

DEPARTMENT OF INDUSTRIAL RELATIONS
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May 11, 2006

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Jon Welner
PAUL, HASTINGS, JANOFSKY & WALKER, LLP
55 Second Street, 24th Floor
San Francisco, CA 94105

Re: Public Works Case No. 2005-041
Pre-rinse Spray Valve Program (Phase II)
California Urban Water Conservation Council

Dear Messrs. Cook and 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 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 replacement of water faucet nozzles under the specific facts of this case is not public work and therefore is not subject to the payment of prevailing wages.

Factual Summary

The "Pre-rinse Spray Valve Installation Program" ("Program") was initiated in 2002 by the California Urban Water Conservation Council ("CUWCC"), a private nonprofit organization consisting of 164 urban water utilities, to provide direct replacement of 27,400 pre-rinse spray valves (also referred to as "water and energy efficient faucet nozzles") in private food service establishments throughout California at no cost to the business or property owner. The new pre-rinse spray valves each saves an average of 218 gallons of hot water per day.¹

¹According to the U.S. Department of Energy's website, http://www.eere.energy.gov/femp/newsevents/detail.cfm/news_id=8306, "[A] low-flow pre-rinse valve uses higher water velocity and more effective spray patterns to remove the food waste just as quickly, while using only 1.6 gpm." The website also states that the function of a pre-rinse spray valve is analogous to a nozzle on a garden hose. "Think about power washing a wood deck or washing your car with a garden hose. Without a nozzle several gallons of water flow out of the hose at low velocity every minute. When you use the hose this way to rinse a car off, it takes a long time and a lot of water. But if you put your thumb over the end of the hose, or even better, attach a nozzle set to

Program was selected and approved by the California Public Utilities Commission as an energy efficient program eligible to receive Public Goods Charge ("PGC") funds. Program was implemented by CUWCC in two phases. Phase I began in October 2002 and ended December 2003. In June 2004, CUWCC entered into a General Services Agreement with Honeywell Utility Solutions ("Honeywell") to implement Phase II of Program.

Each pre-rinse spray valve replacement costs approximately \$180. CUWCC entered into contracts with Southern California Gas Company and Pacific Gas & Electric (also referred to as "Investor Owned Utility") and with local water agencies. The local water agency contracts, which authorize Honeywell to replace up to approximately 200 pre-rinse spray valves in each water agency district, require the water agencies to pay CUWCC \$50 per replacement. The Investor Owned Utility contracts require the utilities to pay CUWCC the remaining \$130 per replacement, which the utilities collect from their customers in the form of PGC charges on their utility bills. CUWCC then pays Honeywell on a monthly basis based on the number of replacements performed. It is anticipated that in Phase II of the Program approximately 24,700 pre-rinse spray valves will be replaced throughout California, with local water agencies contributing approximately \$1.23 million of the total Program cost of \$4.36 million.

Under CUWCC's General Services Agreement with Honeywell, Honeywell employs "Water Conservation Nozzle Salespersons" to go door-to-door to solicit private food service establishments to use water and energy efficient pre-rinse spray valves. These Honeywell employees perform all aspects of the scope of work including marketing, outreach, product procurement, database administration and customer service as well as the actual replacement of the spray valve. For a typical spray valve replacement, a Honeywell employee spends between two to ten minutes unscrewing the old spray valve from the existing water faucet, wiping off any residue and screwing on the new water and energy efficient pre-rinse spray valve.

Analysis

Labor Code section 1720(a)(1)² generally 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" The pre-rinse spray valve replacement

a wide spray pattern, rinsing the car off is faster and easier and uses less water. Low-flow pre-rinse valves work on this same principle."

²All section references are to the Labor Code, unless otherwise provided.

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work is done under contract, the General Services Agreement between CUWCC and Honeywell, and is paid for in part out of public funds from local water agency payments.³ Therefore, the only issue presented here is whether the work involved in replacing the pre-rinse spray valve constitutes "installation" under section 1720(a)(1).⁴

Section 1720 was amended by Senate Bill No. 975 ("SB 975"), effective January 1, 2002, to include "installation" within the definition of public works. (Stats. 2001, ch. 938, § 2.) The legislative history of SB 975 indicates that "installation" was added as a type of enumerated covered work in section 1720 to conform to prior precedential coverage determinations made by the Department. (Sen. Bill No. 975, 3d reading, August 30, 2001 (2001-2002 Reg. Sess.) p. 4; Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished business of Sen. Bill No. 975 (2001-2002 Reg. Sess.) Aug. 30, 2001, p.5.)

The relevant prior precedential determinations of this Department issued prior to passage of SB 975 have in common the bolting, securing or mounting of fixtures to the realty.⁵ As supported by

³A joint letter from the requesting parties, CUWCC and Honeywell, dated December 12, 2005, states that "[a]lmost all local water agencies are public entities, so their payments are public funds." PGC funds, the other source of Program funding, are similar in nature to the PGC funds analyzed and found to be private in PW 2003-029, *Energy Efficiency and Generation Work, San Diego Police Headquarters* (January 28, 2005). Given the conclusions reached herein that the subject work is not public work, the nature of PGC funds in this matter need not be analyzed. Moreover, as stated above, the public funds requirement of section 1720(a)(1) is satisfied by the water agency payments.

⁴The requesting parties argue that the pre-rinse spray valve replacement work does not constitute "maintenance" under section 1771 and the California Code of Regulations, title 8, section 16000 and, if it did, is excluded from the definition of maintenance under the janitorial services exception. This exception need not be addressed because the work at issue does not constitute maintenance. The replacement of spray valves with energy and water efficient spray valves is not routine, recurring or usual work as it is being performed on a one-time basis in the context of a unique conservation program, rather than an ordinary maintenance schedule. In addition, it does not preserve, protect or keep a publicly owned or operated facility in a safe and usable condition for two reasons. First, the food service establishments where the work is being performed are private, not public. Second, while the work may indeed serve an important environmental objective of energy and water conservation, it does not, however, preserve, protect or keep the facility in a safe and usable condition within the meaning of California Code Regulations, title 8, section 16000 as set forth in PW 2005-007, *Street Sweeping, City of Santa Clarita* (June 1, 2005) and PW 2005-014, *Sediment Removal from Storm Drains, California Department of Transportation* (October 31, 2005).

⁵See, e.g., PW 99-034, *Valley View Elementary School, Pleasanton Unified School District, Installation of Signage by Marketshare, Inc.* (September 29, 1999); PW 99-061, *Toilet Partition/Bathroom Accessories Installation, Zanker Elementary School, Milpitas Unified School District* (November 10, 1999); PW 99-060, *Metal*

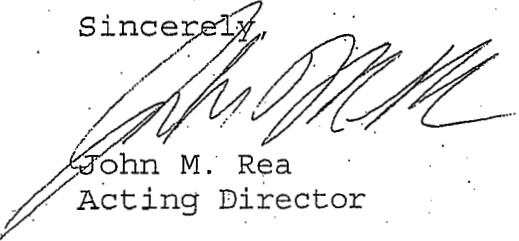
the legislative history of SB 975, "installation" within the meaning of 1720(a)(1) carries this construct of fixture forward.

Here, similar to placing a thumb or screwing on a nozzle at the end of a garden hose, the water and energy efficient pre-rinse spray valve is a device that merely rinses dishes in a faster, more efficient and water conserving manner. Honeywell employees spend less than ten minutes unscrewing and removing the old spray valve from the existing water faucet and screwing on in its place the new water and energy efficient spray valve. These spray valves are not fixtures in that they do not become part of the realty.⁶ Therefore, it is concluded that the work involved in screwing on a water and energy efficient pre-rinse spray valve to a food service establishment's preexisting water faucet by means of a threaded connection, by itself, does not constitute "installation" under section 1720(a)(1).

The conclusion reached herein is consistent with the Civil Code's definition of fixture. Civil Code section 660, in pertinent part, provides as follows: A fixture includes that which is "permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screws;"

For the foregoing reasons, under the specific facts of this case, the work involved in the Pre-rinse Spray Valve Program (Phase II) is not public work and therefore does not require the payment of prevailing wages.⁷

Sincerely,



John M. Rea
Acting Director

Lockers and Metal Storage Shelving, Santa Clara Police Facility (November 30, 1999).

⁶See *Daniger v. Hunter* (1952) 114 Cal.App.2d 796, 798 ["Electrical appliances such as refrigerators and stoves are personal property and do not become a part of the realty where, as here, they are movable and can be disconnected by merely pulling a plug or unscrewing a gas connection."].)

⁷Given the conclusions reached herein that the subject work is not public work, it is unnecessary to address further issues raised by requesting parties whether the Program meets the \$1,000 threshold requirement under section 1771 or whether the fact that Honeywell employees do marketing, outreach, customer service and other administrative tasks in addition to performing the spray valve replacement work is a relevant consideration in determining public works coverage under section 1720(a)(1).