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DIR Reverses Prevailing Wage Assessment Against Design Professional

In a recent prevailing wage enforcement decision, the Department of Industrial Relations (DIR) originally determined that the scope of work performed by a David Evans and Associates, Inc.'s (DEA) subconsultant, ASM Affiliates, was covered work and fell under the classification of Field Soils and Materials Tester. However, the Director reversed the Wage Assessment and reasoned that ASM was not subcontractor to the general contractor, but was a subconsultant to DEA, who had an ongoing services contract with San Diego Association of Governments (SANDAG). Also, the Director reasoned that ASM's tasks were not "an integrated aspect of the 'flow' process of construction" and that ASM's workers "were not functionally related to the process of construction."

Facts Regarding the Project

In July 2008, SANDAG entered into a design services agreement with DEA, under which DEA was to provide various design and related architectural and engineering services to SANDAG on an ongoing, on-call basis. The services were related to the construction of the Sorrento to Miramar Double Track Project, which involved the construction of 1.1 miles of railroad track parallel to the existing track, east of I-805 in San Diego. Under the service agreement, SANDAG would issue task orders further specifying the nature and scope of requested work. In February 2012, SANDAG issued to DEA, the prime designer for this design-bid-build project, "Task Order No. 47" for the project.

ASM Affiliates, Inc. was a subconsultant team member on the DEA on-call team for the SANDAG on-call agreement. On January 18, 2010, ASM was contracted by DEA to conduct an archaeological survey and evaluation of cultural resources within the Area of Potential Effect (APE) of the project. ASM's study took place over two years prior to the start of the construction project. In November 2010, ASM prepared a Historic Property Treatment Plan (HPTP) for the project.

Construction on the project did not begin until June 2012. From December 14, 2011 through March 2, 2012, ASM implemented the data recovery program described in the HPTP. The data recovery program resulted in the recovery of over 21,000 artifacts and cultural materials including bone and shell artifacts, ceramics, stone tools, vertebrate remains and charcoal. The contractor Flatiron/H&R, a joint venture, began grading operations in June 2012 and continued through at least February 2013. Under its subconsultant agreement with DEA, ASM monitored the contractor's grading activities for purposes of preserving the cultural resources.

Soils that were disturbed during the construction that had yielded human remains during ASM's previous archaeological data recovery program was water screened to recover human remains and artifacts. No soil testing was ever performed by ASM on this project. The data recovered by ASM on the project site was not relevant to the construction of the project. Rather, all data recovered by ASM related to archaeological artifacts and cultural materials were incorporated into historic reports and cultural resource reference documents. According to the decision, ASM performed three typical job duties: (1) Water screening, which required the employee to spread five gallon buckets of soil over a mesh screen to allow water to remove soil from the cultural artifacts to be identified; (2) Monitoring of the construction near the culturally sensitive sites; and (3) Dry screening, which again permitted soil to be screened to identify cultural artifacts.

For purposes of the assessment, the DIR inspector deemed ASM's work to be covered under the Field Soils and Materials Tester classification.

DIR's Analysis

The DIR established that ASM was not a subcontractor pursuant to Labor Code section 1772. However, the DIR relied on *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, 749-750 and *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 127 Cal.Rptr. 799, to look beyond the "transactional characterizations of the parties and focus on the actual nature of the work in question. Critical to this analysis in the *Williams* and *Sansone* cases was whether the functions performed "were integral to the performance of the public works contract. Of particular importance to the issue posed here is whether an operation is fully independent of the contract construction activities- i.e., whether it is integrated into the flow process of construction." The DIR found that the archaeologists employed by ASM were not performing work pursuant to the specifications of any construction contract, and were not providing goods or services directly related to the construction of the project. Moreover, ASM's work was not necessary to the physical completion of the project, the safety of the project, or the integrity of the completed structure, and had nothing to do with the construction process. Furthermore, the DIR found that ASM's work was "necessary for a reason extrinsic to actual construction requirements or standards" and only required by the National Historic Preservation Act legal mandate. The DIR concluded that the tasks performed by ASM's workers were not "functionally related to the process of construction and that the tasks were not an integrated aspect of the 'flow' process of construction. Rather, ASM's tasks were "fully independent of the contract construction activities" and ASM's employees performed their work separately from the construction.

While this decision involved fairly narrow and specific facts regarding ASM's scope of services on the project, the analysis and reasoning is helpful for engineers and land surveyors to understand the reasoning and logic that is applied by the DIR is determined whether design related services would be covered under the Prevailing Wage Laws. Moreover, it is important to note that the DIR will often look beyond the contractual relationship of the parties and typically will analyze the actual scope of services

performed to determine if the services would fall under a category such as Field Soils and Materials Tester. Finally, critical in evaluating whether design related services would be considered covered work, is determining if the services are “an integrated aspect of the 'flow' process of construction” and whether the scope of services were functionally related to the process of construction.

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