STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
André Schoorl, Acting Director
Office of the Director
1515 Clay Street, 17th Floor
Oakland, CA 94612
Tel: (510) 286-7087 Fax: (510) 622-3265

January 9, 2019

Pat Maloney
California Department of Transportation
1120 N Street, MS-44
Sacramento, California 94273

RE: Public Works Case No. 2018-001
Caltrans Ventura Maintenance Yard
California Department of Transportation

Dear Ms. Maloney:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws (PWL), and is made pursuant to Labor Code section 1773.5[1] and California Code of Regulations, title 8, section 16001, subdivision (a). Based on my review of the facts and analysis of the applicable law, it is my determination that the off-hauling of maintenance refuse on the project at issue is subject to prevailing wage requirements under section 1720.3 if the underlying maintenance work generating the refuse is covered under the PWL. Conversely, if the underlying maintenance work generating the refuse is not covered under the PWL, then the off-hauling is not subject to prevailing wage requirements under section 1720.3.

Facts

On January 5, 2018, the California Department of Transportation (Caltrans) issued an invitation for bid for on-call trash collection, hauling, and disposal services from its Ventura Maintenance Yard, as well as from off-site bins (Project). On January 3, 2018, Caltrans submitted to the Department a request for a coverage determination for the Project as well as for similar trash collection, hauling, and disposal contracts from other Caltrans maintenance yards. On November 1, 2018, Caltrans narrowed the scope of its request to only the Project.

The Project is to be completed in accordance with Agreement No. 07A4364 (Agreement). The Agreement calls for the contractor to furnish all labor, trash bins, vehicles, travel, materials, equipment, and incidentals for trash collection, hauling, and disposal services from the Ventura Maintenance Yard, and states that in addition, the contractor may be required to perform off-site trash bin and collection work up to 20 times per year within 20 miles of the yard.

[1] All statutory references are to the Labor Code unless otherwise indicated.

The refuse to be off-hauled and disposed of from the Ventura Maintenance Yard includes a mix of refuse generated from various maintenance yard activities and from similar activities along state highways. The refuse to be off-hauled and disposed of from the off-site bins is generated from the removal and clean-up of homeless encampments along state highways' rights of way.

Discussion

Section 1771 requires payment of prevailing wages to workers on public works projects and applies to "contracts let for maintenance work." Under California Code of Regulations, title 8, section 16000, "maintenance" under section 1771 includes:

> (1) 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.

Section 1720.3 expressly provides that "public works" for purposes of the prevailing wage laws include the "hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency . . . or any political subdivision of the state." The issues presented here are whether section 1720.3, which applies to the hauling of refuse from "a public works site," includes the hauling of refuse from a public works "maintenance" site, and if so, whether the off-hauling of refuse under these facts is covered.

A. A Public Works Maintenance Site Is A "Public Works Site" Within The Meaning Of Section 1720.3.

Caltrans contends that section 1720.3 excludes the off-hauling of refuse from public works maintenance sites (as opposed to other types of public works sites). This contention is flawed and in error. The Department's long-standing and consistent interpretation has been that "the hauling of refuse from a public works site" under section 1720.3 includes the hauling of refuse from public works maintenance sites.[2] Caltrans offers no grounds to disturb this interpretation, which is consistent with substantial precedent, the statutory scheme, and the legislative history.

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[2] See, e.g., PW Case No. 2009-008, *Agreement No. 07A2407, Homeless Sites Debris Removal and Disposal – California Department of Transportation* (Jun. 5, 2008) (finding the off-haul of debris from a public works maintenance site for homeless encampment removal to require prevailing wages under section 1720.3); PW Case No. 2005-028, *Self-Generated Waste Program & Highway Spill Program – Cal. Dept. of Transportation* (May 17, 2006) (finding the off-haul of liquid hazardous waste from a public works maintenance site for sump-cleaning to require prevailing wages under section 1720.3); PW Case No. 2004-040, *Liquid Waste Disposal Services for the Los Angeles County Metropolitan Transportation Authority* (Aug. 29, 2005) (finding the off-haul of hazardous waste from a public works maintenance clean-up site to require prevailing wages under section 1720.3); PW Case No. 2001-005, *Trash/Debris Removal from Railroad Rights-Of-Way and Facilities, Blue and Green Lines – Los Angeles County Metropolitan Transportation Authority* (Aug. 8, 2001) (finding the off-haul of debris from a public works maintenance site for railway clean-up to require prevailing wages under 1720.3).

Caltrans contends that a California Attorney General opinion, 83 Ops.Ca.Atty.Gen. 166 (2000), supports its argument that the term "public works site" in section 1720.3 excludes public works maintenance sites. Specifically, Caltrans claims that section 1720.3 covers the off-hauling of refuse generated *only* from activities listed in section 1720, subdivision (a)(1) (hereafter section 1720(a)(1)), i.e. "[c]onstruction, alteration, demolition, or repair work." This argument, however, misconstrues the Attorney General opinion.

The opinion found that a private contractor's employees who operated a county solid waste transfer station were not covered by the PWL for their work collecting fees, and monitoring, unloading, and transporting containers of generalized trash to a landfill. Caltrans argues that the Attorney General's conclusion that section 1720.3 was inapplicable because the off-hauled trash did not result from "'[c]onstruction, alteration, demolition, or repair work' (§ 1720, subd. (a)(1)) at the transfer station," means that the opinion determined that a "public works site" under section 1720.3 encompasses only those activities listed in section 1720(a)(1), and therefore excludes maintenance. That is not a correct interpretation of the opinion; a more straightforward and correct interpretation is simply that because the off-hauled refuse was *generalized* garbage that did not result from *any* type of public work — either construction or maintenance — the Attorney General concluded the PWL did not apply. The opinion does not address, and as such indicates that the Attorney General did not consider, whether a public works maintenance site is a "public works site" under section 1720.3.

Even if the Attorney General had reached the conclusion that Caltrans claims, the opinion is not binding.[3] More importantly, the opinion pre-dates the California Court of Appeals' decision in *Reliable Tree Experts v. Baker* (2011) 200 Cal.App.4th 785 (*Reliable Tree*), in which the court specifically rejected the argument that maintenance work does not qualify as "public work" subject to prevailing wages because it does not involve "[c]onstruction, alteration, demolition, installation, or repair work" under section 1720(a)(1).

In *Reliable Tree,* the court highlighted the importance of section 1771 to the PWL's overall statutory scheme. The court declared that because "sections 1720 and 1771 *both* define the scope of what constitutes a 'public work,'" the plain language of section 1771 "must also be taken into account" when ascertaining coverage under the PWL. (*Reliable Tree, supra,* 200 Cal.App.4th at p. 796, italics added.) Thus, the court reasoned, although "[s]ection 1720 may not expressly include maintenance work within the definition of public work, . . . section 1771 does [do so]," by expressly stating that prevailing wages must be paid to "all workers employed on public works" and that "[t]his section is applicable to contracts let for maintenance work." (*Ibid.*) The court's conclusion could not be more clear: "Accordingly, maintenance work is within the general definition of public works." (*Ibid.*)

Other provisions within the PWL also compel this conclusion. There are several provisions within Section 1720 (subdivision (a), paragraphs (2) through (8)), and in sections 1720.2, 1720.6, 1720.7, and 1720.9, which contain their own definition of what constitutes public work,

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[3] Attorney General opinions, while they are entitled to "great weight" and "great respect," are "not binding." (*Natkin v. Cal. Unempl. Ins. App. Bd.* (2013) 219 Cal.App.4th 997, 1006-1007.)

demonstrating plainly that the public works definition in section 1720, subdivision (a)(1), is not intended to be exclusive. (See, e.g., § 1720.9 [defining public works in the context of the hauling and delivery of ready-mixed concrete].) Further, as the *Reliable Tree* opinion noted, because exceptions prove the existence of the general rule, the limited exceptions for maintenance work found in sections 1720.4 and 1771.5 further reinforce the "general principle that maintenance work is covered." (*Reliable Tree, supra,* 200 Cal.App.4th at p. 795, fn 9.) This observation has only gained persuasive force in light of the Legislature's recent enactment of additional limited maintenance exceptions. After *Reliable Tree,* Senate Bill No. 854 (2013-2014 Reg. Sess.) and Senate Bill No. 7 (2013-2014 Reg. Sess.) added four new sections to the Labor Code with exceptions for "public works" of "fifteen thousand dollars ($15,000) or less . . . for maintenance work," underscoring the principle that maintenance is a type of public work. (See § 1725.5, subd. (f), added by Stats. 2014, ch. 28, § 62; § 1771.1, subd. (n), added by Stats 2014, ch. 28, § 63; § 1773.3, subd. (i), added by Stats 2014, ch. 28, § 70; § 1782, subd. (d), added by Stats. 2013, ch. 794, § 2.)

Finally, the legislative history of section 1720.3 further demonstrates that a maintenance site may constitute a "public works" site. Caltrans refers to the legislative history of the 1999 amendments to section 1720.3 in Assembly Bill No. 302 (1999-2000 Reg. Sess.), and relies on the February 13, 1999, Senate Rules Committee report and the June 23, 1999, Senate Committee on Industrial Relations report, which reference the payment of "prevailing wages on public works projects for the removal of refuse from the construction site" so that "haulers of refuse, trucked off the construction site, are subject to prevailing wage laws." There is no evidence, however, that the use of the term "construction" in these two reports reflected an actual or specific legislative intent to exclude "maintenance" from the term "public works site" in section 1720.3.

Moreover, the relevancy of the 1999 amendments is questionable, in that they neither modified the "public works site" language of section 1720.3, nor were they the most recent amendments. The most recent amendments to section 1720.3 are in Assembly Bill No. 514 (A.B. 514) (2011-2012 Reg. Sess.). The A.B. 514 Assembly Floor Analysis (dated August 31, 2011) describes "public work" as including, "*among other things,* construction, alteration, demolition, installation, or repair work," thus recognizing that activities outside of those listed in section 1720(a)(1) are covered. (Italics added.) Similarly, the final Senate Floor Analysis (dated August 25, 2011) of A.B. 514 repeatedly refers to "public works" sites, not to "construction" sites.

The analysis here is also consistent with the early legislative history of section 1720.3. When section 1720.3 was enacted in 1976, it included no express statutory directive excluding maintenance sites, and the term "public works site" was never amended. (Stats. 1976, ch. 1084, § 1, p. 4907.) This silence is particularly important in light of the Legislature's demonstrated capacity to enact statutes that say what they mean. Prior to 1974, section 1771 expressly excluded maintenance from public works and stated that prevailing wages "shall be paid to all workmen on public works *exclusive of maintenance work."* (Stats. 1953, ch. 1706, § 3, p. 3455, italics added.) In 1974, the Legislature amended section 1771 to remove the exclusion of maintenance work from public works, and to clarify that prevailing wages apply to "contracts let for maintenance work." (Stats. 1974, ch. 1202, § 1, p. 2593.) Given that the 1976 enactment of section 1720.3 post-dates the 1974 amendments that removed the exclusion of maintenance from public works in section 1771, it must be inferred that the Legislature intended the term "public works site" in section 1720.3 to include maintenance.

Lastly, it bears repeating that because the PWL was enacted for the purpose of benefitting workers and the public, it is to be liberally construed. (*City of Long Beach v. Dep't. of Indus. Relations* (2004) 34 Cal.4th 942, 949-950.) This purpose would be ill-served by a narrow interpretation of section 1720.3 that overlooks established precedent, the plain language of the PWL, and its legislative history — all of which favor a broad reading of the term "public works site" to encompass a public works maintenance site.

B. Section 1720.3 Applies If The Maintenance Work Generating The Refuse To Be Off-Hauled To An Outside Disposal Location Is Covered Under The PWL.

Because section 1720.3 covers the off-hauling of refuse from a "public works site," including a public works maintenance site, whether the off-hauling work in this Project is covered depends on whether the maintenance work generating the refuse is covered as a public work.[4] Caltrans includes two types of refuse in its coverage determination request — refuse to be off-hauled from the Ventura Maintenance Yard and refuse to be off-hauled from the off-site bins.[5] In some instances, the activities generating the refuse to be off-hauled are performed by Caltrans employees and in others by outside contractors.

In both cases — the Ventura Maintenance Yard and the off-site bins —the analysis is similar. If the work generating the refuse to be off-hauled and disposed of is performed by Caltrans' own employees, *i.e.* by "force account" work, then section 1720.3 is inapplicable. To be a "public work" under section 1771, the work must be performed "under contract." Work performed by Caltrans' own forces is not work "under contract," and therefore, the refuse these forces generate is not refuse to be off-hauled and disposed of from a "public works site" within the meaning of sections 1771 and 1720.3.

In contrast, if the refuse to be off-hauled and disposed of results from the maintenance work of outside contractors, then as long as the contractors' refuse-generating work is covered maintenance under California Code of Regulations, title 8, section 16000, and the requirements of the PWL are otherwise met, section 1720.3 covers the off-hauling and disposal of that refuse.

Regarding the refuse to be off-hauled from the Ventura Maintenance Yard, Caltrans' coverage determination request provides a non-exhaustive list of 19 refuse-generating maintenance activities performed by outside contractors. If the outside contractors' refuse-generating activity is

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[4] By way of background, outside of section 1720.3, off-hauling by itself is generally not considered a public work, including a work of "maintenance," except when: (1) the off-hauling is within or among public works sites; (2) there is a specification in the overall public works contract that the off-hauling be accomplished in a specific manner or to a specific location; or (3) the off-hauling is to return tools, equipment, or material to the contractor's place of business. (Decision on Administrative Appeal, dated January 3, 2005, in PW Case No. 2003-044, *Lindeman Brothers Trucking.*) None of these circumstances are alleged here.

[5] Section 1720.3, subdivision (b), excludes the "hauling of recyclable metals." If the off-hauled refuse is for the "hauling of recyclable metals" then the off-hauling is excluded from coverage under section 1720.3.

covered maintenance under the PWL, then the off-hauling and disposal of the refuse will be subject to prevailing wage requirements under section 1720.3.

Regarding the refuse to be off-hauled from the off-site bins, Caltrans represents that the refuse is generated exclusively from homeless encampment clean-up and removal work along state highway rights of way. Such clean-up and removal work, when performed by outside contractors, is covered maintenance under the PWL. (Public Works Case No. 2009-008, *Homeless Sites Debris Removal and Disposal, California Dept. of Transportation* (Jun. 5, 2008).) Thus, the off-site bin collection and disposal of such refuse is also covered under section 1720.3, assuming the other requirements of the PWL are met.

Conclusion

For the foregoing reasons, the off-hauling of refuse from a public works "maintenance" site to a disposal location is covered under section 1720.3 and subject to prevailing wage requirements. Whether the off-hauling work for the Project is covered depends on whether the underlying maintenance work generating the refuse to be off-hauled and disposed of itself qualifies as a "public work" under the PWL, as addressed above.

I hope this letter satisfactorily answers your inquiry.

Sincerely,

André Schoorl

André Schoorl
Acting Director