



Memorandum

TO: RULES COMMITTEE

FROM: Katy Allen

SUBJECT: PARK WEST LANDSCAPE/CORDE TERRA FAMILY APARTMENTS **DATE: 01-09-08**

Approved

Date

1/10/08

RECOMMENDATION

Accept this report in response to Park West Landscape Inc.'s December 6, 2007 letter.

BACKGROUND

On December 6, 2007, Park West Landscape requested to have an item placed on an upcoming City Council agenda to dispute a liquidated damage assessment for a prevailing wage violation on the Corde Terra Family Apartments project. At the December 12, 2007 Rules Committee meeting, staff was directed to prepare a written report for the January 16, 2008 Rules and Open Government Committee meeting.

In accordance with City Council and Redevelopment Agency action on January 27, 2004, Item 7.1 (implementation of enforcement mechanisms for prevailing wage law requirements in Redevelopment contracts and agreements administered by the Housing Department), the Office of Equality Assurance assessed liquidated damages in the amount of \$87,779.00 to Fairgrounds Luxury Apartment LP on September 6, 2007 for a prevailing wage violation at the Corde Terra Family Apartments (misclassification of workforce by Park West Landscape, Inc., a subcontractor). Fairgrounds Luxury Apartment LP submitted a check in the amount of the assessment on September 17, 2007.

Attached are copies of the City Attorney's Office and City Manager's letters in response to Park West Landscape, Inc.'s letters.

KATY ALLEN

Director, Public Works Department

NG:jb
g: Council Committees/Rules

Attachments

December 6, 2007

Matthew Prasse
Park West Landscape Inc.
22421 Gilberto
Suite A
Rancho Santa Margarita CA 92688

Re: Corde Terra Apartments

Dear Mr. Prasse:

Thank you for your letter regarding the Corde Terra Apartments and the liquidated damages recently imposed on the Developer, Fairgrounds Luxury Family Apartment LP. Enclosed is a copy of Richard Doyle's response dated December 4, 2007.

As stated in the City Attorney's letter, the review of the facts shows that the Developer violated the City's prevailing wage requirements and as a result liquidated damages were appropriately assessed to the Developer. Any further disputes regarding obligations of Park West Landscape as a subcontractor in this transaction should be resolved between Park West Landscape and Fairgrounds Luxury Family Apartment LP.

Sincerely,



Debra Figone
City Manager

Enclosure

c: Jonathan Emami, Fairgrounds Luxury Family Apartment LP
Richard Doyle, City Attorney
Nina Grayson, Office of Equality Assurance
Jim Tracy, Park West Landscape Inc.

ED MORAN
Chief Deputy City Attorney
Direct Line: (408) 535-1920

December 4, 2007

Matthew Prasse
Park West Landscape Inc.
22421 Gilberto, Suite A
Rancho Santa Margarita, California 92688

RE: Corde Terra Apartments

This is in response to your letter regarding the Corde Terra Apartments and the liquidated damages imposed as a result of the failure to pay the required prevailing wages to certain workers on that project.

As you are aware, Section 4.11 of the Construction and Permanent Loan Agreement and Addendum between the City of San Jose and Fairgrounds Luxury Family Apartment LP ("Developer") for the Corde Terra Family Apartments entered into on September 1, 2005 ("Agreement") requires the Developer to abide by the City's prevailing wage requirements during the construction of the Project. Consequently, under the terms of the Agreement the Developer agreed to pay, or cause to be paid, prevailing wages, for all construction work on the Project. Further, City and Developer recognized that Developer's breach of applicable prevailing wage provisions would cause the City damage by undermining City's goals in assuring timely payment of prevailing wages, and would cause the City additional expense in obtaining compliance and conducting audits, and that the delays, expense and difficulty involved in proving City's actual losses in a legal proceeding would not be remedied by Developer's payment of restitution to the worker paid less than the prevailing wage. Accordingly, instead of requiring such proof of loss or damage, City and Developer agreed that:

- A. For each day beyond the Payroll Due Date that Developer fails to submit contractor's certified payroll to City, Developer shall pay to City as liquidated damages the sum of Two Hundred Fifty Dollars (\$250.00); and

- B. For each instance where City has determined that prevailing wage requirements were not met, Developer shall pay to City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the prevailing wage which should have been paid.

On August 16, 2005, the City's Office of Equality Assurance provided the Developer with wage rates for the project. The wages issued for this project were based on DIR Wage Index 2005-1. In addition, the City sent an accompanying cover sheet dated March 10, 2005 listing classifications not allowed on projects covered by the City's prevailing wage requirements and DIR Residential Wage Rates. Under Labor Code section 1773.2 awarding bodies have the ability and discretion to determine which DIR classifications to allow or disallow on City construction projects.

On March 19, 2007, the Developer submitted Park West Landscape's Statement of Non-Performance for weeks ending December 4, 2006 through December 31, 2006 to the OEA. On April 27, 2007, Park West's certified payroll reports for January 2007 through March 11 were received by OEA. During OEA's review of Park West's certified payroll reports, the staff identified a prevailing wage violation—the use of the Plumber Landscape Tradesman I classification—a classification not allowed on City of San Jose projects and identified on the cover sheet sent on August 16, 2007. Consequently, OEA directed the Developer to have Park West to reclassify the affected workforce, calculate restitution owed, prepare restitution checks to the affected workers and provide OEA with the restitution checks no later than July 31, 2007. On July 13, 2007 Park West provided OEA with 38 restitution checks totaling \$29,265.00.

The City's Director of Equality Assurance, Nina Grayson, met with the Developer and Mr. Jim Tracy on September 6, 2007 to discuss the assessment of liquidated damages as agreed to in the Agreement. At that meeting, Ms. Grayson informed the Developer and Mr. Tracy that the liquidated damages provision of the Agreement had been agreed to by the parties to the Agreement and could not be waived by City staff but provided options that could be pursued—attend a City Council meeting and request a waiver or file a formal claim with the City of San Jose.

Following the meeting on September 6, 2007, Ms. Grayson notified the Developer of the liquidated damage assessment of \$87,779.00. On September 17, 2007 the Developer submitted a check in the amount of the assessment

The City prevailing wage policy as stated in the Agreement provides for liquidated damages upon a determination that a violation of the City's prevailing wage policy has occurred. There is no element of "willful" or "intentional" acts in determining liquidated damages. In fact, the purpose of liquidated damages as set forth in the Agreement is so that the parties would not have to expend time and expense in determining the extent of the penalty or damages in each case.

In conclusion, the review of the facts shows that the Developer violated City's prevailing wage requirements in the Agreement by not paying appropriate prevailing wages as required under the Agreement and as a result liquidated damages were appropriately assessed to the Developer. Any further disputes regarding any obligations of Park West Landscape as a subcontractor in this transaction should be resolved between Park West Landscape and the Developer.

Very truly yours,

RICHARD DOYLE, City Attorney

By: 

ED MORAN
Chief Deputy City Attorney

cc: Jonathan Emami, Fairgrounds Luxury Family Apartment LP
Debra Figone, City Manager
Mina Grayson, Office of Equality Assurance
Jim Tracy, Park West Landscape Inc.
Paul Purcell, Esq.



Office of the City Attorney
200 East Santa Clara Street,
San Jose, CA 95113
Attn: Richard Doyle, City Attorney

Subject: Corde Terra Apartments
Contractor: Roem, Inc.
Subcontractor: Park West Landscape, Inc

Dear Mr. Doyle:

I am writing on behalf of Park West Landscape Inc, to inform of you a pending matter between Roem Inc, PWL and the City of San Jose. Through the Office of Equality Assurance, the City of San Jose has wrongfully and punitively levied unwarranted and unjustified liquidated damages.

Please find enclosed a copy of our letter to Roem Inc, the general contractor of the project. Park West Landscape has tried to resolve this matter with the City Office of Equality Assurance directly and through the General Contractor, to no avail. We encourage you to review the information enclosed and take interjectory measures at our request. We are available to meet with you at your convenience with the goal to gain resolution and avoid further action.

Please contact me (949)546-8315 or Jim Tracy (949)546-8311 with any questions you may have.

Thank you for your time,



Matthew Prasse
Labor Compliance Officer
Park West Landscape

CC: Debra Figone, City Manager

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(949) 546-8300 • FAX: (949) 546-8392
www.parkwestlandscape.com



City Manager's Office
200 East Santa Clara Street,
San José, CA 95113
Attn: Debra Figone, City Manager

Subject: Corde Terra Apartments
Contractor: Roem, Inc.
Subcontractor: Park West Landscape, Inc

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Please contact me (949)546-8315 or Jim Tracy (949)546-8311 with any questions you may have.

Thank you for your time,

A handwritten signature in black ink, appearing to read "Matthew Prasse", written over a circular scribble.

Matthew Prasse
Labor Compliance Officer
Park West Landscape

CC: Richard Doyle, City Attorney



10/18/2007

Jonathan Emami
Roem Corporation
1650 Lafayette Street
Santa Clara, CA, 95050

Ref: Corde Terra Apts
Subject: Change order #8

Dear Jonathan,

We are in receipt of your deductive change order dated September 17th 2007, requesting our agreement to a charge of \$89,159.61. No supporting documents accompanied this request, but we understand it is based on a claim by the City of San Jose that Park West Landscape failed to comply with the City's Prevailing Wage Policy. The amount of the charge is stated as three times the claimed underpayment. PWL has reviewed its compliance procedures and the facts. PWL is and has been in compliance with the Policy, and therefore does not feel that the charge back is appropriate. In fact, PWL has, without admission of prevailing wage noncompliance, already paid out \$ 29,719.77 to certain laborers as requested by the City and in full settlement of all claims.

PWL also notes that any obligation it may have to Roem in this regard must arise out of its Subcontract, as PWL has no direct contract with the City. PWL will fully comply with its obligations under the Subcontract, of course. However, for example, its limited obligations of indemnity if applicable here surely imply the right to dispute the underlying claim.

Our position, derived from our review of the applicable City of San Jose Statutes and Resolutions, is as follows:

Liquidated Damages Do Not Apply

Section 1 of the prevailing wage policy of the City of San Jose (under Resolution 61144) states:

- I. "It is the policy of the City of San Jose that in any contract hereinafter entered into under the circumstances set forth below shall provide that not less than the general prevailing wage of per diem wages as defined in the California Labor Code shall be required to be paid:

(A.) City Public works construction projects funded in whole or in part by City funds, where work is performed pursuant to any public works construction contract to which the City is a party."

It also states under Policy Section 3(B)

"(B) Prevailing wage rates for employees covered by this Policy *shall be* those wage rates as established or published by the State Department of Industrial Relations."

It is clear that the Prevailing Wage Policy looks solely to the DIR for direction in wage determination. As all workmen executing the public work were paid under these guidelines; there has been no breach of the Wage Provision.

Every PWL employee who worked on the Corde Terra project was in compliance with this policy.

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Because the actual contracted work done was that of a Landscape Tradesman as defined by the Department of Industrial Relations of the State of California ("DIR") and *therefore adopted by the City in Policy*, the employee was *in fact paid* the required prevailing wage for that classification, in full compliance with the Policy as adopted by City Council. For reasons not disclosed, however, the City's Office of Equality Assurance does not "allow" the classification of "Landscape Tradesman". The basis for OEA's alleged authority to "allow" or "disallow" classifications is, to say the least, obscure. Nevertheless, at the City's request, PWL resubmitted its compliance forms to "reclassify" the work done as that of a Landscape Assistant Journeyman, which is an "allowed" classification, which resulted in a higher prevailing wage classification. PWL made these changes and paid the difference in wages (approximately \$30,000) to the affected employees all at the City's request and insistence, and in the belief, induced by the City, that PWL by doing so resolved all issues with the City.

We assert that there was no prevailing wage breach, and that the Goals of City's Prevailing Wage Policy were not damaged in anyway during any point of the execution of the contract.

The following are the listing of City's "Goals" that are mentioned in Attachment "C" from the Contract Provision for Prevailing wages:

- 1. It protects City job opportunities and stimulates the City's economy by reducing the incentive to recruit and pay a substandard wage to labor from distant, cheap-labor areas.*

Park West Landscape did in fact pay the prevailing, DIR sanctioned, correct wage for the tasks performed on the jobsite. The wage paid was not substandard, and thus there was no incentive to recruit outside our workforce. In fact, all employees who worked on the job were current employees of PWL prior to commencement of labor upon the field, with the majority of them being citizens of San Jose.

- 2. It benefits the public through the superior efficiency of well-paid employees, whereas the payment of inadequate compensation tends to negatively affect the quality of services to the City by fostering high turnover and instability in the workplace.*

All workmen on the site were well and accurately paid for the task performed according to the Department of Industrial Relations. The quality of work was satisfactory to the City. In addition, as recognized by the OEA at the time of payment dispersal, of the 38 employees paid as a Landscape Tradesman, only two were no longer employed by Park West Landscape, further showing essentially no turnover and a stable work environment.

- 3. Paying workers a wage that enables them not to live in poverty is beneficial to the health and welfare of all citizens of San Jose, because it increases the ability of such workers to attain sustenance, decreases the amount of poverty and reduces the amount of taxpayer funded social services in San Jose.*

All workmen on the job in question were paid a correct prevailing wage of \$15.15/hr. This amount is triple the federal minimum wage, more than double the state minimum wage, half again as much as the San Jose Living Wage resolution, and a correct prevailing wage, and was therefore no burden to the City of San Jose's taxpayer social services due to possible impoverishment.

- 4. It increases competition by promoting a more level playing field among contractors with regard to the wages paid to workers.*

At the time of bidding, all contract stipulations provided were taken into account and accurately bid. Employees were paid at least the prevailing wage for the work performed, as mandated and sanctioned by the State, this regulated rate caused no injury to the City or fellow contractors.

There are no grounds under which incalculable damage occurred to the City as a result of our compliance with the Prevailing Wage policy. The charge is therefore without merit, and is void. It seems more likely, that the assessment is being used as a penalty, with no recourse for an honest contractor.

OEA's response to Park West Landscape regarding damages seems to be in contrast with their mission statement, State Law, San Jose's prevailing wage policy and the City auditor's recommendation.

While we understand that the City of San Jose is a charter city, PWL can't help but notice that the lack of mercy/ability to negotiate/heart in the conduct of the Office of Equality Assurance is directly in contrast with their own prevailing wage policy, state law, and even the original recommendations of the City auditor.

Under the belief induced by the OEA that a meeting including Roem and the representatives of OEA in regards to this issue would lead to a conclusion and relief, Jim Tracy, COO of PWL met with Jonathan Enami, VP of Roem Corporation; Rebecca Lam, Roem's Senior Accountant; and representatives of the offices of the OEA. After a brief review with Theresa LeVar, the City of San Jose's Contract Compliance Specialist of the circumstances and its consequential resolution, she was of opinion that PWL had done what was needed. The contractors then met with Nina Grayson, the City of San Jose's OEA Director for the express purpose of waiver. However, at that time, Ms. Grayson stated that she had "no authority to waive the requirement of a resolution" and regardless of the diligence of our records, the honest way in which they were represented, or the speed with which the issue was resolved to the City's satisfaction, the only recourse was to "go to a City Council meeting" or "file a formal complaint". It seems that while the goal of the liquidated damages clause is useful in deterring would be subverters of prevailing wage policy, it leaves no room for the "equitable treatment of Contractors", part of OEA's stated mission.

The City's prevailing wage policy was created and sculpted from the recommendations of an internal audit. In 2003, upon finding that the OEA did not retrieve funds or penalize contractors at the time, the city auditor made the following recommendation:

"Recommendation 7: "Impose financial penalties on contractors who willfully or blatantly violate the City's Prevailing Wage or Living Wage resolution."

Park West Landscape has violated neither resolution, but by accidental administrative oversight, missed an inserted addendum by the OEA.

The prevailing wage policy of the City of San Jose (under Resolution 61144) is as follows:

"(C) Contracts or agreements entered into by the city for the projects or services specified in Section 1 above shall include provisions relating to records, apprentices, notices and enforcement in accordance with the requirements of the California Labor Code."

California Labor Code, in regard to Prevailing wages (1770 - 1781) states numerous times that penalties incurred should be only assessed at maximum rate when found to be "willful" (1775.2(B)(iii)) and that it takes into account whether or not the failure to pay the correct rate was "good faith mistake" (1775.2(A)(j)) It goes on to further reduce the penalties in the case that if the error was a good faith mistake and "voluntarily and promptly corrected when brought to the attention of the contractor or subcontractor". (1775(2)(B)(i))

All of these are certainly true in this situation.

You can imagine, therefore, our surprise at the deductive change order. In PWL's view it paid *more* than the prevailing wage for the work performed by these employees, because the City insisted that PWL did so. The affected employees had previously been paid the prevailing wage *for the work done by them*. As set out in the Policy, the amount to be paid to an employee for the work performed is the prevailing wage, no more and no less. Thus, Policy Section 3(B) states:

"(B) Prevailing wage rates for employees covered by this Policy shall be those wage rates as established or published by the State Department of Industrial Relations."

See also, Policy Section 2, which pertains to Roem:

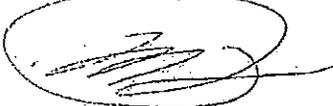
"Section 2. Obligations of Contractors: On publicly funded projects, contractors are required to pay and ensure that their subcontractors pay the prevailing wage as determined by the Director of the California Department of Industrial Relations and/or the awarding body."

Again, the requirement is to pay the prevailing wage, *not* more than the prevailing wage as OEA demands.

OEA has no authority to change those rates under the Policy. The only authority to independently set any prevailing wage rate at all is given in the rare instance where there has been *no* DIR determination, and in that case it is given to the City Manager, not the OEA (Policy, Section 3(D)). Thus the City Council, having considered the issue whether to assign authority to change the prevailing wage figure, decided *not* to give *any* authority to OEA to do so. It looks as if OEA, for reasons of its own, wanted to increase the applicable prevailing wage for Landscape Tradesman from the one set by the DIR and *required* by the City Council in the Policy. Precluded from making that change directly, it "disallowed" the actual classification, leaving only the higher prevailing wage classification of Landscape Assistant Journeyman as an option. This attempt to accomplish indirectly what it could not accomplish directly should itself be "disallowed."

Based on the foregoing PWL is unable to agree that there was any violation of the Policy justifying the assessment of any liquidated damages. Likewise, even if such violation did occur, which it did not, nevertheless the conclusion is inescapable that it was merely an honest good faith error which was quickly and completely resolved and settled in the exact fashion that the City requested. PWL stands by the correctness of its actions and will persevere to defend its integrity by all means necessary and expedient. PWL recommends to Roem to present this information to the City and resolve the matter to the benefit of all parties.

In all sincerity,



Matthew Prasse
Labor Compliance Officer

CC:
Nina Grayson
Theresa LaVar
Rebecca Lam
Jim Tracy

ROEM
CORPORATION

EXQUISITE DETAIL ON
A SOLID FOUNDATION

September 17, 2007

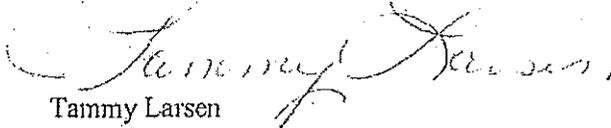
Mr. Jim Tracy
Park West Landscape, Inc.
22421 Gilberto, Suite A
Rancho Santa Margarita, CA 92688

Re: Liquidated Damages for Violation of Prevailing Wages
Cordé Terra Family Apartments

Dear Mr. Tracy:

The attached deductive change order is being assessed to Park West Landscape on the Cordé Terra Apartments for violation of prevailing wage requirements. As per Attachment "C," of the contract signed between ROEM Builders, Inc. and Park West Landscape, liquidated damages equal the sum of three times the difference between the actual amount of wages paid and the amount of wages that should have been paid and in this case, the sum of liquidated damages total \$89,159.61 (Per the City of San Jose, \$29,719.87 x 3). Please sign the attached deductive change order and return with your immediate attention.

Sincerely,



Tammy Larsen
Contract Administrator

Attachments

REC'D OCT 20 2005

ATTACHMENT "C"

Cordé Terra
Family Apartments

Liquidated Damage for Breach of Wage Provision

Contractor agrees its breach of the Wage Provision would cause the City damage by undermining the Goals and the City's damage would not be remedied by contractor's payment of restitution to the workers who were paid a substandard wage. Contractor further agrees that such damage would increase the greater number of employees not paid the applicable prevailing wage and the longer the amount of time over which such wages were not paid.

The City and Contractor mutually agree that making a precise determination of the amount of City's damages as a result of Contractor's breach of the Wage Provision would be impracticable and/or extremely difficult. Therefore, the parties agree that, in the event of such a breach, Contractor shall pay to the City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the amount of wages that should have been paid.

I have read and acknowledge the above Liquidated Damage for Breach of Wage Provision:

Karl Hansen Dir Pres
Signature of Subcontractor

10/17/05
Date

[Signature] Proj
Signature of ROEM Representative

10/24/05
Date



December 6, 2007

City of San Jose
200 East Santa Clara St.
San Jose, CA 95113

Attention: Mayor and City Council Members
C/O Lee Price

Subject: Request to place an item on the City Council agenda

Dear Mayor and Members of the City Council:

This letter shall serve as our request to place an item on the City Council agenda. This request is pursuant to our dispute of an assessed \$90,000 liquidated damage penalty for an alleged prevailing wage at the Corde Terra Apartments project. Enclosed please find several documents that outline the assessment and subsequent response by Park West. It is our request that we be allowed to present our case to the City Council for a determination if in fact the assessment meets with the City's guidelines.

Thank you in advance for your placement of this item on the next City Council meeting.

Sincerely,

Jim P. Tracy
Chief Operating Officer
Park West Landscape, Inc.