

DEPARTMENT OF INDUSTRIAL RELATIONS

Christine Baker, Director

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February 5, 2016

Bryan Berthiaume
Foundation for Fair Contracting
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Janet Barentson
Chief Deputy Director
California Department of Forestry and Fire Protection
P.O. Box 944246
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Re: Public Works Case No. 2016-001
Valley Fire Hazard Tree Mitigation and CAL FIRE Tree Removal Work
County of Lake
Department of Forestry and Fire Protection

Dear Mr. Berthiaume and Ms. Barentson:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced projects under California's prevailing wage laws and is made pursuant to California Labor Code section 1773.5¹ and California Code of Regulations, title 8, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the Valley Fire Hazard Tree Mitigation work in the County of Lake and the California Department of Forestry and Fire Protection's (CAL FIRE) tree removal work in various counties throughout California is not public works and is therefore not subject to prevailing wage requirements.

Facts**A. The Valley Fire.**

On September 12, 2015, a massive fire broke out near Cobb in the southern part of Lake County. It quickly spread south and east and grew to approximately 40,000 acres overnight. The blaze later tore through the Hidden Valley Lake area and became known as the Valley Fire. Thousands of firefighters battled the fire, and four of them had to be hospitalized with second-degree burns. By

¹ Unless otherwise indicated, all further statutory references are to the California Labor Code and all subdivision references are to the subdivisions of section 1720.

the time the Valley Fire was completely contained, it had scorched over 75,000 acres across Lake, Napa, and Sonoma Counties, leveled over a thousand homes, and claimed four lives.

B. Lake County's Valley Fire Tree Mitigation Scope of Work.

1. "Hazard trees" and the danger they pose.

In addition to destroying homes and manmade structures, the Valley Fire ripped through the area's many trees and created what are known as "hazard trees." According to the United States Forest Service, hazard trees include "dead or dying trees, dead parts of live trees, or unstable live trees (due to structural defects or other factors) that are within striking distance of people or property (a target). Hazard trees have the potential to cause property damage, personal injury or fatality in the event of a failure." The Valley Fire gave rise to tens of thousands of hazard trees that could fall and damage property or roll onto County-maintained roads and block them. Falling or rolling trees can also kill or seriously injure people. These hazard trees thus present an immediate threat to public safety. In addition, utility companies and other entities have already felled many hazard trees and placed them on the side of County roads, creating yet another fire and safety hazard.

2. The "hazard tree mitigation" scope of work requires removal and disposal of hazard trees but implicates only minimal soil disturbance.

On November 9, 2015, Lake County issued a Request for Proposals (RFP) from "qualified and experienced contractors to provide all labor, materials and equipment necessary for hazard tree mitigation." According to the RFP, hazard tree mitigation is "limited to County-maintained road rights-of-way; County park land; and private land from which hazard trees could threaten County roads, trails or structures." An arborist hired by the County will mark hazard trees that meet specified criteria. The winning bidder will be required to "remove and dispose of all marked trees and trees already felled that lie within the County-maintained road or trail system."

The scope of work described in the RFP includes more specifically "Hazard tree felling and removal, hauling and disposal of trees and stumps to final disposal site(s) designated by the Contractor and approved by the County." "Stump grinding and/or removal is required within County road ROW [right-of-way]" whereas on private property, stumps will remain in place, but not exceed a height of "3 inches on the uphill side." In an addendum to the RFP, Lake County clarified that it "does not expect to have any stumps pulled." The RFP further provides that soil disturbance is to be as "minimal as possible," noting that operations will cease "before causing damage which will result in soil erosion or compaction." The RFP added that the project should not create any exposed root balls, but if any are created, the winning bidder must grind them or tip them back into an "upright position."

3. The work will be paid for by a variety of state, local, and federal grants and emergency assistance funds.

Funding for Lake County's Valley Fire Hazard Tree Mitigation work comes from several sources, including: (1) Federal Emergency Management (FEMA) Agency Public Assistance Grant Funds; (2) Federal Highway Administration (FHWA) Emergency Relief Program Funds; (3) California Office of Emergency Services (Cal OES) Disaster Assistance Act Funds; and (4) County of Lake Funds. According to Lake County, "roads classified as major collectors or arterials should be

100% funded by FHWA, while all other local roads and parks should be funded 75% by FEMA, 18.75% by the state, and 6.25% with local or other funds.”

The cost of Lake County’s hazard tree mitigation work is \$17,385,000 and the estimated completion date is March 20, 2016.

C. CAL FIRE Tree Removal Work.

CAL FIRE indicates that its tree removal work will be performed in Fresno, Kern, Madera, Mariposa, Tulare, and Tuolumne counties. The projects will also be paid for by a variety of state, local, and federal funds. The scope of work is as follows:

Cutting and removal [of trees] will be conducted by contractors . . . and will be carried out on private and public lands or rights-of-way. Contractors will fell, remove, and relocate dead trees utilizing chainsaws, skidders, cranes, and yarders. Trees will be felled onto the ground utilizing chain saws leaving stumps generally 12 inches in height or less. Contractors may be responsible for removing logs from the project site utilizing a variety of equipment, including skidders, loaders, cranes, and trucks. Slash and other woody material may be chipped on site, piled for burning, and/or skidded to and loaded onto trucks. Skidding involves dragging logs and/or limbs along the ground on a network of skid trails, either preexisting or created by movement of skidders along a route of travel. Both logs and slash may be transported by truck to a processing site to be sorted for further processing. Prior to the conclusion of operations, disturbed soil will be treated by the contractor utilizing a variety of techniques, including waterbars, slash packing, and mulching to reduce the possibility of erosion. Waterbars are berms of dirt established across skid trails to divert water off the skid trails minimizing erosion. Slash packing involves running equipment over branches and pine needles, compacting that material low to the ground and slightly depressing it into the soil. Mulching is accomplished by spreading organic material, generally chipped branches, across the surface of the ground. At the conclusion of the work, the land will remain generally unchanged except for the removal of dead and dying trees.

Discussion

“Public works” is defined under the Labor Code as construction, alteration, demolition, installation, repair, or maintenance work that is done under contract and paid for in any part out of public funds. (§§ 1720, subd. (a)(1); 1771.) Workers employed on public works must be paid the prevailing wage. (§ 1771.)

It is undisputed that both Lake County and CAL FIRE’s projects involve work done under contract that will be paid for out of public funds. The issue is whether the work constitutes construction, alteration, demolition, installation, repair, or maintenance work within the meaning of the prevailing wage law.

The Foundation for Fair Contracting (FFC) contends that the tree removal projects involve demolition as well as alteration. FFC also contends that the work constitutes maintenance under

the Court of Appeal's holding in *Reliable Tree Experts v. Baker* (2011) 200 Cal.App.4th 785 (*Reliable Tree*). Like FFC, Northern California District Council of Laborers (NCDCL) and International Union of Operating Engineers, Local 3 (Local 3) argue that the work constitutes demolition, alteration, or maintenance. International Union of Operating Engineers, Local 12 (Local 12), on the other hand, argues only that the work constitutes alteration. Both Lake County and CAL FIRE are opposed to any characterization of the work as public works including, but not limited to, any characterization that the work constitutes "alteration." CAL FIRE analogizes the current scopes of work to the description of the work performed in PW 2005-026, *Tree Removal Project - County of San Bernardino Fire Department* (July 28, 2006) (*San Bernardino*), a prior coverage determination issued by DIR.

A. The Work at Issue Does Not Constitute Demolition Because Trees are Not Things That Were Previously Constructed.

FFC, NCDCL, and Local 3 contend that the tree removal work constitutes demolition. Demolition, as defined by the Court of Appeal in *Priest v. Housing Authority of City of Oxnard* (1969) 275 Cal.App.2d 751, 756 (*Priest*), involves tearing up and removing those things that were previously constructed. Manmade structures are previously constructed, as are below surface "basements, foundations, utility connections and the like." (*Ibid.*) Trees are not previously constructed. Accordingly, tree removal work does not constitute demolition under section 1720, subdivision (a)(1). Furthermore, there are no specific facts in any of the scopes of work that indicate demolition of structures will be performed. If demolition work, as defined in *Priest*, is undertaken, it is outside the scope of this determination.

B. The Work at Issue Does Not Constitute Maintenance Under the Department's Regulations Because it Involves One-Time Projects Designed to Remove Dead or Dying "Hazard Trees."

For prevailing wage law purposes, maintenance is defined in a regulation as "Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired." (Cal. Code Regs., tit. 8, § 16000.)² The court in *Reliable Tree* held that, despite the absence of any mention of "maintenance" in section 1720, maintenance work nonetheless qualifies as public work subject to prevailing wage requirements, because section 1771 expressly states that prevailing wages are required on maintenance contracts. (*See Reliable Tree, supra*, 200 Cal.App.4th at p. 788.)

In *Reliable Tree*, the California Department of Transportation (Caltrans) acknowledged that "tree maintenance, including removal and pruning is a routine, recurring and usual activity for Caltrans. There are thousands of trees on state rights-of-way that must be maintained on a routine, recurring and usual basis. Tree work on [a] Caltrans right-of-way is not a 'one time project' but an on-going task which requires the use of many contracts throughout the state." (*Reliable Tree, supra*,

² Section 16000 provides two other definitions of maintenance. Neither of the two applies to the work here. In addition, because the work is not routine, it is irrelevant that some of the work will occur on publicly owned property.

200 Cal.App.4th at p. 798.) The contractor in *Reliable Tree* unsuccessfully argued that “its one-time contract does not qualify as maintenance because the great majority of the work under the contract involved tree removal.” (*Ibid.*) FFC relies on the opinion in *Reliable Tree* to support its position that the work performed for Caltrans in *Reliable Tree* and the removal of dead/diseased trees in Lake County and other counties for CAL FIRE is similar because the projects all involve tree removal. But the similarities end there.

Here, the tree removal is in response to a specific, unanticipated triggering event – the Valley Fire.³ Neither Lake County nor CAL FIRE expects to remove hazard trees on a routine basis. Indeed, during a special meeting of the Lake County Board of Supervisors to discuss this project, the Board was alarmed at the contract’s large dollar amount. That suggests Lake County does not usually perform this type of work. The funding sources also indicate that the hazard tree removal work is not routine, recurring, or usual. The majority of the money (FEMA, FHWA, and Cal OES) comes from funds earmarked for emergencies. Emergencies are not routine. For that reason, the tree removal work is not subject to prevailing wages under section 1771, because it does not constitute maintenance under section 16000 of title 8 of the California Code of Regulations.

C. The Tree Removal Work is Not Alteration Because it Does Not Modify Any Particular Characteristic of the Landscape.

Local 12, Lake County, and CAL FIRE do not state a position regarding whether the work at issue constitutes maintenance. All the interested parties, however, present different arguments as to whether the tree removal work constitutes “alteration” within the meaning of section 1720, subdivision (a)(1). FFC, NCDCL, and Local 3 side with Local 12 in arguing that the work constitutes alteration. In contrast, Lake County and CAL FIRE maintain that the tree removal work is not alteration. Of the interested parties who made submissions, only CAL FIRE offers any type of substantive support for its position, citing DIR’s prior determination in *San Bernardino*.

In *San Bernardino*, the project required “the felling of pre-designated trees to a stump no more than eight inches in height, the chemical treating of the exposed stumps and the removal of the felled trees and debris from the property.” Other provisions in the *San Bernardino* scopes of work mirror those in CAL FIRE’s tree removal scopes of work, which appear – with good reason – to be modeled after the scopes in *San Bernardino*. Citing *Priest, supra*, 275 Cal.App.2d 751, the determination found that the tree removal work in *San Bernardino* did not constitute alteration for prevailing wage law purposes.

In *Priest*, the Oxnard Housing Authority required the contractor to remove underground pipes and all surface and above-surface materials, including concrete, blacktop, and debris, from a burned down wartime housing development. This was done to make the land suitable for farming. (*Id.* at p. 755.) The court in *Priest* held that the work was subject to prevailing wage requirements on the basis that it constituted demolition, alteration, or both. (*Id.* at p. 756.) With regard to alteration, the *Priest* court clarified that “[t]o ‘alter’ is merely to modify without changing into something else” and that alteration need not be in connection with a building. Rather, *Priest* suggested that alteration “may, as well as not, apply to a changed condition of the surface or the below-surface.”

³ CAL FIRE’s tree removal work resulted from recent fires, disease, and drought conditions.

(*Ibid.*) This language in *Priest* – as well as a dictionary definition of “alter”⁴ – led the *San Bernardino* determination to find that “with regard to land . . . to alter under section 1720(a)(1) is to modify a particular characteristic of the land.”

The *San Bernardino* determination also referred to prior determinations that found work modifying the land surface and below-surface to be public work. (See PW Case No. 2001-066, *Excavation Work at Willow Lake Water Treatment Facility* (March 29, 2002) (*Willow Lake*); PW 2000-036, *Carlson Property Site Lead Affected Soil Removal and Disposal Project* (May 31, 2000) (*Carlson*).) In *Willow Lake*, the excavation, clearing, and grading of land was done in preparation for construction. Likewise, in *Carlson*, the excavation of soil and placement of fill was necessary to prepare the land for other use. And more recently, in PW 2008-015, *Land Clearing Project – Selma-Kingsburg-Fowler County Sanitation District* (June 11, 2008) (*Land Clearing Project*), the determination found that a particular characteristic of the land is modified when the land is cleared for other, different uses.

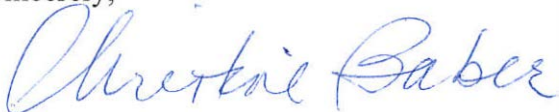
Unlike in *Priest* or *Land Clearing Project*, the work in *San Bernardino* did not modify any particular characteristic of the landscape in that the land was not slated for any different uses and the tree removal is done only for safety purposes. The tree removal work here resembles the work at issue in *San Bernardino*. The landscape remains the same after the work is complete.⁵ Consequently, consistent with the reasoning in *San Bernardino*, because the tree removal work at issue in this determination does not modify any particular characteristic of the landscape nor does it effect a changed condition of the surface, the work is not “alteration” within the meaning of subdivision (a)(1).

Conclusion

For the foregoing reasons, the Valley Fire Hazard Tree Mitigation work in the County of Lake and CAL FIRE’s tree removal work in various counties throughout California is not public works and is therefore not subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiries.

Sincerely,



Christine Baker
Director

⁴ Webster’s Third New International Dictionary (2002) defines ‘alter’ as: “to cause to become different in some particular characteristic (as measure, dimension, course, arrangement or inclination) without changing into something else.”

⁵ Nothing in the scopes of work provided by Lake County and CAL FIRE indicate any reconstruction work will be undertaken with the funds dedicated to the removal of trees. Any such work is outside the scope of this determination.