

DEPARTMENT OF INDUSTRIAL RELATIONS

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May 20, 2020

Jennifer Keating
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1999 Harrison Street, Suite 2700
Oakland, California 94612

Re: Public Works Case No. 2019-021
Napa State Hospital Fire Alarm and Fire Pump Testing Services
Department of State Hospitals

Dear Ms. Keating:

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 Napa State Hospital Fire Alarm and Fire Pump Testing Services work for the Department of State Hospitals is public work and therefore subject to prevailing wage requirements.

Facts

On October 5, 2018, The Napa Department of State Hospitals – Napa (DSH) issued Invitation for Bid (IFB) Number 18-4107-000, seeking bids from contractors to perform “Fire Alarm and Fire Pump Testing Services” for DSH. Per the IFB, the contractor is to provide all labor, equipment and transportation to provide DSH with fire alarm and fire pump testing services. The IFB Description of Services states:

This is a full service contract developed to ensure that the Contractor is responsible for all services necessary to maintain operational integrity of the hospital's Fire Alarm System per National Fire Protection Association (NFPA) 25² and NFPA 72 Standards. Services shall include:

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

² NFPA refers to the National Fire Protection Association, which among other things, publishes standards regarding fire safety. NFPA 25 guidelines set minimum standards, including timelines, for inspection, testing and maintenance of water-based fire protection systems. NFPA 72 guidelines set minimum standards, including timelines, for inspection, testing and maintenance of fire alarm systems.

- a. Inspections
- b. Testing
- c. Maintenance (i.e. incidental repairs, replacement of parts, fire alarm programming, parts and service).

In addition, the Description of Services indicates that:

the system consists of a monitored fire alarm system, a local fire system, and a fire pump. The fire pump is included for testing, incidental repairs and service. Contractor is responsible for the fire pump test and controller alarm, as well as tampers devices and flow switches on automatic sprinkler system . . . Testing and maintenance of the six (6) roll-up fire doors on patient treatment buildings is also included.

The Scope of Work section of the IFB contains almost identical language as that set forth above from the Description of Services. The Scope of Work also states:

Contractor shall follow requirements of the currently adopted NFPA 25 Standard (the most current edition) for the Inspection, Testing and Maintenance of Water-Based Fire Protection Systems and NFPA 72, 2013 edition, National Fire Alarm Code for all inspections, test, repairs and service for fire alarms.

After the solicitation of bids, DSH and HCI Systems, Inc. (HCI) entered into Department of State Hospitals Contract No. 18-4107-000 (the Contract), effective January 1, 2019, for HCI to provide fire alarm, fire pump inspection, testing and maintenance services to DSH. While in a slightly different format, the Contract contains the same language as set forth above from IFB 18-4107-000 regarding the services to be provided and the scope of work. Further, the Agreement Summary for the Contract states the purpose of the work is to “maintain the operational integrity of the DSH-N Fire Systems.”

Neither the IFB nor the Contract contain any provision requiring the payment of prevailing wages.

Discussion

A. The Positions of the Parties.

Northern California Electrical Construction Industry Labor-Management Cooperating Committee (NCECI), which requested a coverage determination for the work described in the Contract, takes the position that the scope of work in the Contract “is indistinguishable from the work addressed in the DIR’s coverage determination in Public Works Case No. 2015-012 (Fire Sprinkler Inspection, Testing and Maintenance Work, City of Santa Rosa).” In that case, the Department concluded that the work at issue was maintenance work under section 1771. NCECI also points out that the Department has issued a Prevailing Wage Determination for Sprinkler Fitter (Fire Protection and Fire Control Systems) in Napa County, and argues that this determination’s scope of work “clearly encompasses the work to be performed under Contract 18-4107-000.”

When the Department asked for its position, DSH indicated it had not “formulated” an opinion on whether or not the Contract was a public works contract. However, in past email correspondence with NCECI, its position was that the work under the Contract did not constitute public work.³

For its part, HCI respectfully declined to provide an opinion.

B. Relevant Provisions of California Prevailing Wage Law (CPWL).

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) (hereafter section 1720(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.”

Undisputedly, the Contract is paid for out of public funds: the Contract itself sets forth that it is being funded through California’s General Fund, and DSH confirmed this in its letter in response to the Department’s inquiries. The issue is whether the work is the type that fits the definition of “public work” in the CPWL.

The Department’s regulations implementing the CPWL define “maintenance” 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.” (Cal. Code of Regs., tit. 8, § 16000; hereafter Regulation 16000.)

C. Maintenance Work is Subject to Prevailing Wages Under Section 1771.

DSH at one point expressed the opinion to NCECI that it believed the Contract was not a public works contract as defined by section 1720(a)(1). While it does not currently appear to adopt that position, and in fact expressly stated it had not formulated an opinion when given an opportunity to provide its position to the Department, the definition of “public work” in the CPWL will nevertheless be addressed for the sake of clarity.

“[T]he scope of the Prevailing Wage Law is not to be ascertained solely from the words of section 1720(a)(1). Section 1771 is also a part of the Prevailing Wage Law, and its language must also be taken into account.” (*Reliable Tree Experts v. Baker* (2011) 200

³ In response to a request from NCECI for certified payroll records (CPRs) and contract documents in the summer of 2019, DSH produced the contract documents, but denied the request for CPRs, stating that it did not have CPRs and is not required to obtain them because “the underlying contract is not a Public Works Contract, as defined under the Labor Code section 1720(a)(1) *et seq.*” Apparently, DSH at some point did obtain the CPRs from HCI, because DSH submitted the CPRs to the Department in response to the Department’s Request for Information letter, although the Department did not specifically request CPRs.

Cal.App.4th 785, 795 (*Reliable Tree*.) In *Reliable Tree*, the Court of Appeal examined the CPWL in the context of tree maintenance work along state highways, and found that “maintenance work” is a form of public work. (*Id.* at pp. 795-796.) The *Reliable Tree* court rejected the argument made by the contractor that maintenance is not within the definition of public works because it is not found in section 1720(a)(1). (*Id.* at p. 795.) The court explained that both sections 1720 and 1771, together, define “public work.” “Section 1720 may not expressly include maintenance work within the definition of public work, but section 1771 does.” (*Id.* at p. 796.) Accordingly, the definition of public work is not so narrow as to only include section 1720(a)(1); section 1771, and therefore maintenance, also falls within the definition.⁴

The issue then becomes whether the work under the Contract fits the definition of “maintenance” under the CPWL, as NCECI contends.

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

Under section 1771 and its implementing regulation, “maintenance” is defined under one definition as routine, recurring and usual work that is done for the preservation, protection and keeping of any publicly-owned or publicly-operated facility for its intended purposes in a safe and continually usable condition for which it has been designed. (Regulation 16000.)

Citing *Reliable Tree* in finding “maintenance work” was subject to the CPWL, a federal district court analyzed the issue of whether stand-alone testing and inspection of fire alarm and sprinkler systems constitutes “maintenance” under the Department’s regulations. (*Bennett v. SimplexGrinnell LP* (N.D.Cal. 2014) 2014 WL 910354.) The district court found that the work was “maintenance” and therefore subject to prevailing wage under section 1771. While not binding, the district court’s analysis of Regulation 16000 is instructive and its conclusion that the work was “maintenance” is persuasive.⁵

In determining whether work is “routine, recurring, and usual,” the focus must be on the nature and frequency of the work, rather than the terms of the specific contract under which the work is performed. (*Reliable Tree, supra*, 200 Cal.App.4th at p. 798.) The routine, recurring, and usual nature of the testing, inspection and maintenance work at issue here is required by the terms of the Contract, as well as by regulation. The Contract does not set out explicitly its own schedule for preventative maintenance service and inspections. However, the Contract implies a schedule in its Budget Detail and Payment

⁴ Section 1720 contains several distinct definitions of “public works.” (See § 1720, subds. (a)(1)-(a)(8), (e).) Other provisions of the prevailing wage law further define public works. (See, e.g., §§ 1720.2, 1720.3, 1720.6, 1720.7, 1720.9.)

⁵ In addition, the scope of work in the Contract is similar to that in PW 2015-012, *Fire Sprinkler, Testing and Maintenance Work – City of Santa Rosa* (Oct. 30, 2015) and PW 2015-007, *Stand-Alone Testing and Inspection of Fire Alarm Systems – California Department of Corrections and Rehabilitation* (June 26, 2015). In both those coverage determinations, the Department concluded that the testing and inspection of fire protection systems was maintenance work subject to prevailing wage requirements.

Provisions “rate sheet,” as it sets out rates for “Quarterly Fire Alarm Testing” and “Monthly Unit 4 Testing.” Moreover, the Contract specifically requires the contractor to follow “NFPA 25 Standard (the most current edition) for the Inspection, Testing and Maintenance of Water-Based Fire Protection Systems and NFPA 72, 2013 edition, National Fire Alarm Code for all inspections, test, repairs and service for fire alarms”; the NFPA guidelines set out standards for the frequency of inspections, testing and maintenance. In addition, State Fire Marshal regulations found at Title 19 of the California Code of Regulations, which incorporate various provisions of the NFPA guidelines by reference, require that fire alarms and sprinkler systems be inspected and tested at predetermined intervals. (See Cal. Code Regs., tit. 19, §§ 901, 904.) Therefore, whether the frequency of the testing, inspection and maintenance is set by the Contract’s reference to NFPA standards or by State Fire Marshal regulations, these must occur at set intervals according to a schedule.

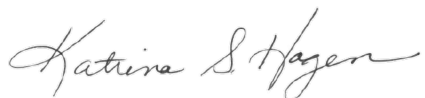
To qualify as “maintenance,” the routine, recurring and usual work must also be done for the “preservation, protection and keeping of any publicly owned or publicly operated facility . . . for its intended purposes in a safe and continually usable condition for which it has been designed” (Regulation 16000.) Fire protection devices such as smoke alarms and sprinkler systems are, by definition, designed to protect a facility against fire, and relevant law requires them to be “maintained in an operable condition.” (See, e.g., Health & Saf. Code, § 13113, subd. (a); Cal. Code Regs., tit. 19, § 1.14.) The Agreement Summary for the Contract expressly states the purpose of the work is to “maintain the operational integrity of the DSH-N Fire Systems.” Routine testing and inspection are necessary to ensure that the fire protection system functions as intended when a fire breaks out, and an operational fire protection system ensures the safety and usability of the facility. Therefore, the work at issue serves to protect public property for its intended purpose in a safe and continually usable condition.

Conclusion

For the foregoing reasons, the Napa State Hospital Fire Alarm and Fire Pump Testing Services work for the Department of State Hospitals is subject to prevailing wage requirements because the work constitutes maintenance under Labor Code section 1771 and California Code of Regulations, title 8, section 16000.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Katrina S. Hagen
Director of Industrial Relations