STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

PUBLIC WORKS CASE NO. 2023-001

KERN MEDICAL CENTER SOLAR PROJECT

KERN COUNTY HOSPITAL AUTHORITY

I. INTRODUCTION

On March 7, 2024, the Director of the Department of Industrial Relations (Department) issued a public works coverage determination (Determination) finding that construction of the Kern Medical Center Solar Project for the Kern County Hospital Authority is public work subject to California's prevailing wage requirements.

On April 3, 2024, Alpha Energy Management, Inc. (AEM) filed an appeal of the Determination (Appeal) under Labor Code section 1773.5[1] and California Code of Regulations, title 8, section 16002.5. In conjunction with its appeal, AEM also requested a hearing. All interested parties were thereafter given an opportunity to provide legal argument and any additional supporting evidence. AEM subsequently filed submissions, including declarations and exhibits in support of the Appeal. The Division of Labor Standards Enforcement (DLSE) filed an opposition. AEM filed a reply.

The Director has sole discretion to decide whether to hold a hearing. (Cal. Code Regs., tit. 8, § 16002.5, subd. (b).) Because the material facts are not in dispute and the issues raised on appeal are solely legal, a hearing is unnecessary.

All of the submissions have been reviewed in detail and given careful consideration. For the reasons set forth in the Determination, which is incorporated into

[1] Unless otherwise indicated, all further statutory references are to the California Labor Code.

this Decision on Administrative Appeal (Decision on Appeal), and for the additional reasons set forth and discussed in detail below, the Appeal is denied and the Determination is affirmed.

II. RELEVANT FACTS AND CONTENTIONS ON APPEAL

AEM correctly points out that the Determination inadvertently misstated that AEM did not timely respond to the Department's inquiry. AEM *did* timely respond to the Department, and this Decision on Appeal shall reflect that corrected fact for the record. AEM's submission at the Determination level, which consisted nearly entirely of legal argument, was considered. Aside from that inadvertent oversight, the material facts set forth in the Determination are undisputed, and to that extent, they are incorporated herein by reference. A very brief recitation of the undisputed relevant facts is provided here only for context.

The Kern County Hospital Authority (Hospital Authority) entered into a Solar Power Purchase Agreement (PPA) with SCP 35 LLC to construct the Kern Medical Center Solar Project (Solar Project) at 1111 Columbus Street in Bakersfield. Under the PPA, the Hospital Authority agreed to purchase from SCP 35 LLC "all of the electric energy generated by" the Solar Project. SCP 35 LLC later entered into a separate contract with AEM, which then entered into a subcontract with MPE Solar Carports, Inc. (MPE), to actually develop and construct the Solar Project. An exhibit to AEM's agreement with MPE describes the Solar Project as a "prevailing wage project."

The parties appeared to agree that the sole legal issue for the Determination was whether the Hospital Authority was a "political subdivision" for the purposes of section 1721 and the prevailing wage law.[2] The Determination concluded that the Hospital

[2] AEM additionally argued that it was "entitled to rely in good faith on representations expressly made by the Kern County Hospital Authority, and reiterated by the prime contractor (SCP 35 LLC) that the construction project was not subject to the PWL." But as discussed in more detail below, its reliance on representations by the Hospital Authority, whether done in good faith or not, is not evaluated in this coverage determination process, which is authorized under section 1773.5.

Authority was a "political subdivision" and construction of the Solar Project was therefore public work subject to prevailing wage requirements.

On appeal, AEM argues against this conclusion.

First, AEM claims that the work at issue was done under private contract, and therefore was not public works under section 1720, subdivision (a)(1) (hereafter section 1720(a)(1)). Next, AEM argues that the Hospital Authority is not a "political subdivision" because hospital authorities are not mentioned in section 1721, which, according to AEM, provides an exhaustive list of political subdivisions for purposes of the prevailing wage law. Third, AEM claims that even if section 1720.6 applied to the work, "only MPE would be responsible for failure to pay prevailing wage rates and not AEM. Under its contract with MPE, AEM had no duty to pay MPE's workers or to ensure that the workers were in legal compliance. Under Labor Code sections 1741 and 1774, AEM had no vicarious responsibility to ensure MPE's compliance with the prevailing wage law and the Assessment should not have been issued against AEM." Finally, citing the California Supreme Court's opinion in *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976 (*Lusardi*), AEM argues that it "should not have been assessed penalties by DLSE because under applicable California Supreme Court authority, AEM was entitled to rely on KCHA's representations that the MPE work was not subject to prevailing wage rates because it was privately funded."

The Department considers each of these arguments in turn.

III. DISCUSSION

A. The Determination Correctly Concluded that the Solar Project Was a Public Work Under the Prevailing Wage Law.

Section 1720(a)(1) provides the standard and most common definition of "public works." It defines "public works" to mean: construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds. "There are three basic elements to a 'public work' under section 1720(a)(1): (1) 'construction, alteration, demolition, installation, or repair work'; (2) that

is done under contract; and (3) is paid for in whole or in part out of public funds." (*Busker v. Wabtec Corporation* (2021) 11 Cal.5th 1147, 1157 (*Busker*).)

1. It is unnecessary to determine whether the Solar Project is public work under section 1720(a)(1).

AEM presented no argument in the underlying Determination regarding whether the three elements of section 1720(a)(1) had been met. AEM submitted an opinion letter, and a response to DLSE's opinion letter, but neither of AEM's submissions addressed section 1720(a)(1). AEM did include an email from a special projects manager at the Hospital Authority that read: "I forgot that there is no prevailing wage or DIR on this job due to funding." But that is all. AEM did not elaborate on what the funding was, where it came from, or any aspect regarding the other two elements of section 1720(a)(1). Its primary focus was the "threshold issue" of whether the Hospital Authority was a "political subdivision" within the meaning of section 1721.

On appeal, AEM argues that the work on the Solar Project is not a public work under section 1720(a)(1) because all the funding was from non-public, private sources. In support, AEM submitted declarations from AEM's project manager with copies of contracts between SCP 35 LLC, AEM, and MPE. While the contract between SCP 35 LLC and AEM does not expressly mention public funding, the first paragraph of the agreement clearly describes that the Solar Project will be built on "certain real property and premises (the "Site") owned or leased by Kern County Hospital Authority (a/k/a Kern Medical Center), a local unity[sic] of government (the "Customer") pursuant to a Power Purchase Agreement between Customer and Owner [SCP 35 LLC]."

DLSE does not respond to these new arguments on appeal.

After reviewing the submissions, the Department determines that it is unnecessary to decide whether the Solar Project is public work under section 1720(a)(1), because the Solar Project meets all the elements of a public work under a separate section.

2. The Solar Project was built pursuant to the Solar Power Purchase Agreement between SCP 35 LLC and the Hospital Authority.

Section 1720.6 provides that "public works" also includes any construction, alteration, demolition, installation, or repair work done under private contract when the following conditions exist:

(a) The work is performed in connection with the construction or maintenance of renewable energy generating capacity or energy efficiency improvements.

(b) The work is performed on the property of the state or a political subdivision of the state.

(c) Either of the following conditions exists:

(1) More than 50 percent of the energy generated is purchased or will be purchased by the state or a political subdivision of the state.

(2) The energy efficiency improvements are primarily intended to reduce energy costs that would otherwise be incurred by the state or a political subdivision of the state.

The contracts AEM included in its appeal demonstrate that the construction or installation work was done by AEM and its subcontractor MPE on the Solar Project pursuant to the PPA between SCP 35 LLC and the Hospital Authority. The PPA in the record shows that the Hospital Authority is a "local unit of government," that 1111 Columbus Street (where the Solar Project is built) is property of the Hospital Authority, and that the Hospital Authority will purchase all of the electric energy generated by the Solar Project. Consequently, all of the elements of section 1720.6 are met, provided that the Hospital Authority is a "political subdivision." This is the key legal issue to be decided in this Appeal, as it was in the Determination.

3. The Hospital Authority is a political subdivision.

The term "political subdivision" is used extensively throughout the prevailing wage law. Section 1721 provides that the term political subdivision "includes any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts." Is the Hospital Authority a political subdivision?

The Hospital Authority currently operates the Kern Medical Center, which is a public hospital located in Bakersfield and was originally founded in 1867. According to AEM, prior to 2015, Kern Medical Center was operated by Kern County. Effective January 1, 2015, the Kern County Hospital Authority Act was signed into law and codified at Health and Safety Code sections 101852, et seq. The Hospital Authority Act established the Kern County Hospital Authority to operate the Kern Medical Center. (Health & Saf. Code, § 101852.) The Hospital Authority Act expressly stated that its enactment was "necessary to allow the formation of a new political subdivision, a public hospital authority" to operate the Kern Medical Center. (*Ibid.*)

AEM argues that the Hospital Authority is not a political subdivision. AEM's argument is straightforward. It states that the Hospital Authority is not a "county, city, district, public housing authority, or public agency of the state" and is also not an "assessment or improvement district." (Lab. Code, § 1721.) And because the Hospital Authority is none of those things, the Hospital Authority cannot be a political subdivision for the purposes of the prevailing wage law.

The Determination engaged in a detailed analysis of the statutory language and interpreted the term "includes" in section 1721 to be a term of enlargement, rather than limitation. As a result, the Determination concluded that the Hospital Authority was a political subdivision, and the Solar Project was therefore a public work subject to prevailing wage requirements. On appeal, AEM challenges this conclusion and argues that "includes" in section 1721 is actually exhaustive or exclusive rather than a term of enlargement. In support of this argument, AEM cites a variety of cases from different courts, including decisions of the California Court of Appeal, the Ninth Circuit Court of Appeals, and the United States Supreme Court.

4. AEM's cited cases are distinguishable.

AEM first relies on *Chicken Ranch Rancheria of Me-Wuk Indians v. California* (9th Cir. 2022) 42 F.4th 1024 (*Chicken Ranch*). In *Chicken Ranch*, the Ninth Circuit analyzed a provision in the federal Indian Gaming Regulatory Act (IGRA) that set out a list of permitted topics of negotiation over gaming compacts. The court found that the list of topics was exhaustive, based on the fact that the section sets out a list of six specific permitted topics and then ends with the seventh catch-all provision. (*Chicken Ranch,*

supra, 42 F.4th at p. 1034.) "We think it easy enough to say the obvious: that the natural inference from this enumerated list is that it is exclusive. Why else devote such attention to drafting a careful itemized list only to have it impose no limits? Indeed, if the list were not exhaustive there would be little point in including the catch-all provision." (*Ibid.*)

AEM's attempt to draw a parallel with section 1721 is not persuasive, as section 1721 is markedly different from the IGRA provision analyzed in *Chicken Ranch*. Not only are the purposes of the statutes different, the statutory language of the two statutes is structured differently. Section 1721 is a list of public agencies that do not have any particular specificity, unlike the IGRA provision. For instance, it does not list the City of Bakersfield, the County of Kern, or the Housing Authority of Kern County. Section 1721 simply includes a list of many different types of state and local public entities. The list in section 1721 also does not include a catch-all. And because of these crucial differences, there is no "natural inference" that the enumerated list in section 1721 is exclusive, unlike the IGRA provision.

AEM's citation to the Court of Appeal's decision in *Patricia J. v. Rio Linda Union Sch. Dist.* (1976) 61 Cal.App.3d 278 (*Patricia J.*) is similarly unconvincing of AEM's position. In *Patricia J.*, the court was "called upon to determine whether the term 'prisoner' as used encompasses a juvenile court ward committed to the custody of his parent and not retained in custodial detention." (*Id.* at p. 283.) The court held that the ward was not a prisoner[3] because he was committed to the custody of his parent and was not restrained by confinement. (*Id.* at p. 288.) The court reached its conclusion by looking at other definitions of "prisoner," the legislative history of the provision at issue, other court decisions interpreting the same provision, and the purpose of immunizing public entities from tort liability for injuries to and by a prisoner. (*Id.* at pp. 283-287.) Contrary to AEM's assertions, the *Patricia J.* court did not hold that the definition of prisoner was "exclusive." *Patricia J.* did not discuss the phrase "includes" at all in its analysis. In fact, the court agreed that a ward of a juvenile court who was placed in a foster care facility could be a "prisoner" under the statute, which tends to suggest that the definition is expansive rather than exclusive. (*Id.* at p. 287 ["A foster care agency in

[3] The definition at issue reads: "As used in this chapter, 'prisoner' includes an inmate of a prison, jail or penal or correctional facility." (Gov. Code, § 844.)

which restraints on individual freedoms are exerted would properly be categorized as an institution whose inmates are considered prisoners . . . .”]) That is because a foster care agency is neither a “prison, jail or penal or correctional facility.” (Gov. Code, § 844.) Given *Patricia J.*’s holding and the fact that “includes” was not the focus of the court’s discussion, it is puzzling how AEM believes that “includes” as used in the statute “was interpreted by [the *Patricia J.* court] to be exclusive.” (AEM Opening Brief, 13:10-11.)

Next, AEM looked to the United States Supreme Court’s decision in *Carcieri v. Salazar* (2009) 555 U.S. 379 (*Carcieri)* for support. In *Carcieri*, the high court analyzed the definition of Indian in the Indian Reorganization Act (IRA), which reads in relevant part:

> The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.
>
> (25 U.S.C. § 5129, renumbered from 25 U.S.C. § 479.)

The high court reasoned that Congress “explicitly and comprehensively defined the term by including only three discrete definitions: “[1] members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and . . . [3] all other persons of one-half or more Indian blood.” (*Carcieri*, *supra,* 555 U.S. 379 at pp. 391–392.)

The IRA definition of Indian uses the terms “shall include” and “shall further include” as opposed to “includes,” which is the term used in section 1721. The IRA definition shares more similarities with the IGRA provision discussed in *Chicken Ranch* than it does with section 1721. As with the IGRA provision, the IRA definitional list is very specific and discrete. There would be no reason to be so explicit in defining the specific conditions under which a person is considered Indian if Congress intended to encompass other tribes not specifically described. Because of the stark differences between section 1721 and the IRA definition of “Indian,” *Carcieri* is distinguishable and its reasoning is inapplicable to section 1721.

Finally, AEM invokes *expressio unius est exclusio alterius*, the canon of statutory interpretation that the expression of one thing is the exclusion of the other. But the canon's applicability to statutes that employ the term "includes" or "includes but not limited to" is questionable. The canon usually applies when the statutory definition is exhaustive. And that is precisely why AEM's reliance on this canon misses the mark. Both of the referenced statutes AEM employs to demonstrate the canon's operation feature definitions with exhaustive lists. Neither uses the term "includes" or another term of enlargement, because the canon would then be inapplicable.

AEM's attempt begins with a California statute that defined a pipeline as "only the line of pipe itself and certain enumerated fittings." (*Southern Pacific Pipe Lines, Inc. v. State Bd. of Equalization* (1993) 14 Cal.App.4th 42, 49.) The State Board of Equalization had sought, unsuccessfully, to include in the definition "lands, rights-of-way and all facilities 'necessary or appurtenant to the operation of' the pipeline so that it may tax those items." (*Id.* at p. 49.) This decision is inapposite because the statute does not use a term of enlargement. The other example AEM alludes to is a constitutional provision that provided a short, exhaustive list of the types of local agencies that could exercise the police power. (See former Cal. Const., art. XI, § 11, amended and renumbered to section 7 ["*A county or city* may make and enforce within its limits all local, police, sanitary, and other ordinances . . . ."]) Again, the provision did not use the word "include." Naturally, a port authority, being excluded from the exhaustive list, could not exercise police powers under that constitutional provision.

AEM's choice to present these statutes as comparators to section 1721 is hard to decipher since they do not include terms of enlargement. Its choice to invoke *expression unius est exclusion alterius* in this circumstance is further misplaced. The Legislature's use of "includes" in section 1721 is precisely why the definition of "political subdivision" is not limited to the enumerated public entities.

In short, none of the cited cases help AEM's flawed argument that section 1721 provides an exhaustive list.

5. AEM does not even attempt to challenge the Determination's conclusion that a broad reading of section 1721 comports with the purposes of the prevailing wage law.

As explained in the Determination, the California Supreme Court deemed a project by the Southern California Regional Rail Authority to be public works subject to the prevailing wage law, even though the Rail Authority, a joint powers authority, is not specifically enumerated in section 1721. (*Busker, supra*, 11 Cal.5th at p. 1171.) Furthermore, none of the Rail Authority's member transportation commissions are specifically enumerated in section 1721 either. Yet there was no question by any party, any of the numerous amici, or any of the reviewing courts whether the project was a public work or whether the Rail Authority or its constituent transportations commissions were political subdivisions. Despite AEM's citation to *Busker* and extensive argument on the different types of statutory definitional provisions, AEM fails to even acknowledge this point, let alone respond to it.

In addition, the Determination engaged in a lengthy discussion on why the use of seemingly duplicative terms in section 1721, in conjunction with the use of "includes," evinces a legislative intent to cover as many public entities as possible in its expansive list, and why exclusion of the Hospital Authority would run contrary to the law's purposes.[4] Despite being the foundation for the Determination's conclusion, AEM does not challenge — or even acknowledge — this analysis in any meaningful way.

The overall purpose of the prevailing wage law "is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees." (*Lusardi, supra,* 1 Cal.4th at p. 987.) The prevailing wage law is construed liberally to fulfill its various purposes. (*Kaanaana v. Barrett Business*

[4] It also seems noteworthy that the Legislature intended the Hospital Authority to be a political subdivision. (See Health & Saf. Code, § 101852, subd. (b)(5) [Act enacted to form Hospital Authority as new "political subdivision."])

Services, Inc. (2021) 11 Cal.5th 158, 166.) There is no reason to limit the payment of prevailing wages to workers on a public work based on the name of the public entity they are performing work for. Because workers would be paid prevailing wages on hospital authority projects under the interpretation that defines political subdivision to include hospital authorities, "[t]hat interpretation serves the prevailing wage law's purposes." (*Kaanaana, supra*, 11 Cal.5th at p. 172.) Although the Supreme Court has cautioned that liberal construction "is a different enterprise from rewriting the law to have it read as we think best" (*Mendoza v. Fonseca McElroy Grinding Co., Inc.* (2021) 11 Cal.5th 1118, 1142), reading political subdivision to include hospital authorities is consistent with the statutory framework and the prevailing wage law's purposes.

Because this Decision on Appeal affirms the Determination's conclusion that the term "includes" in section 1721 is a term of enlargement, and that it covers the Hospital Authority, all the elements of section 1720.6 are met, and the Solar Project is therefore a public work subject to prevailing wage requirements.

B. AEM's Other Arguments Are Not Addressed in the Coverage Determination Process.

AEM alternatively argues that even if section 1720.6 applied to the work (which it does), "only MPE would be responsible for failure to pay prevailing wage rates and not AEM. Under its contract with MPE, AEM had no duty to pay MPE's workers or to ensure that the workers were in legal compliance. Under Labor Code sections 1741 and 1774, AEM had no vicarious responsibility to ensure MPE's compliance with the prevailing wage law and the Assessment should not have been issued against AEM."

AEM then argues that it "should not have been assessed penalties by DLSE because under applicable California Supreme Court authority, AEM was entitled to rely on KCHA's representations that the MPE work was not subject to prevailing wage rates because it was privately funded."

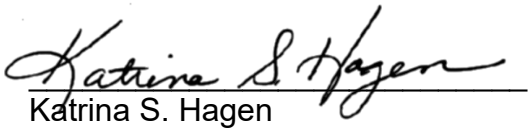
This Decision on Appeal does not address these arguments because the coverage determination process is not the correct forum for those issues. "The Director undertakes a coverage determination when a request is made to her in regard to a specific project or type of work. [citation.]" (*Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 205 (*Cinema West)*.) The coverage determination process is

statutorily authorized under section 1773.5 and the regulations governing the process are set out in California Code of Regulations, title 8, sections 16001 to 16002.5. The Court of Appeal in *Cinema West* extensively described the coverage determination and appeal process. (*Cinema West, supra,* 13 Cal.App.5th at pp. 205-206.) Nowhere in that process is any mention of any duty, or lack thereof, of a higher-tiered contractor to pay the wages of a lower-tiered subcontractor on a public work, "vicarious responsibility" of a higher-tiered contractor for a lower-tiered subcontractor's violation of the prevailing wage laws, civil wage and penalty assessments, or even any mention of wages or penalties.[5] The only issue determined in the coverage determination process is "whether a specific project or type of work awarded or undertaken by a political subdivision is a public work." (Lab. Code, § 1773.5, subd. (b).) As discussed, this Decision on Appeal affirms the Determination's conclusion that the Solar Project is a public work.

IV. CONCLUSION

In summary, for the reasons set forth in the Determination, as supplemented by this Decision on Appeal, the Appeal is denied and the determination that prevailing wages are required for work on the Kern Medical Center Solar Project performed under the Solar Power Purchase Agreement with the Kern County Hospital Authority under the specific factual circumstances described is affirmed. This Decision on Appeal constitutes the final administrative action in this matter.

Dated: June 30, 2025



Katrina S. Hagen
Director of Industrial Relations

[5] Other statutory provisions outside the coverage determination process may address the issues raised by AEM on appeal. (See, e.g., Lab. Code, §§ 1741, 1742, 1743, 1775, 1777.5, 1777.7, 1813.)