

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: October 12, 2015

TO: Dana Springs, Executive Director, Commission for Arts and Culture

FROM: City Attorney

SUBJECT: Contractor Registration and Commission for Arts and Culture Artist Contracts

INTRODUCTION

The Commission for Arts and Culture (Commission) contracts with artists to create artwork to be integrated into public works construction projects. Currently, two Requests for Qualifications (RFQs) are awaiting final approval for artwork to be incorporated into a new fire station and a new equestrian and multi-use staging area at Mission Trails Regional Park. The issuance of an RFQ is the first step to selecting artists for new projects. The standard RFQ used by the Commission sets forth the scope of work for the design, fabrication and installation of new artwork for the particular project and provides guidelines for responses. Responses to the RFQ are used to select the artist for the project and the RFQ forms the contract eventually entered into between the City and the artist. These particular RFQs call for an artist or artist team to apply to create site-specific artwork for the two projects.

California Senate Bill 854 (2013-2014 Reg. Sess.) (SB 854) passed in 2014 requires contractors to register prior to bidding on or performing public works subject to prevailing wages. Cal. Lab. Code § 1725.5. As of March 1, 2015, the City may no longer accept a bid, proposal, or quote from a contractor who is not registered with the California Department of Industrial Relations (DIR). Cal. Lab. Code § 1771.1(g). As of April 1, 2015, the City may not award a contract to a contractor who is not registered. *Id.* The Commission has asked whether artists would be considered contractors required to register with the DIR prior to bidding on an RFQ for the design, fabrication, and installation of artwork to be incorporated into a public work. These will be the first RFQs issued since the requirement to register went into effect.

QUESTIONS PRESENTED

1. Is the Commission required to comply with prevailing wage law when issuing an RFQ for artwork to be incorporated into new construction?

2. Is the artwork contracted pursuant to a Commission RFQ considered a public work under the California Labor Code?
3. Are artists bidding on the Commission's RFQ considered contractors such that they must register with the DIR prior to responding to the RFQ?
4. What are the Commission's options for complying with DIR registration requirements?

SHORT ANSWERS

1. Yes. The San Diego Municipal Code requires compliance with the California Labor Code prevailing wage sections. The City could be subject to severe penalties, including the loss of state funding for public works projects, for non-compliance.
2. Most likely yes. The pending RFQs call for the design, fabrication, and installation of artwork. Installation work is considered a public work. There is no case law or DIR determinations that have analyzed whether the design and fabrication of artwork is considered a public work, but there are some exemptions to prevailing wage coverage that may apply in limited circumstances.
3. Most likely yes. Because the standard RFQ includes prevailing wage covered work, i.e. installation work, artists responding to the RFQ would be considered contractors bidding on a public works contract requiring registration.
4. There are several options, each with some level of risk. The least risky option is to require the artists to register with the DIR. The City can also sever installation work from the current RFQ, then request a DIR determination that an RFQ calling for design and fabrication of artwork only is not subject to prevailing wages and therefore does not require DIR registration. The City can also issue the RFQ for design and installation only without requiring DIR registration or requesting a DIR opinion. This option carries more risk because the design and fabrication of artwork has not been analyzed by the DIR.

BACKGROUND

The Commission uses the following process to contract with artists when soliciting new artworks for incorporation into new construction¹:

- Commission staff, under oversight from the City of San Diego Public Works Contracting Group, will conduct a RFQ process open to individual artists and artist teams.

¹Due to the fact-based inquiry necessary to determine coverage of projects under prevailing wage law, this analysis is limited to the solicitation of new artwork intended for incorporation into new construction only. Solicitations for other types of projects will require prevailing wage coverage analysis based on the facts of the specific project.

- The RFQ sets forth the artist's scope of work for the design, fabrication, and installation of an artwork or artwork(s).
- RFQ respondents are asked to submit the following materials for evaluation: 1) a work sample of past work including still images and/or videos with annotations, 2) a letter of interest, 3) a résumé, and 4) three professional references.
- An ad hoc artist selection panel evaluates the pool of artists who respond to the RFQ. Generally, anywhere between 50-100 artists apply for a given project.
- The panel selects one artist for the contract award.
- The selected artist begins contract process with the City.

The RFQ responses are used to determine which artist is awarded the contract and its contents form the basis of the contract. Once under contract, the artist completes a design proposal to be included in the contract. A final artwork design is typically not approved by the Commission until 8-9 months after artist selection. At that point, the Commission and the artist have a general idea of what the artwork is and how it will be installed at the project site.

While the Commission calls this process an RFQ, this procedure is different than other RFQs used by the City pursuant to SDMC § 22.3008. Pursuant to that section, RFQs can be issued to “determine the interest of potential bidders or to shortlist or prequalify the field of Bidders eligible to submit bids or proposals.” Under a traditional RFQ, the contract is not awarded based on the RFQ, so registration with the DIR is not required prior to responding. Since the Commission awards the contract based on the RFQ, registration with the DIR is required prior to bidding if the RFQ calls for public works. This is because the response is a proposal to do work, meeting the requirements of a bid, defined at California Code of Regulations title 8 section 16000.

ANALYSIS

I. STATE AND LOCAL LAWS REQUIRE THE PAYMENT OF PREVAILING WAGES ON PUBLIC WORKS.

State law requires the payment of prevailing wages to workers employed on public works. Cal. Lab. Code § 1771. The San Diego Municipal Code requires “compliance with California Labor Code sections 1770 - 1781, as may be amended, for construction work over \$25,000 and for alteration, demolition, repair or maintenance work over \$15,000.” SDMC § 22.3019.² With the passage of SB 854, contractors must be registered to bid or work on contracts for public works requiring the payment of prevailing wages. Cal. Lab. Code §§ 1725.5a and 1771.5.³

The penalty for non-compliance with the California Labor Code is severe. The City could be prohibited from receiving or using state funding or financial assistance on construction projects

²See City Att’y MOL No. 2013-10 (June 17, 2013) for a detailed analysis of SB 7, which required charter cities to comply with prevailing wage law in order to receive state funding for construction projects.

³See City Att’y MS-2015-7 (April 20, 2015) for a more detailed analysis of the requirements of SB 854.

if the City has awarded, within the prior two years, a public works project without requiring compliance with the California Labor Code. Cal. Lab. Code § 1782(b). The City may be liable for attorneys' fees, penalties, and wage underpayment on projects that are inaccurately designated. Cal. Lab. Code § 1726(c)(1). City representatives who willfully violate the California Labor Code may be guilty of a misdemeanor. Cal. Lab. Code § 1777. If the City enters into a contract with an unregistered contractor, the City must also terminate the contract, which could lead to additional costs associated with cancellation. Cal. Lab. Code § 1771.1(f).

The Director of Industrial Relations has final authority to determine whether prevailing wages apply to a project. Cal. Lab. Code § 1773.5(d). This authority supersedes any determination the City makes regarding the applicability of prevailing wage law to a project.⁴

II. INSTALLATION WORK IS A PUBLIC WORK; DESIGN AND FABRICATION IS LIKELY OFF-SITE FABRICATION AND NOT A PUBLIC WORK.

For the purposes of paying prevailing wages, the term "public works" means "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds. . . . '[C]onstruction' includes work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work." Cal. Lab. Code § 1720(a)(1). Prevailing wage requirements also are "applicable to contracts let for maintenance work." *Id.*

The current standard RFQ calls for the design and fabrication of artwork and for the installation of the artwork. There is no doubt that all of the work will be done under contract and will be paid in whole or in part out of public funds. It must be determined whether the work to be completed constitutes "[c]onstruction, alteration, demolition, installation" or maintenance.

A. Installation

The installation of the artwork into a construction project would be considered a public work. Installation is specifically called out as an activity subject to prevailing wages and applies whether or not the fabrication of the underlying item is subject to prevailing wages. Cal. Labor Code § 1720(a)(1). The DIR defines installation as "work involving the bolting, securing or mounting of fixtures to realty." PW 2008-034, *Installation of Smart Classroom Technology - Fresno Unified School District* (Jul. 27, 2009).⁵

⁴ A final DIR determination can only be challenged by judicial review pursuant to California Code of Civil Procedure section 1085. Cal. Lab. Code § 1773.5(d).

⁵ The DIR considers any item that is affixed to realty to be a fixture, citing California Civil Code section 660, defining fixture as that which is "permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screws;" regardless of whether the fixture can later be uninstalled and relocated. PW 2008-034. DIR decisions are advisory only and have no precedential value. See DLSE Public Works Manual § 2.7.1 (June 2014). The DIR has cautioned that the decisions are current only as of the date of issuance.

In cases where the artwork is permanent and fixed, the installation would constitute “bolting, securing or mounting of fixtures to realty.” The RFQs for site-specific artwork calling for installation would meet this definition.⁶ The RFQ would be considered a contract for a public work requiring registration because it includes design, fabrication, and installation in one contract.⁷

B. Design and Fabrication of Artwork

A large part of the work to be completed under each RFQ is the design and fabrication of the artwork. Neither courts nor the DIR have analyzed whether the design and fabrication of artwork constitutes a public work subject to prevailing wages. For new pieces of artwork, it must be determined whether the work completed in the design and fabrication of the artwork would be considered construction.

The term “construction” is not specifically defined in the Labor Code or regulations and is broadly interpreted in the prevailing wage context. *See Priest v. Housing Authority of the City of Oxnard*, 275 Cal. App. 2d 751, 754-756 (1969); *Lusardi Construction Co. v. Aubry*, 1 Cal. 4th 976, 987-89 (1992). The DIR has interpreted this term to include “activities integrally connected to the construction of the Project. . . without which the Project could not have been developed.” PW 2002-047, *Legacy Partners Project City of Concord Redevelopment Agency* (Oct. 29, 2003), quoting PW 2000-011, *Town Square Project/City of King* (Dec. 11, 2000). Courts have relied on definitions of construction related to the building of structures and buildings, not artwork. One court described:

As one thinks of ‘construction’ one ordinarily considers the entire process, including construction of basements, foundations, utility connections and the like, all of which may be required in order to erect an above-ground structure.

Priest, 275 Cal. App. 2d at 756. Another court defined construction as:

The plain meaning of the term ‘construction’ includes not only the erection of a new structure but also the renovation of an existing one.

Plumbers and Steamfitters, Local 290 v. Duncan, 157 Cal. App. 4th 1083, 1089 (2007).

⁶ The applicability of prevailing wage law to temporary installations would need to be analyzed based on the specific facts of the installation.

⁷ The threshold amounts set forth in SDMC § 22.3019 are based on the construction project total, rather than the cost of installation alone. The DIR has stated that under California Labor Code section 1720 (a), if “there is a single project involving the payment of public funds, prevailing wage will apply to the entire project.” PW 2000-016, *Vineyard Creek Hotel and Conference Center, Redevelopment Agency of Santa Rosa* (October 16, 2000). The installation contract would require the payment of prevailing wages, requiring registration prior to bidding, as a part of the overall construction project.

In the case of the current RFQs, the projects for the new fire house and the park multi-use staging area would certainly be considered construction as erections of new structures. In order for the design and construction of artwork to be considered independent of the underlying construction of new structures, it must not be “integrated into the flow process of construction.” *Sheet Metal Workers’ Int’l Ass’n., Local 104 v. Duncan*, 229 Cal. App. 4th 192, 206 (2014) (“*Duncan*”).

The RFQ for the multi-use staging area calls for the art to be “incorporated” and “site-specific.” It further anticipates that, “the Artist and design team may work together to supplement the construction drawings with notes about the artwork installation.” While the artwork is intended to be incorporated, the RFQ process is separate from the underlying design and construction contracts.

Although site-specific, the artwork contemplated in these RFQs is intended to be designed and fabricated off-site. Off-site fabrication of items for incorporation into public works projects is not a part of the flow of construction and is outside the scope of prevailing wage law. *Duncan* at 212. The *Duncan* court analyzed off-site fabrication of materials and explained that:

Work performed at a permanent, offsite, and non-exclusive manufacturing facility does not constitute an integral part of the process of construction at the site of the public work. Fabrication performed at a permanent offsite facility is independent of the performance of the construction contract because the facility’s existence and operations do not depend upon a requirement or term in the public works contract.

Id. The court ultimately ruled that:

Offsite fabrication is not covered by the prevailing wage law if it takes place at a *permanent*, offsite manufacturing facility and the location and existence of that facility is determined wholly *without regard to the particular public works project*.

Duncan at 214 (emphasis added).

In order to take advantage of this exemption from prevailing wage coverage, artists would not be able to submit to the RFQ unless they have an established studio or workspace where the design and fabrication work could be completed and subsequently installed by registered contractors at the final site.⁸ The *Duncan* court emphasized that the site of fabrication could not be established specifically for the project based on consistent DIR determinations that fabrication at a facility specifically established to fabricate items for a public works project is itself a public work. *Duncan* at 209; see P.W. 1999-032, *San Diego City Schools, Construction of Portable Classrooms*. (June 23, 2000). Because the work takes place off-site, there is a good argument

⁸ If the work must be assembled at the final site, assembly would require the payment of prevailing wages if the work to be assembled is subsequently installed. PW [2005-017](#), *Western Contract Services Assembly and Disassembly of Free-Standing Modular Furniture* (December 16, 2005).

under *Duncan* that the design and fabrication of artwork should not be considered public work subject to prevailing wages.⁹ In this case, the artwork would be created by the artist in his or her own workspace and not at a location established for the contract, and the workspace would not be located at the site of the work.¹⁰

As off-site fabrication, work ancillary to the actual design and fabrication of the artwork should likewise be exempted, such as the creation of an installation and lighting plans and consultation on installation. Design and consultation work is not construction and work under design contracts is only covered by prevailing wage law if it requires going on site to do work involving trades covered by prevailing wage determinations. See Memorandum from Tom Zeleny, Chief Deputy City Attorney, City of San Diego, to Al Rechany, Deputy Director, Public Works-Contracts, City of San Diego (April 28, 2015) (on file with Office of City Attorney); PW 2009-005, *Solar Photovoltaic Distributed Generation Facility West County Wastewater District Design* (April 21, 2010) (Construction work does not encompass “traditional white-collar engineer and architect work”). The artist’s work on lighting and installation plans is design work, not construction and does not require work involving trades covered by prevailing wage determinations. Similar to design work, an artist consulting on installation would not involve work of trades covered by prevailing wage determinations. The RFQ should specify that all installation work will be done by registered contractors and the artist would serve as a consultant only.

Based on the *Duncan* case, work in a contract for off-site design and fabrication of artwork would most likely not be considered a public work requiring registration prior to bidding. However, no DIR determinations or court decisions have specifically addressed this specific issue and the only way to ensure that registration is not required would be to get a DIR determination that the work is not considered a public work.

III. ARTISTS WOULD LIKELY BE CONSIDERED CONTRACTORS.

SB 854 requires all contractors and subcontractors who bid on or perform work on public works contracts be registered with DIR. Cal. Lab. Code § 1771.1. The requirement that a contractor be registered must be included in all bid invitations and registration must be checked prior to acceptance of a bid. *Id.* California Labor Code section 1722.1. specifies that, “For the purposes of this chapter, “contractor” and “subcontractor” include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works pursuant to this article and Article 2 (commencing with Section 1770).” There is no exception in the California Labor Code for artists.

⁹ Prior to *Duncan*, the DIR determined that the off-site refurbishment of decorative iron fixtures on the State Capitol was subject to prevailing wages. PW 2002-034, *Sacramento State Capitol Exterior Painting Project, Restoration and Hauling of Decorative Cast Iron Elements* (Jul. 18, 2002). The DIR determined that the refurbishment of the decorative pieces was integral to the project and there was no analysis of the fact that the work was done off-site. Unlike court decisions, DIR determinations are non-precedential and non-binding. Furthermore, the design and fabrication of new artwork can be distinguished from the refurbishment of architectural elements already incorporated into construction.

¹⁰ The RFQ should specify that design and fabrication work is to be completed off-site.

While there is no case law interpreting this section, one DIR public works determination letter rejected the contention that contractor and subcontractor should be “defined in accordance with the requirements of the state contractor’s licensing board” in a footnote. PW 2007-008, *Russ Will Mechanical, Inc. - Off-Site Fabrication of HVAC Components*, p. 4, n. 3 (Nov. 13, 2008). The DIR website indicates that “contractor” will be interpreted broadly. In answering questions regarding SB 854, the DIR explains that “coverage is not necessarily limited to work performed at the construction site by the traditional construction trades” and directs awarding bodies to seek a determination of whether work is considered a public work. (Department of Industrial Relations- Frequently Asked Questions, <http://www.dir.ca.gov/Public-Works/PublicWorksSB854FAQ.html>.)

If the work is subject to prevailing wages, it must be done by a DIR registered contractor, regardless of whether it is done by a traditional construction contractor. Based on the DIR’s broad interpretation of its regulations and with no exemption for artists, it is likely that artists would be considered contractors when bidding on an RFQ calling for public works. Absent any clear authority for exempting artists from registration requirements, an artist should be treated as a contractor and be required to register if bidding on an RFQ calling for public works to protect the City from the risk of an adverse determination.

IV. ARTISTS CANNOT BID ON OR PERFORM PUBLIC WORKS WITHOUT REGISTERING.

To protect the City from the risk of violating the California Labor Code, the Commission should not allow unregistered artists to bid on public works contracts including responding to RFQs that will result in a contract. This leaves the Commission with three options for proceeding with its RFQs, listed below in order of increasing risk to the City.

Option 1: Keep the current RFQ for the design, fabrication, and installation of artwork and require all artists to register with the DIR prior to responding to the Commission’s RFQ¹¹

This option ensures that both the City and the artist are in compliance with all requirements under the California Labor Code, including the registration of contractors. This option has no risk for the City because artists will be registered with the DIR as contractors, allowing them to bid on and perform public works.

This option also protects artists from any possible repercussions of bidding on public works projects while unregistered. Pursuant to California Labor Code section 1725.5, a prerequisite of registration requires that the “contractor has not bid on a public works contract, been listed in a

¹¹ In order to limit the number of artists subject to registration, the Commission could consider a two-part RFQ/RFP contracting process. Unregistered artists would be able to respond to an initial RFQ that does not form an eventual contract pursuant to SDMC § 22.3008. From this solicitation, the Commission could then prequalify artists, who would then register with DIR, to respond to an RFP that would form the eventual contract.

bid proposal, or engaged in the performance of a contract for public works without being lawfully registered in accordance with this section, within the preceding 12 months...” Cal. Lab. Code § 1725.5 (a)(2)(E). The period of disqualification can be waived, but only if the contractor has not had any other violations in the previous 12 months and if the contractor pays a nonrefundable penalty registration fee of \$2000. *Id.*

Option 2: Sever the design and fabrication of the artwork into a separate contract from installation and ask the DIR for a determination of whether the work contracted for in a design and fabrication contract is subject prevailing wages prior to the issuance of an RFQ.

This option requires splitting the design and fabrication work into a separate contract from the installation work. This option has little risk because it relies on receiving a DIR opinion prior to issuing the RFQ to ensure that the design and fabrication work is not a public work requiring registration. The DIR is empowered to make such determinations pursuant to California Code of Regulations title 8 section 16001(a)(1).

As currently written, the RFQ contains specific directives involving the installation of the artwork into facilities. In order to enable the City to make an argument that the contract is not a public work, installation should be removed from the RFQ and resulting contract. As explained in section IIA, this installation work would most likely be considered a public work and would require artists to be registered in order to bid. This would leave a RFQ and contract for design and fabrication of the artwork itself only. The request for determination on that RFQ should specify that the artist will transport the artwork and would create a plan for and consult on installation of the artwork to be completed by registered contractors via separate contract.

Since it is unclear whether the design and fabrication of artwork standing alone would be considered a public work, getting a DIR determination ensures compliance with the California Labor Code. If the DIR determines that design and fabrication of artwork is a public work, the Commission can require artists to become registered prior to bidding on a design and fabrication contract. If the design and fabrication of the artwork is considered by the DIR to be a public work standing alone requiring registration, it would not create any additional problems to include the installation work in the final RFQ going out for bid, since the artist would be required to be registered anyway for the design and fabrication of the artwork. If the DIR determines that design and fabrication of artwork is not a public work, the Commission can release the RFQ for design and fabrication of artwork for bids without requiring registration. Any stand alone RFQ for installation would have to be bid on by DIR registered contractors, and the payment of prevailing wages would apply.

Option 3: Sever the design and fabrication of the artwork into a separate contract from installation and proceed with bidding from unregistered contractors without first asking the DIR for a determination of whether the work is subject to prevailing wages.

This option would require relying on an untested argument that design and fabrication of artwork to be incorporated into a public work is not in and of itself a public work because the artwork is created off-site.

Because there is no case law or DIR determination confirming that design and fabrication of artwork is not a public work, this option carries more risk than proceeding after receiving a determination from the DIR. If the DIR ultimately concludes that the design and fabrication of artwork for incorporation into a public work constitutes a public work, the City and the artist would be subject to the penalties described in Section I. The City would potentially lose state funding for City projects and the artist would also be required to pay a penalty registration fee of \$2000 after his or her first violation to work on public work moving forward. The City would be forced to cancel the contract and would be subject to costs associated with cancellation. Cal. Lab. Code § 1771.1(f).

CONCLUSION

Artists who respond to an RFQ for a public work must be registered with the DIR. The design and fabrication of artwork is likely not a public work because it is not integrated into the flow of construction by virtue of its production off-site from the construction project it is to be integrated into. However, the *installation* of the artwork into the construction project is a public work, therefore, requiring registration prior to bidding.

The Commission has several options for compliance with the California Labor Code in proceeding with its RFQs. To ensure compliance, the Commission can require all artists to become registered with the DIR before bidding on an RFQ for the design, fabrication, and installation of artwork. If the Commission removes installation work from its RFQs for the design and fabrication of artwork, artists are arguably not required to register as contractors with the DIR prior to bidding, assuming that the design and fabrication is done off-site. Removing the installation work without a DIR determination puts the City in a better position than issuing the RFQ with installation included, but still has risk because the design and fabrication of artwork is an untested area. A DIR determination would guarantee that a design and fabrication contract

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does not constitute a public work. Letting the RFQ out for bid as it has been done in the past, including all design, fabrication, and installation work, without registration would certainly run afoul of the California Labor Code and could subject the City and the artist to significant penalties.

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