Development Bank (I-Bank, a state agency).[85] It also establishes a definition for "public funds" that conforms to several precedential coverage decisions made by DIR, and seeks to remove ambiguity regarding the definition of public subsidy of development projects.[86]

Regulations: California Code of Regulations, Title 8, sections 16000 through 16802, as pled in the test claim and in Exhibit I, implement and make specific the statutory provisions cited above.

Claimant's Position

The claimant states that the test claim statutes and regulations impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Claimant asserts that the following activities and costs are reimbursable:

1. Increased labor and administrative costs to pay prevailing wage rates to all workers on a project, if the project cost is greater than $1,000, for new types of projects now classified as public works. (Lab. Code, §§ 1771 and 1774, and Cal. Code Regs., tit. 8, § 16000.)
2. Post at each job site prevailing wage rates for the project. (Lab. Code, § 1773.2.)
3. Maintain and make available for inspection certified payroll records containing detailed information for each worker. (Lab. Code, § 1776 and Cal. Code Regs., tit. 8, § 16400, subdivision (e).)
4. Comply with statutory apprenticeship requirements. (Lab. Code, § 1777.5.)
5. Training of public agency's administrative and legal staff.
6. Increased cost for disposal of refuse at a public works site. (Lab. Code, § 1720.3.)
7. Increased cost of dealing with certain nonprofit volunteer projects. (Lab. Code, § 1720.4.)
8. Notify Labor Commissioner of any suspected violations of the CPWL. (Lab. Code, § 1726.)
9. Tracking more carefully the amounts under contract and progress payments, increased administrative costs and expenses, and training, to address changes in procedures for withholding moneys from contract payments for violations. (Lab. Code, § 1727.)

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[85] Senate Rules Committee, Office of Senate Floor Analyses, SB 975, September 5, 2001, page 4.

[86] *Ibid.*

10. Additional administrative and contract monitoring efforts to address changes in anti-discrimination provisions of the CPWL. (Lab. Code, § 1735.)

11. Additional administrative expense in tracking contracts and progress payments for purposes of civil wage and penalty assessments, serving notice of those assessments, withholding of contract payments, and training on contract and payment management for staff of awarding body. (Lab. Code, § 1742.)

12. Establish a Labor Compliance Program (LCP) with the following requirements:

    a. Include appropriate language in all bid invitations and contracts for public works concerning the CPWL.

    b. Conduct a prejob conference with the contractor and all subcontractors to discuss federal and state labor law requirements applicable to the contract.

    c. All 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.

    d. Review and, if appropriate, audit payroll records to verify compliance with the CPWL.

    e. Withhold contract payments when payroll records are delinquent or inadequate.

    f. Withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

(Lab. Code, § 1771.5.)

13. Enforce CPWL by withholding penalties or forfeitures from contract payments. (Lab. Code, § 1771.6.)

14. As a result of the Director of Industrial Relations' new authority to establish rules and regulations for the purpose of carrying out the chapter, "*including, but not limited to, the responsibilities and duties of awarding bodies under this chapter*,"[87] the following new responsibilities imposed by regulation:

    a. File with DIR and/or receive service of request to DIR to determine whether or not a particular work is covered by the CPWL. (Cal. Code Regs., tit. 8, §§ 16000 and 16100.)

    b. Appeal DIR determination of coverage, with notice including all factual and legal grounds upon which the determination is sought and whether a hearing is requested. (Cal. Code Regs., tit. 8, § 16002.5.)

    c. As responding party for any request for determination or appeal of such determination, submit all documentation and legal arguments pertaining to the issue.

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[87] Statutes 1989, chapter 1224, added the italicized text; previously, Labor Code section 1773.5 stated: "The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out the prevailing wage provisions of this article."

d. If volunteer labor is to be used, serve a written request to use such labor 45 days prior to the commencement of work, setting forth the basis for belief that use of volunteer labor is authorized pursuant to Labor Code sections 1720.4, and name all unions in the locality where the work is to be performed. (Cal. Code Regs., tit. 8, § 16003.)

e. Pursuant to California Code of Regulations, title 8, section 16100, subdivision (b):

   i. Obtain prevailing wage rate from DIR.

   ii. Specify the appropriate prevailing wage rates in bids and contracts.

   iii. Ensure that requirement for posting prevailing wage rates is applied to each job.

   iv. Make request for special determination by the DIR Division of Labor Statistics and Research at least 45 days prior to project bid advertisement date, if the wage for a particular craft, classification, or type of worker is not already available from DIR (See also Cal. Code Regs., tit. 8, § 16202).

   v. Notify the Division of Apprenticeship Standards.

   vi. Notify the prime contractors of the relevant public work requirements, which include:

      1. Appropriate number of apprentices.

      2. Workers' compensation coverage.

      3. Requirement to keep accurate work records.

      4. Inspection of payroll records.

      5. Other requirements imposed by law, including a plethora of requirements that are imposed upon local agencies when awarding a contract.

f. Pursuant to California Code of Regulations, title 8, section 16100:

   i. Withhold monies.

   ii. Ensure that public works are not split into smaller projects to evade prevailing wages.

   iii. Deny the right to bid on public contracts to those who have violated public works laws.

   iv. Prohibit workers from working more than 8 hours per day or more than 40 hours per week, unless paid not less than time and one half pay.

   v. Refrain from taking any portion of the workers' wages or fee.

   vi. Comply with requirements set forth in Labor Code sections 1776, subdivision (g), 1777.5, 1810, 1813 and 1860.

g. When the awarding body believes that the Director of DIR has not adopted appropriate prevailing wage rates for its area or for the classifications in question,

file a petition to DIR for the review of the prevailing wage rate determination pursuant to Labor Code section 1773.4 and California Code of Regulations, title 8, section 16302. Such petition must include:

i. The name, address, telephone number and job title of the person filing the petition and the person verifying the petition, as well as his or her attorney.

ii. Whether the petitioning party is the local agency, prospective bidder, or a representative of one or more of the crafts.

iii. The nature of the petitioner's business.

iv. The name of the awarding body.

v. The date on which the call for bids was first published.

vi. The name and location of the newspaper in which the publication was made and a copy thereof.

vii. If the petitioner is an awarding body other than a county, city and county, city, township, or regional district, it shall describe the parent or principal organization and the statutory authority for the award of the work.

viii. The manner in which the wage determination failed to comply with Labor Code section 1773.

ix. The prevailing wage rate that petitioner believes to be accurate.

x. If there are facts relating to a particular employer, the facts must identify the employer by name and address and give the number of workers involved.

xi. If the facts relate to rates actually paid on public or private projects in the area, the facts surrounding that payment must be included.

xii. If the DIR has failed to consider rates, those rates must be alleged in detail.

h. Receive service of the petition, if petitioner is not the awarding body. (Lab. Code, § 1773.4.)

i. Respond to the petition, if petitioner is not the awarding body.

j. If a hearing on the petition is conducted by the Director pursuant to California Code of Regulations, title 8, section 16304, receive service of notice of the hearing, introduce evidence, and cross-examine witnesses.

k. Costs of handling a request for detailed payroll records including acknowledging receipt of the request and estimating the costs of providing the records. (Lab. Code, § 1776, Cal. Code Regs., tit. 8, § 16400.)

l. If the Labor Commissioner issues a civil wage and penalty assessment as permitted by Labor Code section 1727, receive written notice of the decision and withhold, retain or forfeit the amount stated in the notice. (Lab. Code, § 1727, Cal. Code Regs., tit. 8, §§ 16411 and 16412.)

m. If the contractor or subcontractor challenges the Labor Commissioner's decision and a hearing is held, receive a copy of the decision. (Cal. Code Regs., tit. 8, § 16414.)

n. To get initial approval of a Labor Compliance Program (LCP), pursuant to California Code of Regulations, title 8, section 16426, provide information to the Director of DIR regarding the following factors:

   i. The experience of the awarding body's personnel on public works labor compliance issues.

   ii. The average number of public works contracts annually administered.

   iii. Whether the proposed LCP is a joint or cooperative venture among awarding bodies, and how the resources and responsibilities of the proposed LCP compare to the awarding bodies involved.

   iv. The awarding body's record of taking cognizance of Labor Code violations and of withholding in the preceding five years.

   v. The availability of legal support for the proposed LCP.

   vi. The availability and quality of a manual outlining the responsibilities of an LCP.

   vii. The methods by which the awarding body will transmit notice to the Labor Commissioner of willful violations.

o. To get final approval of LCP, pursuant to California Code of Regulations, title 8, section 16427, provide evidence to the Director of DIR that the awarding body has satisfactorily demonstrated its ability to monitor compliance with the requirements of the Labor Code and the regulations, and has filed timely, complete and accurate reports as required.

p. If an interested party requests the Director of DIR to revoke an awarding body's LCP, provide a supplemental report as required by the Director. (Cal. Code Regs., tit. 8, §§ 16428, subdivision (b)(2), and 16431.)

q. If LCP is approved, comply with the requirements of California Code of Regulations, title 8, section 16430, including:

   i. Specify in the call for bids and the contract or purchase order the appropriate language concerning Labor Code requirements.

   ii. Conduct a prejob conference with contractors and subcontractors in the bid, at which time federal and state labor law requirements applicable to the contract are discussed, and copies of applicable forms are provided, including 14 points suggested in Appendix A.

   iii. Create a form, as necessary, meeting the minimum requirements of a certified weekly payroll, or use the DIR "Public Works Payroll Reporting Form."

   iv. Establish a program for orderly review of payroll records and, if necessary, audit the payroll records.

v. Establish a prescribed routine for withholding penalties, forfeitures and underpayment of wages for violations of the Labor Code.

vi. Include a provision in all contracts to which prevailing wage requirements apply a provision that contract payments will not be made if payroll records are delinquent or inadequate.

r. If LCP is approved, submit an annual report to the Director of DIR within 60 days after the close of the awarding body's fiscal year, pursuant to California Code of Regulations, title 8, section 16431, to include the following:

i. Number of contracts awarded and their total value.

ii. Number, description and total value of contracts which were exempt from prevailing wages.

iii. Summary of penalties and forfeitures imposed or withheld from any money due contractors as well as the amount recovered by court action.

iv. Summary of wages due to employees resulting from contractors failing to pay prevailing wage rates, the amount withheld from money due the contractors, and the amount recovered through court action.

s. If LCP is approved, pursuant to California Code of Regulations, title 8, section 16432 and Appendix B, conduct audits at discretion of awarding body or when ordered to do so by the Labor Commissioner, to consist of the following:

i. A comparison of payroll records to the best available information concerning the hours worked and the classification of employees.

ii. Sufficient detail for the Labor Commissioner and the LCP to draw reasonable conclusions as to whether there has been compliance with prevailing wage laws and to ensure accurate computation of underpayment of wages to workers as well as applicable penalties and forfeitures.

t. If LCP is approved, enforce the CPWL in a manner consistent with the practice of the DIR Division of Labor Standards Enforcement, pursuant to California Code of Regulations, title 8, section 16434.

u. If LCP is approved, and LCP wishes the Labor Commissioner to determine the appropriate amount of a forfeiture, the LCP shall file a request, pursuant to California Code of Regulations, title 8, section 16437, which includes deadlines, evidence of violation, evidence of audit or investigation, evidence that contractor was given opportunity to respond, previous record of contractor in meeting prevailing wage obligations, whether the LCP has been granted initial, extended initial or final approval, and notice procedures.

v. If LCP is approved, awarding body takes enforcement action, and contractor appeals such enforcement action to DIR Director, provide to DIR Director within 30 days a full copy of the record of the enforcement proceedings and any further documents, arguments, or authorities it wishes the Director to consider, and, as requested by the Director, a supplemental report on the activities of the LCP. (Cal. Code Regs., tit. 8, § 16439.)

w. If the DIR Division of Labor Standards Enforcement investigates violations, the awarding body is required to inform prime contractors of the requirements of Labor Code section 1776 and any other requirements imposed by law in order to assist the Division of Labor Standards Enforcement with its investigation.

With regard to cost estimates for complying with the program, claimant states: "[N]ot only is the cost of each contract increased by 15-30% for the increase in wages, but the administrative cost of monitoring as required by these laws runs many thousands of dollars on an annual basis."

Claimant filed comments on the draft staff analysis which are addressed, as necessary, in the analysis.

Position of Department of Finance

The Department of Finance states that the claimant did not establish a clear or concise argument that the claimant is mandated to pay prevailing wages for public works projects, since the prevailing wage laws only apply to private contractors bidding for, and working on, public works contracts paid for by local agencies or school districts. Although the definition of what constitutes a public works project has substantially increased by statute since 1975, under existing state law, local agencies and school districts are not limited to private contractors to build, repair or maintain public works projects. Since local agencies are free to use their own employees for projects, and are also allowed to purchase, rather than construct, structures for government purposes mandated under state law, the payment of prevailing wages cannot be considered mandatory for local agencies.

Citing *City of Merced v. State of California* (1984) 153 Cal.App.3d 777 and *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, the Department concludes the courts have held that costs to a local entity resulting from an action undertaken at the option of the local entity are not reimbursable as costs mandated by the state. The Department believes that the provisions of California Code of Regulations, Title 8, sections 16000-16802, last amended January 26, 1997, simply make an optional program available to local agencies, the costs of which are not reimbursable because they are not costs mandated by the state.

The Department further claims that all penalties and enforcement duties imposed for non-compliance with prevailing wage laws cannot be considered state-reimbursable mandates because article XIII B, section 6 does not apply to the creation of new crimes or costs related to the enforcement of crimes. Federally-mandated labor laws also do not apply to article XIII B, section 6.

The Department filed comments on the draft staff analysis agreeing with the staff recommendation.

Position of Department of Industrial Relations (DIR)

DIR asserts that the claim should be denied because no new state mandate has been created, concluding the following:

> The very decision to perform construction using private contractors and private workers is a voluntary act, and the results that flow from this voluntary act are not subject to subvention. Further, local and state governments share the responsibility to comply with the CPWL with private employers. When viewed as a whole, the inevitable changes over almost 30

years in the CPWL have reduced the burdens on local governments by shifting more responsibility to the state for determining public works, setting prevailing wages, and enforcing the obligation to pay prevailing wages. For this reason, the claim should be denied.

The DIR filed additional comments on the draft staff analysis, essentially reiterating previous arguments. In a rebuttal to claimant comments on the draft staff analysis, DIR asserted that the Public Contract Code requirements to contract out for public works projects do not apply to chartered cities unless the city chooses to be covered, the Public Contract Code does not apply to all expenditures of public funds for construction, and the Public Contract Code does not necessarily apply to any project since a city can opt out on a project by project basis. DIR further states that in order to obtain reimbursement, claimants would have to show there is a requirement to build a building or structure, there is a requirement under the Public Contract Code to contract with the private sector, there is no ability to avoid the requirements of the Public Contract Code, and changes to the CPWL have increased the requirements for cities on those particular projects. DIR reiterates its previous arguments, stating there is no mandate.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[88] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[89] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[90]

A test claim statute or regulation may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[91] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[92]

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[88] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[89] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 735.

[90] *County of San Diego v. State of California* (*County of San Diego*) (1997) 15 Cal.4th 68, 81.

[91] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[92] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[93] To determine if the program is new or imposes a higher level of service, the test claim requirements must be compared with the legal requirements in effect immediately before the enactment of the test claim statutes.[94] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[95]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[96]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[97] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[98]

The analysis addresses the following issue: Do the test claim statutes and regulations mandate a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

Issue 1: Do the test claim statutes and regulations mandate a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

For the test claim statutes and regulations to impose a reimbursable state-mandated program under article XIII B, section 6, the language must order or command a local agency to engage in an activity or task. If the language does not do so, then article XIII B, section 6 is not triggered. Moreover, where program requirements are only invoked after the local agency has made an underlying discretionary decision causing the requirements to apply, or where participation in the underlying program is voluntary, courts have held that resulting new requirements do not

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[93] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*County of Los Angeles*); *Lucia Mar, supra,* 44 Cal.3d 830, 835).

[94] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[95] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877.

[96] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[97] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[98] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817 (*City of San Jose*).

constitute a reimbursable state mandate.[99] Stated another way, a reimbursable state mandate is created when the test claim statutes or regulations establish conditions under which the state, rather than local officials, has made the decision requiring the local agency to incur the costs of the new program.[100]

The plain language of the test claim statutes and regulations do require certain activities of the awarding body to comply with the CPWL. However, the question here is whether the state has ordered or commanded local agencies to engage in an activity or task, since the provisions of the CPWL are only applicable when a local agency contracts with a private entity to undertake a public works project.[101] Notwithstanding claimant's allegations that local agencies are sometimes required by law to contract for public works projects, staff finds there is no evidence in the record or the law to demonstrate that the test claim statutes and regulations legally or practically compel a local agency to undertake a public works project, with a private contractor, subject to the CPWL. Staff therefore finds that the test claim statutes and regulations do not mandate a new program or higher level of service within the meaning of article XIII B, section 6.

Labor Code section 1720 sets forth the types of public works projects that are subject to the CPWL:

- construction, including design and preconstruction phases such as inspection and land surveying;
- alteration;
- demolition;
- installation;
- repair;
- work done for irrigation, utility, reclamation and improvement districts (but not operation of irrigation or drainage system of any irrigation or reclamation district);
- street, sewer or other improvement work;
- laying of carpet;
- public transportation or demonstration projects authorized pursuant to Streets and Highways Code section 143; and
- hauling of refuse from a public works site to outside disposal location.

It is clear that the CPWL covers a broad range of projects, and the undertaking of such projects could arise in a myriad of ways, from a local administrative decision to an initiative enacted by the voters. Claimant states on page 11 of the test claim:

> [I]t is critical to keep in mind the fact that not all projects are discretionary to the local government entity. First of all, this law applies to maintenance of all buildings as well as infrastructure. Additionally, it applies to repairs as well as replacements. Thus, if a street needs to be fixed, a water main

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[99] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783; *Kern High School Dist., supra,* 30 Cal.4th 727, 727.

[100] *San Diego Unified School Dist., supra* (2004) 33 Cal.4th 859, 880.

[101] Labor Code section 1771.

breaks, or a building because it has been used for years is in need of repair lest it become a hazard, these works are all subject to prevailing wages.

There is no evidence in the test claim statutes, regulations or the record, however, that the *state* has required local agencies to undertake such public works projects.

First, there is no evidence in the record to demonstrate that the decision to undertake a public works project is legally compelled by the plain language of the test claim statutes or regulations, or any other provision of law.

Absent legal compulsion, the courts have ruled that at times, based on the particular circumstances, "practical" compulsion might be found. The Supreme Court in *Kern High School Dist.* addressed the issue of "practical" compulsion in the context of a school district that had participated in optional funded programs in which new requirements were imposed. In *Kern,* the court determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe ... penalties" such as "double ... taxation" or other "draconian" consequences.[102]

In the case of *San Diego Unified School Dist.*, the test claim statutes required school districts to afford to a student specified hearing procedures whenever an expulsion recommendation was made and before a student could be expelled.[103] The Supreme Court held that hearing costs incurred as a result of statutorily required expulsion recommendations, e.g., where the student allegedly possessed a firearm, constituted a reimbursable state-mandated program.[104] Regarding expulsion recommendations that were discretionary on the part of the district, the court stated that in the absence of legal compulsion, compulsion *might* nevertheless be found when a school district exercised its discretion in deciding to expel a student for a serious offense to other students or property, in light of the state constitutional requirement to provide safe schools.[105] Ultimately, however, the Supreme Court decided the discretionary expulsion issue on an alternative basis.[106]

There is no evidence in the record to indicate that failure to undertake public works projects would result in certain and severe penalties such as double taxation or other draconian consequences as set out in the *Kern* case. Nor does the record show that the circumstances here are similar to those faced by the *San Diego* court. And, although claimant has alleged that there could be negative consequences if the local agency fails to undertake a public works project in certain instances, no evidence has been provided to support such a claim.

Instead, staff finds that the local decision to undertake a public works project is analogous to the situation in *City of Merced.* There, the issue before the court was whether reimbursement was

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[102] *Kern High School Dist., supra,* 30 Cal.4th 727, 754.

[103] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 866.

[104] *Id.* at pages 881-882.

[105] *Id.* at page 887, footnote 22.

[106] *Id.* at page 888.

required for new statutory costs imposed on the local agency to pay a property owner for loss of goodwill, when a local agency exercised the power of eminent domain.[107] The court stated:

> "Whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost."[108]

The Supreme Court in *Kern High School District* reaffirmed the *City of Merced* rule in applying it to voluntary education-related funded programs:

> "The truer analogy between [*Merced*] and the present case is this: In *City of Merced*, the city was under no legal compulsion to resort to eminent domain – but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate."[109]

Claimant argues that in *City of Merced*, the discretionary nature of the decision to exercise eminent domain was set forth in the statute itself, i.e., Code of Civil Procedure section 1230.030, which stated the exercise of eminent domain was a discretionary act. Claimant acknowledges that the city had, at its own option, embarked on a course that resulted in it having to pay for loss of goodwill.

Claimant then argues that "even the *City of Merced* court recognized that underlying decisions within the purview of governmental function are not outside the scope of reimbursable state mandate,"[110] since the *City of Merced* court did not find that the initial decision to *acquire* the property "was a voluntary decision that would prevent recovery of costs by the city."[111] Carrying this concept further to the *Kern High School District* and *San Diego Unified School District* cases, claimant asserts that the court's lack of analysis as to the initial decision to create a district or educate pupils indicates there is "a line to be drawn between those decisions that are functions of government and those that are truly voluntary."[112]

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[107] *City of Merced, supra,* (1984) 153 Cal.App.3d 777, 777.

[108] *Id.* at 783.

[109] *Kern High School District, supra,* 30 Cal.4th 727, 743.

[110] Claimant comments, November 7, 2007, page 5.

[111] *Ibid.*

[112] *Ibid.*

Staff disagrees. The Government Code provides statutory authority for cities and counties to acquire property,[113] and the courts have held that the power to purchase land and erect buildings is both legislative and discretionary.[114] The *City of Merced* case dealt with eminent domain, which is also a "function of government" for acquiring property for public use, and still the court denied reimbursement.

There are several eminent domain statutes which address the discretionary nature of property acquisition by local agencies. Government Code section 37350.5 provides that "[a] city *may* acquire by eminent domain any property necessary to carry out any of its powers or functions." (Emphasis added.) For counties, Government Code section 25350.5 provides that "[t]he board of supervisors of any county *may* acquire by eminent domain any property necessary to carry out any of the powers or functions of the county." (Emphasis added.) Moreover, Code of Civil Procedure section 1240.010 states, in pertinent part, that "[t]he power of eminent domain *may* be exercised to acquire property only for a public use." (Emphasis added.) Code of Civil Procedure section 1240.130 further states that "any public entity *authorized* to acquire property for a particular use by eminent domain *may* also acquire such property for such use by grant, purchase, lease, gift, devise, contract, or other means." (Emphasis added.)

The Code of Civil Procedure provision that was cited in *City of Merced* states:

> Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.[115]

The Law Revision Commission's comment on this provision stated:

> Section 1230.030 makes clear that whether property is to be acquired by purchase or other means, or by exercise of the power of eminent domain, is a discretionary decision. Nothing in this title requires that the power of eminent domain be exercised; but, if the decision is that the power of eminent domain is to be used to acquire property for public use, the provisions of this title apply except as otherwise specifically provided by statute. ...[116]

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[113] Government Code section 37350 states: "A city *may* purchase, lease, receive, hold, and enjoy real and personal property, and control and dispose of it for the common benefit." (Emphasis added.) Government Code section 25353 states: "The board [of supervisors] *may* purchase, receive by donation, lease, or otherwise acquire water rights or real or personal property necessary for use of the county for any county buildings, public pleasure grounds, public parks, botanical gardens, harbors, historical monuments, and other public purposes, or upon which to sink wells to obtain water for sprinkling roads and other county purposes. The board may improve, preserve, take care of, manage, and control the property. ..." (Emphasis added.)

[114] *Nickerson v. County of San Bernardino* (1918) 179 Cal. 518, 522.

[115] Code of Civil Procedure section 1230.030.

[116] California Law Revision Commission comment, 19 West's Annotated Code of Civil Procedure (1982 ed.) following section 1230.030, p. 414.

The holding in *City of Merced* applies here. A local agency's discretionary decision to undertake a public works project is very similar to the discretionary decision to acquire property via eminent domain.

In comments on the draft staff analysis, claimant alleged that there are Public Contract Code provisions that require local agencies to contract for public works projects in certain instances. However, none of the statutes pled by claimant in this test claim require the local agency to contract out for public works projects. Labor Code section 1771 expressly states that the requirement to pay prevailing wages is limited to work performed under contract:

> 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.

This provision affords the local agency discretion to contract prior to being subject to the CPWL. And since there have been no statutes pled to demonstrate that local agencies are required to enter into such contracts that would trigger all the provisions of the CPWL, the Commission has no jurisdiction to make findings with regard to that issue.

The *San Diego Unified School District* case, in dicta, warned against an overly strict interpretation of *City of Merced* in stating: "[W]e agree there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement ... whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[117] The court provided only one example of where it believed this reasoning might go beyond the intent of article XIII B, section 6 – that is, a fire district's discretionary decision on how many firefighters to employ.[118] But neither the *San Diego* case, nor any other case, has overruled *City of Merced*. Consequently, the well-settled principles of *City of Merced* are directly on point in this analysis and must be followed.

As previously noted, public works projects can arise in a myriad of ways. But there is no evidence in the record or in law to demonstrate that the test claim statutes and regulations legally or practically compel a local agency to undertake a public works project, with a private contractor, subject to the CPWL. In fact, like the exercise of eminent domain in *City of Merced*, the local agency has discretion to undertake public works projects. The courts have underscored the fact that a state mandate is found when the state, rather than a local official, has made the decision that requires the costs to be incurred.[119] Therefore, staff finds that the test claim statutes and regulations do not mandate a new program or higher level of service on local agencies within the meaning of article XIII B, section 6.

Conclusion

Staff finds that the test claim statutes and regulations do not constitute a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution.

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[117] *San Diego Unified School Dist., supra,* (2004) 33 Cal.4th 859, 887.

[118] *Id.* at 888.

[119] *Id.* at page 880.

Recommendation

Staff recommends the Commission adopt this analysis to deny the test claim.

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