STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
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December 30, 2020

Jon Welner
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
44 Montgomery Street, 36th Floor
San Francisco, California 94104

Re: Public Works Case No. 2019-016
Snow Removal
County of Nevada

Dear Mr. Welner:

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 1773.5[1] 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 snow removal and sanding work performed pursuant to the Personal Services Contract between the County of Nevada and Sugar Bowl Corporation, entered into on August 11, 2016, is public work and therefore subject to prevailing wage requirements.

Facts

On August 11, 2016, the County of Nevada (County) entered into a contract (Contract) with Sugar Bowl Corporation (Sugar Bowl) for snow removal, road sanding, and snow pack removal for the Soda Springs area of eastern Nevada County. The Contract provided for services from October 1, 2016 through June 30, 2017. The services were at a fixed rate regardless of snowfall amounts, with any additional "On Demand" services to be paid at an hourly rate. Snow plowing was to commence whenever snow depth exceeded four inches and to continue until all roads in the service area were cleared along the entire width of the pavement. Sanding was to commence whenever the road was wet and temperature was or was expected to be below 32 degrees within four hours, there was snowpack or ice on any of the service area roadways, or when instructed to sand by the Department of Public Works, the County Sheriff or the California Highway Patrol. Further, upon cessation of an individual storm, after fresh snow had been removed, Sugar Bowl was to commence removal of snow pack. The Contract states which specific roads were to get plowed and sanded, and the order of priority for these roads. The work was to be performed with equipment equal to an all-wheel drive loader

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

with a reversible snow-plow blade, a rotary snow plow with minimum capacity of 1500 tons per hour, a 3-5 ton sand truck, and a plow truck with a 11 foot blade.

The Contract further indicates that:

> To the extent made applicable by law, performance of this Contract shall be in conformity with the provisions of California Labor Code, Division 2, Part 7, Chapter 1, commencing with Section 1720 relating to prevailing wages which must be paid to workers employed on a public work as defined in Labor Code §§1720, et seq.; and shall be in conformity with Title 8 of the California Code of Regulations §§200 et seq., relating to apprenticeship. …

The Position of the Parties

Sugar Bowl's sole argument is that it should be able to rely on PW 95-020, *County of Nevada – Contract for Snow Removal* (Nov. 7, 1995) (*PW 95-020*) as applying to the Contract signed in August 2016 and that it should apply through the life of the contract. *PW 95-020* held that the snow removal work in that case was not a public work. Sugar Bowl argues it should not be held to the determination made in PW 2016-015, *Snow Removal and Snow Staking Services – County of El Dorado* (Jan. 31, 2017) (*PW 2016-015*), which held the snow removal in that case was a public work, because it was issued after the Contract was signed. Sugar Bowl believes that the Director should follow the determination that existed at the time the Contract was signed, the "benchmark" date, and therefore determine the snow removal and sanding work in their Contract are not subject to prevailing wages.

The Division of Labor Standards Enforcement (DLSE) takes the position that while *PW 2016-015* is not precedent, it is instructive to the issue at hand. DLSE argues that the "reasoning and policy" of *PW 2016-015* should be applied to this case to find the work in the Contract is covered work subject to prevailing wages. DLSE rejects Sugar Bowl's argument regarding "benchmark" dates, pointing out that per the "Important Notice" issued on September 4, 2007, coverage work determinations are no longer considered "precedential" but instead are advice letters.

The County of Nevada was given an opportunity to submit an opinion letter regarding the request for a determination, but included no position or opinion in its response.

Operating Engineers Local Union No. 3 (Local 3), which submitted a letter of opinion with respect to the request for a determination, argues that the work in the Contract is akin to the work in *PW 2016-015*, and the same reasoning should apply to find it subject to prevailing wages. Local 3 argues that "benchmark" dates apply to changes in governing law and that coverage determinations are not "new law." Local 3 opines that the Director had only considered coverage determinations as changes in the law when such determinations were precedential, which they no longer are per the September 4, 2007 Important Notice. Further, it points out that all the cases relied on by Sugar Bowl to support its "benchmark date" argument refer to changes in prevailing wage *statutes*.

Section 1773.5 provides that the Director of Industrial Relations makes determinations "of whether a specific project or type of work awarded or undertaken by a political subdivision is a public work . . . ." Under California Code of Regulations, title 8, section 16001, subdivision (a), an interested party may request that the Director "determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which that interested party believes may be subject to or excluded from coverage as public works under the Labor Code." Here, Sugar Bowl made a request pursuant to section 16001, subdivision (a), specifically for "a public works determination with regard to the Contract." As such, under section 1773.5, the Director is making a determination specific to the work in the Contract and any discussion of "benchmark dates" is inapplicable and irrelevant. Moreover, in this determination, neither *PW 95-020* nor *PW 2016-015* are relied upon, because neither are precedential.

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."

Undisputedly, the Contract is paid for out of public funds. The issue is whether the work at issue is the type that fits the definition of public 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." (Cal. Code of Regs., tit. 8, § 16000; hereafter Regulation 16000.)

1. The Work at Issue Constitutes Maintenance as it is Routine, Recurring, and Usual Work Done for the Preservation, Protection, and Keeping of Publicly Owned and Operated Facilities.

The Contract requires (1) snow to be removed from certain specific roads any time the snow exceeds a certain level; (2) roads to be sanded under specified conditions; and (3) snow pack to be removed after a storm has ceased and fresh snow has been removed. Accordingly, the work in question is routine, recurring, and usual, albeit seasonal in nature. The roads to be plowed and sanded are publicly owned and operated County roads. The public needs these roads to be cleared of snow and sanded so that they can safely utilize them to drive around the County. Snow removal is therefore necessary to keep publicly-owned or operated property in a "safe and continuously usable condition" for which they have been designed. Unless an exception applies, the snow removal is public work because it constitutes "maintenance." "Janitorial or custodial

services of a routine, recurring or usual nature" are excluded from the definition of "maintenance." (Regulation 16000.)

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

The Contract did not make Sugar Bowl a "custodian" of the roads. One definition of "custodial" is "relating to, providing, or being protective care or services for basic needs," while "custodian" is defined as "one that guards and protects or maintains; especially: 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.) However, the scope of services in the Contract between the County and Sugar Bowl describes work that goes beyond protective care or services for basic needs. Sugar Bowl was not protecting or guarding the County roads; it was using an all-wheel drive loader with a reversible snow-plow blade, a rotary snow plow with minimum capacity of 1500 tons per hour, a 3-5 ton sand truck, and a plow truck with a 11 foot blade to remove and sand the roadways under specified conditions in order to allow the public to safely move about the County. The heavy machinery and manual labor involved in snow removal, typically under dangerous weather conditions, cannot be described as merely "protective care" or "custodial," because Sugar Bowl was performing work without which the public roads could not safely function.

To the extent custodial services are distinct from janitorial services, the snow removal work also does not constitute janitorial services. A janitor is defined as "one who keeps the premises of a building (such as an apartment or office) clean, tends the heating system, and makes minor repairs." (Merriam-Webster's Collegiate Dict. (11th ed. 2003) p. 669.) Snow removal does not take place in a building, nor did the Contract provide for keeping the premises of a building clean. Instead, the contractor was to clear snow from the public roads to allow safe public access and travel. Accordingly, because none of the relevant exceptions apply, the snow removal work constitutes "maintenance" for the purposes of the prevailing wage law.

Conclusion

For the foregoing reasons, the work performed pursuant to the Contract between the County and Sugar Bowl 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,

Katrina S. Hagen

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Director of Industrial Relations