

DEPARTMENT OF INDUSTRIAL RELATIONS

Katrina S. Hagen, Director

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August 30, 2021

Daniel Vest
Purchasing Manager
City of Chino
13220 Central Avenue
Chino, California 91708

Luis Carrillo
Center for Contract Compliance
1168 East La Cadena Drive, Suite 202
Riverside, California 92507

Re: Public Works Case No. 2019-022
Gun Range Lead Dust Removal Work
City of Chino

Dear Mr. Vest and Mr. Carrillo:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project 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, subdivision (a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the gun range lead dust removal work for the City of Chino (City) is public work and therefore subject to prevailing wage requirements.

Facts

Following a request for bids in October 2016, the City awarded a one-year contract, subsequently renewed for two one-year periods, to Brickley Environmental for what the City terms "periodic indoor gun range cleaning services" at its Police Department's indoor gun range facility. After the Center for Contract Compliance (CCC) asserted that the work was subject to prevailing wage requirements, the City requested a coverage determination regarding this work for future bids and contracts.

The scope of work as set forth in the request for bids states the following, in relevant part:

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

The Work covered by this section includes the wipe down of Lead contaminated dust, handling of Lead contaminated dust which is encountered during the cleanup activities of all Lead contaminated dust including, but not limited to interior brick walls and wall attachments (electrical conduits/panels, sound proofing wall and ceiling panels), HVAC exhaust ducts, and the incidental procedures and equipment required to protect workers and occupants of the building, or both, from contact with airborne Lead dust, fallen dusts containing Lead. The work also includes the proper disposal of the removed Lead contaminated dust at an approved disposal site according to current Federal, State, Regional, or Local regulations that apply.

The scope of work requires the contractor to supply all labor, materials, equipment, services, insurance, and incidentals necessary to perform the work, in accordance with applicable government regulations. The contractor is responsible for medical monitoring before and after the work in accordance with applicable laws and regulations. The scope of work also makes the contractor responsible for the removal, storage, transportation, and disposal of all the removed lead dust and removed components.

The scope of work further requires the contractor to wet wipe and vacuum, using a HEPA² vacuum, lead dust from all areas; remove and dispose of air filters in December of each year; remove and replace a City-supplied 55 gallon drum as-needed. It further requires the contractor to construct a two-room decontamination enclosure system for workers entering and exiting the work area. The decontamination enclosure system must be independent of the facility. The decontamination area is required to be under negative air pressure with make-up air provided by the contractor. The contractor must also construct a waste load-out wash down station contiguous to the equipment room or work area to clean any equipment or materials removed from the work area.

The performance of the work is required to comply with federal, state, and local regulations to control the release and spreading of lead dust, including the use of protective clothing for workers in contact with lead dust and local exhaust ventilation and enclosures when feasible. Further engineering controls are required including sealing the openings where the release of lead could occur outside the work area with two layers of 6-mil flame retardant polyethylene sheeting secured with duct tape and covering the floors with a minimum of one layer of 6-mil flame retardant polyethylene sheeting secured with duct tape.

The contractor also must monitor the air quality at the work area. If the airborne lead levels at any time exceed the Permissible Exposure Limits (PEL) established by the Occupational Safety and Health Administration (OSHA), the contractor is responsible for initiating engineering controls and work practices until the levels are reduced to below the PEL.

The contractor is responsible for disposal of lead dust under particular procedures depending on the level of hazard, after testing. For example, for non-hazardous waste, lead dust and related waste must be placed in 6-mil polyethylene plastic bags that are air-

² HEPA stands for "high efficiency particulate air [filter]"

tight and puncture resistant. Items that do not fit in bags shall be wrapped in 6-mil polyethylene plastic. The contractor is responsible for disposing liquid waste in sealed containers. The contractor must remove sealed and labeled containers of waste and dispose of them at an authorized disposal site. For hazardous waste, the contractor is required to comply with the Resources Conservation and Recovery Act, and contact state and local authorities to determine their criteria for proper containerization. Under a separate contract, the City will perform lead dust wipe surface sampling in accordance with the clearance requirements specified by Housing and Urban Development regulations.

The Service Schedule in the bid for work indicated the services are to be completed bi-annually.

The Position of the Parties

The City, the requestor, asserts that the lead dust removal work is not a project subject to California's prevailing wage laws (CPWL). First, it argues that the work is "custodial" or "janitorial" therefore excluded from the CPWL pursuant to California Code of Regulations, title 8, section 16000 (Regulation 16000). It cites to the Division of Labor Standards Enforcement (DLSE) Public Works Manual (May 2018 edition) which describes the janitorial exception set forth in Regulation 16000 as "routine and recurring janitorial services such as washing, vacuuming, litter removal, etc. at a public facility." The City stresses that the lead removal work is periodic cleaning to the gun range facility, not involving construction, removal of construction material, "no encapsulation, no lead remediation, nor lead abatement work performed."

Second, the City claims that the work constitutes "Lead Interim Controls" as defined by the Environmental Protection Agency (EPA), not "Lead Abatement," because the work does not permanently eliminate the lead hazard at the facility.³ And, since there is no prevailing wage determination for "Lead Interim Controls," the City argues the CPWL does not apply.

CCC, which first raised the issue of coverage with the City and which submitted a letter of opinion with respect to the request for a determination, argues that the work at issue is "maintenance" as defined by Regulation 16000, because it is routine, recurring and usual, and done for the preservation, protection and keeping of a publicly owned and operated facility. CCC disagrees with the City's assertion that the work is custodial or janitorial, arguing that the work goes beyond protective care for basic needs, comparing the work to that in PW 2016-015, *Snow Removal and Snow Staking Services – County of El Dorado* (Jan. 31, 2017). CCC contends that the work at issue does not just keep a building clean, but instead removes a poisonous material so that the gun range can be safely accessed. Further, CCC argues some of the work takes place outside of the building, and therefore does not constitute janitorial services.

CCC also takes issue with the City's contention that the CPWL does not apply because there is no prevailing wage rate for the work at issue. Citing to *Division of Lab.*

³ The City did not provide a citation to what it claims are EPA definitions.

Stds. Enforcement v. Ericsson Information Systems, Inc. (1990) 221 Cal.App.3d 114 (*Ericsson*), CCC argues that prevailing wage must be paid even if there is no prevailing wage rate for a given craft, classification, or type of work. CCC further claims that the fact that the Director of Industrial Relations has authority under Labor Code section 1773.4 and California Code of Regulations, title 8, section 16202 to issue special prevailing wage determinations when there is no rate for a given craft, classification or scope of work demonstrates that a project can require prevailing wages even in the absence of a published prevailing wage rate. Finally, CCC argues that the work at issue is “Lead Abatement” not “Interim Controls.” CCC relies on the definitions in the Code of Federal Regulations regarding lead-based paint in residential structures. “Interim Controls” refers to a “set of measures designed to temporarily reduce human exposure or likely exposure to lead-based paint hazards.” (40 C.F.R. § 745.223.) “Lead Abatement” means “any measure or set of measures designed to permanently eliminate lead-based paint hazards.” (*Id.*) CCC asserts that since the work at issue is a series of measures designed to permanently remove lead from the gun range, and the gun range becomes contaminated again solely due to later use of the gun range, then the work is “Lead Abatement.”

Discussion

A. The Work at Issue Constitutes Maintenance Work Under Section 1771.

All workers employed on public works projects must be paid at least the prevailing wage rates applicable to their work. (§ 1771.) Labor Code section 1720, subdivision (a)(1) 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. Further, section 1771 specifically states that the section “is applicable to contracts let for maintenance work.”

Under section 1771 and its implementing regulation, “maintenance” is defined in relevant part as, “[r]outine, 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.” (Regulation 16000.) “Janitorial or custodial services of a routine, recurring or usual nature” are excluded from the definition of “maintenance.” (*Id.*)

Undisputedly, the work at issue here is paid for out of public funds. The issue is whether the work is the type that fits the definition of “maintenance” and whether it meets the “janitorial or custodial services” exception.

1. The Work at Issue Constitutes Maintenance As It Is Routine, Recurring, and Usual Work Done for the Preservation, Protection and Keeping of a Publicly Owned and Operated Facility.

The City requires lead removal services to take place bi-annually, with removal of air filters in December of each year. As such, the work at issue is routine, recurring and

usual. The gun range, a facility at the Chino Police Department, is publicly owned and operated.

If absorbed into the body at certain doses, lead is a toxic substance. (Substance Data Sheet for Occupational Exposure to Lead (Cal. Code Regs., tit.8, § 5198, appendix A, § II.) Simply put, “lead is a potent, systemic poison.” (*Id.*) Chronic overexposure can lead to serious health conditions, including organ damage, and damage to blood-forming, nervous, urinary, and reproductive systems. (*Id.*; see also OSHA Fact Sheet, *Protecting Workers from Lead Hazards and Indoor Firing Ranges*, <<https://www.osha.gov/sites/default/files/publications/OSHA3772.pdf>> [as of Aug. 30, 2021].) If workers are exposed to lead above permissible levels, engineering, work practices and other controls to limit exposure are required. (See Cal. Code Regs., tit.8, § 5198, subd. (e).) Removal of lead dust from surfaces is one of the various required and recommended practices that limit lead exposure to workers and users of a gun range. (OSHA Fact Sheet, *supra*.)

Apparently, the gun range is for use of police officers for target practice. Lead dust accumulating on the walls, other surfaces, and in the ventilation system must be removed on a regular basis or the gun range would become unsafe and potentially inoperable. (See, e.g. Lab. Code, § 6323 [California Division of Occupational Safety and Health may seek injunction restraining the use of a workplace with conditions that render it a menace to safety].) The work at issue is akin to hazardous waste removal. It includes the removal of lead dust from the surfaces of the gun range by wet wiping and HEPA vacuuming. It includes the removal and disposal of air filters. By removing this hazardous substance, the workers allow the gun range to remain in use by the City’s police force. Therefore, the work at issue allows for the “preservation, protection and keeping” of the gun range “for its intended purposes in a safe and continuously usable condition” for which it was designed and constructed. Unless an exception applies, the lead removal work is public work because it constitutes “maintenance.”

2. The Work at Issue is Not Custodial or Janitorial in Nature.

The City refers to the work at issue as “cleaning services” and contends it is “custodial” and “janitorial”, citing to examples in the DLSE Public Works Manual⁴ of “washing, vacuuming, litter removal, etc.” These examples do not accurately describe the lead removal work at issue here.

⁴ The DLSE Public Works Manual, while instructive, is not statutory or regulatory law, and is not binding on the Director, the Department of Industrial Relations, the DLSE, or the courts. As the manual itself states in section 1.1, it is “a training tool for the . . . staff to better understand the Labor Commissioner’s functions in carrying out its responsibilities to conduct investigations and undertake enforcement actions . . . It is not intended as a comprehensive summary of existing law or duly promulgated regulations, or a pronouncement of the Labor Commissioner’s enforcement policies, with regard to prevailing wage compliance. Rather, the purpose of the Manual is to familiarize staff assigned to prevailing wage enforcement with processes and historical issues which have arisen, and may continue to arise, as investigations are conducted and enforcement actions are initiated, and administratively reviewed, under the statutory scheme.”

The relevant definition of “custodial” is “relating to, providing, or being protective care or services for basic needs” while a “custodian” is defined as “one that guards and protects or maintains; esp: one entrusted with guarding and keeping property or records or with custody or guardianship of prisoners or inmates.” (Merriam-Webster’s Collegiate Dict. (11th ed. 2003) p. 308.) A janitor is defined as “one who keeps the premises of a building (as an apartment or office) clean, tends to the heating system, and makes minor repairs.” (Merriam-Webster’s Collegiate Dict. (11th ed. 2003) p. 669.)

The scope of the work goes far beyond protective care or services for basic needs. Nor is the work at issue guarding or protecting the property. The work also goes beyond mere cleaning or tending to minor repairs at the premises of the building. The work at issue here includes the removal of a hazardous substance from contaminated areas, including interior brick walls, electrical conduits/panels, sound proofing wall and ceiling panels, and HVAC exhaust ducts. These are areas which are not typically cleaned, or even accessible to custodians or janitors. It includes the removal and disposal of air filters, which is maintenance work not typically carried out by custodians or janitors. And, it requires the use of protective clothing and various engineering controls which custodians and janitors would not typically need. Further, the work at issue here includes constructing a special contamination enclosure and a waste load-out station outside of the gun range. This is not work that would be conducted by a custodian or janitor. Finally, the work goes beyond that of a custodian or janitor because it requires workers to leave the premises to transport and dispose of waste, with certain conditions based on lead waste characterization testing levels, at disposal sites.

Accordingly, because none of the relevant exceptions apply, the work at issue constitutes “maintenance” for the purposes of prevailing wage law.

B. The Work at Issue Is Public Work Whether or Not a Prevailing Wage Determination Exists.

The City’s argument that no prevailing wage determination exists for the work at issue is irrelevant. The Director takes no position in this coverage determination as to whether such a classification does or does not exist -- determining which classification applies to the work at issue is a charge reserved for the factfinder in a separate proceeding. (*Ericsson, supra*, 221 Cal.App.3d at p. 129; § 1742, subd. (b).) Regardless, whether work is within the scope of work of a published prevailing wage classification is not dispositive as to whether such work is subject to prevailing wage requirements. (*Ericsson, supra*, 221 Cal.App.3d at p. 126.) “It would defeat the legislative intent of affording private sector employees payment of prevailing wages on public works, to allow the contractor to excuse a failure to pay a prevailing wage solely because an after-the-fact examination reveals no listed classification was precisely limited to the type of craft employed on the project.” (*Ibid.*)

Determination Letter to Daniel Vest and Luis Carrillo

Re: Public Works Case No. 2019-022

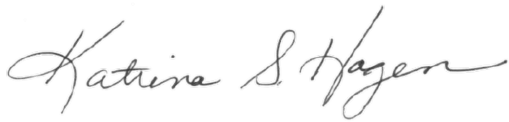
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Conclusion

For the foregoing reasons, the gun range lead dust removal work for the City of Chino is subject to prevailing wage requirements because the work constitutes maintenance under Labor Code section 1771 and Regulation 16000.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Katrina S. Hagen". The signature is written in black ink and is positioned above the typed name and title.

Katrina S. Hagen
Director of Industrial Relations