

DEPARTMENT OF INDUSTRIAL RELATIONS

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July 29, 2021

Ann Wu, Hearing Officer  
Office of the Director – Legal Unit  
Department of Industrial Relations  
355 South Grand Avenue Suite 1800  
Los Angeles, California 90071

Re: Public Works Case No. 2020-019  
Primary Electrical Improvements Step 4  
University of California, Irvine

Dear Ms. Wu:

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<sup>1</sup> 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 electrical acceptance testing work conducted by Electrical Reliability Services, Inc. (ERS) performed for the University of California, Irvine (UCI) Primary Electrical Improvements Step 4 (Project) is subject to prevailing wage requirements.

### **Facts**

#### **A. University of California, Irvine Primary Electrical Improvements Step 4.**

The University of California, Irvine Primary Electrical Improvements Step 4 project provides the addition of new 12kV<sup>2</sup> Substations and completes the installation of a 12kV out power system loop including the addition of supervisory control and data acquisition (SCADA) system controls. The project was intended to increase the efficiency and improve the reliability and safety of the UCI campus's electrical distribution system, correct existing system deficiencies and address infrastructure needs resulting from campus development. The scope of the work includes: installation of 12kV switchgear at University Substation; constructing a new 12kV South Substation on the outer campus utility loop; installing a new 12kV feeder from University Substation to South Substation;

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the California Labor Code and all subdivision references are to the subdivisions of section 1720.

<sup>2</sup> kV is an abbreviation for kilovolt, or 1,000 volts.

providing a new 12kV feeder and duct bank system between South Substation and East Substation; replacing East Substation and Central Plant CP1 and CP2 switchgear protective devices; replacing cogeneration MV-01 switchgear relay protective devices; providing an entirely new 12kV SCADA system; installation of SCADA system hardware, programming and communications at each substation; interconnecting substation SCADA systems with redundant communication systems; and replacing existing Rule 21 protection system relays and PLC interface.

UCI advertised the Project for bid on September 11, 2015. The bid advertisement specified that the successful bidder and its subcontractors were to pay no less than the applicable prevailing wage to all workers employed in the execution of the contract. The bid advertisement noted that no contract or subcontractor may be listed on a bid for this project nor awarded any portion of this project unless registered with the Department of Industrial Relations pursuant to Labor Code section 1725.5.

The successful bidder was Helix Electric, Inc. (Helix), which entered into a contract with UCI on January 7, 2016. The contract was paid in whole by public funds sourced from the University of California's annual budget for capital expenditures. The General Conditions agreement incorporated into the contract notes that Helix, as the general contractor, shall perform the work in the project in accordance with the applicable code requirements relating to the payment of prevailing wage, payroll records, and apprentices in sections 3.7.1.3, 14.2, 14.3, and 14.4. It further provides that any subcontractor shall assume towards the general contractor all obligations and responsibilities which the general contractor assumes towards UCI under the general contract documents per section 5.2.1.

#### **B. Helix Electric, Inc. Subcontract with ERS.**

On May 11, 2016, ERS submitted a proposal for service to Helix pertaining to the Project. ERS noted that it was a member of the InterNational Electrical Testing Association (NETA) and ANSI standards developer for the electrical testing industry. On June 30, 2016, Helix entered into a subcontract agreement with ERS to perform electrical acceptance testing work on the Project. The subcontract agreement stipulated that ERS agrees to be bound to Helix in the same manner and to the same extent that Helix is bound to UCI. The subcontract agreement further provides in Addendum No. 3 titled "State Jobs" that this is a prevailing wage job whereby the subcontractor is responsible for compliance with payment of prevailing wages pursuant to provisions of the Department of Industrial Relations. Moreover, the subcontractor was required to provide weekly certified payroll reports and statements of compliance to ensure the correct prevailing wage rate is shown. The subcontract agreement also outlines the apprentice requirements for the subcontractor. Addendum No. 5 titled "General Subcontract Provisions" under section AP again provides for the subcontractor's requirement to pay prevailing wage and to furnish certified payroll records.

On July 15, 2016, Helix and ERS entered into an agreement to modify the subcontract agreement to exclude the subcontractor's liability from prevailing wage laws and the subcontractor's requirement to submit certified payroll records. However, ERS

continued to maintain certified payroll records for this Project and classified its workers as “Inside Wireman” after the modification of the subcontract agreement.

### **C. ERS Electrical Acceptance Testing.**

Under its subcontract agreement, ERS was responsible for the acceptance testing on the installed equipment for the Project prior to energization and to establish the baseline data for future preventive maintenance programs. ERS performed acceptance testing on individual pieces of electrical equipment for the Project including visual and mechanical inspection as well as electrical testing.<sup>3</sup> ERS submitted a declaration from Service Operations Director Jeffrey Daniels attesting that the purpose of the service provided by ERS was to verify that the electrical distribution equipment is or will operate properly and safely when energized. ERS’s onsite work on the Project was performed periodically from October 2016 to March 2018. The purpose of acceptance testing is to verify that the manufactured devices are operating as designed and intended, free of any defects or damage.

### **Discussion**

All workers employed on public works projects must be paid at least the applicable prevailing wage rates. (§ 1771.) Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work. (§ 1772.) 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. The work by Helix to install the new 12kV Substations and 12kV out power system loop for the Project is indisputably installation work done under contract and paid for out of public funds, as Helix performed the work pursuant to a contract with UCI paid for with public funds sourced from the University of California’s annual budget for capital expenditures.

The issues are whether electrical acceptance testing work constitutes “installation” for the purposes of section 1720(a)(1) or whether the electrical acceptance testing work is

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<sup>3</sup> ERS described in its proposal that for each type of equipment tested by ERS on this Project for which acceptance testing was performed, there was both “visual and mechanical” work and “electrical test” work performed. Visual and mechanical work included but was not limited to inspecting physical and mechanical conditions, verifying correct connection and operation of equipment, performing mechanical operation tests, inspecting compression-applied connectors, shield grounding, cable supports terminations, and inspecting bolted electrical connections for high resistance using one or more of the following methods: use of low-resistance ohmmeter in accordance with Section 7.6.3.2., verify tightness of accessible bolted electrical connections by calibrated torque-wrench method in accordance with manufacturer’s published data or Table 100.12, verify cell fit and element alignment, verify racking mechanism operation. Electrical tests consisted of but was not limited to verifying that voltage transformer secondary circuits are grounded, performing insulation-resistance tests, ratio-verification tests, and voltage testing.

done “in the execution of” the contract with UCI, such that workers performing the electrical acceptance testing must be paid prevailing wages.

**A. Electrical Acceptance Testing is within the Final Phase of the Installation Process.**

There is no dispute that the physical installation of the new 12kV switchgear at the University substation and the installation of the 12kV outer power system loop including the addition of the SCADA system controls constitutes “installation” under section 1720(a)(1) per the contract for the Project between Helix and UCI. The dispute is whether the electrical acceptance testing work performed by ERS is part of the “installation” process.

Helix was awarded the contract for the Project which entailed increasing the power capacity of the University Substation with the addition of a 12kV switchgear, 12kV south substation to decentralize primary distribution, 12kV supply to East Substation, and a new SCADA fiber optic cable for high speed loop between the University Substation, South Substation, and East Substation and Central Plant to the University Substation. Helix entered into a subcontract agreement with ERS as an independent testing organization to perform the electrical acceptance testing of the installed equipment after the physical installation of the new equipment was completed.

The Division of Labor Standards Enforcement (DLSE), which issued a civil wage and penalty assessment under section 1741, argues that acceptance testing work and commissioning work are similar. The Department has previously found commissioning work<sup>4</sup> covered under the prevailing wage law as that work is part of the final phase of installation and is done in the execution of the contract. (PW 2018-018 and 2018-031, *Los Angeles Southwest College School of Behavioral and Social Sciences HVAC Upgrade Commissioning Work and East Los Angeles College Campus Student Center and Bookstore Commissioning Work – Los Angeles Community College District* (Dec. 9, 2020/May 9, 2020) (*LACCD Commissioning*)). DLSE strongly contends that the *LACCD Commissioning* coverage determination controls the analysis here.

In an attempt to distinguish *LACCD Commissioning*, ERS argues that acceptance testing occurs before electrical commissioning and before new equipment is put into operation and thus, unlike commissioning, “does not constitute the final phase of the installation process.” To draw a further distinction between acceptance testing and commissioning, ERS argues that its acceptance testing does not verify whether a contractor correctly installed the equipment but rather it verifies whether the equipment being tested is operational as intended by the manufacturer and project engineer. These arguments are not persuasive.

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<sup>4</sup> In *LACCD Commissioning*, the Department referred to commissioning as a process that “focuses upon verifying and documenting that the facility and all of its systems and assemblies are planned, designed, installed, tested, operated and maintained to meet the Owner’s Project Requirements” and “entails programming, calibration, and verification that the energy management system is installed correctly.”

As ERS concedes, the purpose of acceptance testing is to verify that the “manufactured devices do not have any defects, are operating as they were designed and intended, and are not damaged” before energization. ERS’s electrical acceptance testing of the newly installed equipment for the Project is therefore a continuation of the physical installation of the upgrades as part of the final phase of the installation process. In that sense, electrical acceptance is similar to commissioning, as both types of work seek to ensure that the installed system operates as intended. The installation simply is not complete until electrical acceptance testing work is done. For these reasons, ERS’s electrical acceptance testing work under this factual scenario is properly considered installation for the purposes of the prevailing wage law. (§ 1720, subd. (a)(1).)

**B. Electrical Acceptance Testing is Done in the Execution of the Contract.**

The issues of whether electrical acceptance work is installation, and whether the electrical acceptance work is done in the execution of the contract, are similar, and closely intertwined. If the work is so essential to the installation process such that it constitutes installation, then that work is also done “in the execution” of the contract for the installation. (§ 1772.) In determining whether certain types of work are done “in the execution,” courts have looked to whether “certain functions are integral to the performance of a public works contract.” (*Sheet Metal Workers’ Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 205-206 (Local 104); see also *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742, 753 [“integral part of the process of the public works project”]; *O. G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 444 [“integrated aspect of the ‘flow’ process of construction.”])

As discussed above, the Department has enforced prevailing wage requirements for commissioning work done on public works projects finding that commissioning is the final phase of installation and that commissioning is done in the execution of the contract. (*LACCD Commissioning, supra*, PW 2018-018 and 2018-031.) Because commissioning is the final phase of installation and must be performed before the installation is deemed complete, the commissioning testing is an “integral part of the [installation] process” (*Local 104, supra*, 229 Cal.App.4th at p. 212.)<sup>5</sup>

ERS’s argument that the acceptance testing does not verify whether a contractor correctly installed the equipment but rather it verifies whether the equipment being tested is operational as intended by the manufacturer and project engineer is unpersuasive. As discussed above, ERS itself states that electrical acceptance testing verifies that the “electrical distribution equipment is or will operate properly and safely when energized.” Similar to commissioning work, acceptance testing is performed to ensure the installed equipment can safely operate is part of the final phase of installation and integral to the installation process.

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<sup>5</sup> This conclusion is also consistent with the Department’s pre-S.B. 975 coverage determinations on installation, which found that installation work was covered both as construction and because it was in the execution of a public works construction contract.

Unlike offsite prefabrication of HVAC components (see *id.* at p. 214), acceptance testing includes a visual and mechanical inspection component which was done on site to ensure that installed equipment perform as intended by the manufacturer and project engineer. Acceptance testing is therefore more akin to final stage or post-completion “testing” that the Department has long found to constitute public work. (See PW 2002-029, *Installation, Testing and Calibration of Truck Scale Cells, City of Los Angeles - Hyperion Treatment Plant – Miron Electric, Inc./Mettler-Toledo* (Apr. 16, 2003) (*Truck Scale Cells*) [“Under longstanding Department precedent, ‘testing’ is part of construction under Section 1720(a)(1) as well as work done in the execution of a public work under Section 1772.”]) As the acceptance testing here is also a form of testing and verification that equipment for the Project is operating properly and thus installed correctly, finding the acceptance testing work covered is in accord with the Department’s determination in *Truck Scale Cells* that “testing” work is covered public work.

### **C. ERS’s Remaining Arguments are Unpersuasive.**

ERS’s other arguments lack merit. ERS argues that acceptance testing can be performed entirely offsite to distinguish it from commissioning or onsite installation work. However, ERS admits that it performed acceptance testing work onsite from October 2016 to March 2018. ERS described in its proposal the extent of visual and mechanical inspection work for each type of equipment tested. Such work included inspecting physical and mechanical conditions, inspecting compression-applied connectors, and inspecting bolted electrical connections for high resistance by using various methods such as using a calibrated torque-wrench to verify the tightness. 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. This provision defines “construction” to include inspection “regardless of whether any further construction work is conducted.” (§ 1720, subd. (a)(1).) ERS’s visual and mechanical inspection work, done as a part of the acceptance testing, is further support that the acceptance testing work is covered public work.

ERS also contends that it did not contract with the University directly for the Project and therefore did not contract to provide for installation of the equipment tested. However, ERS was on notice that it was bound to Helix in the same manner that Helix was bound to UCI as explicitly provided in the initial subcontract agreement between ERS and Helix. As discussed above, ERS’s acceptance testing work was necessary to ensure the safety of the installed equipment for the Project and was thus within the final phase of installation.

To show that acceptance testing is not the type of work that is covered by prevailing wage laws, ERS argues that the scope of work for “inside wireman” in Orange County that accompanies the Department’s prevailing wage determinations<sup>6</sup> does not include acceptance testing. ERS states in its proposal that it is a member of NETA and that all electrical testing is performed according to NETA standards. ERS’ theory appears to be that NETA acceptance testing work (or any other type of work) is covered only when

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<sup>6</sup> The Department’s prevailing wage determinations “generally list the scope of work and craft classifications to which the rates apply.” (*Henson v. C. Overaa & Co.* (2015) 238 Cal.App.4th 184, 189.)

a scope of work or prevailing wage determination specifically includes reference to NETA acceptance testing. The argument is flawed. First, NETA testing *is* expressly referenced in a prevailing wage determination for neighboring Los Angeles County.<sup>7</sup> Under ERS' theory, NETA testing would be covered because it is mentioned in a prevailing wage determination. Though the reference is in a neighboring county's determination, if work is deemed covered under the prevailing wage laws, the work is covered statewide. Perhaps the more important point, reiterated recently in *LACCD Commissioning*, is that the prevailing wage determinations and their accompanying scopes of work provisions are not dispositive as to whether a particular type of work is subject to prevailing wage requirements. (*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 126.) This is because the Department makes "two determinations; *first*, whether a particular type of worker or work is covered by the prevailing wage laws, and *second*, if so, what the prevailing wage for that category of worker should be." (*Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345, 352, italics added.)

ERS claims that apprentices are not trained on the "acceptance testing performed by ERS at the voltage levels specified in the proposal or the equipment utilized by ERS on the Project." In support of that claim, ERS includes a declaration from one apprenticeship program coordinator attesting to the fact that his program does not provide such training. However, the curriculum of one program does not establish a statewide practice, as there appear to be dozens of electrical industry apprenticeship programs in California that are approved by the Division of Apprenticeship Standards. Moreover, apprenticeship training curricula do not dictate coverage under the prevailing wage law. Many types of work are in non-apprenticeable classifications and would not be present in any apprenticeship training curriculum, but would nonetheless be subject to prevailing wage requirements. (See Lab. Code, § 1777.5, subd. (d).)

Finally, ERS contends that *not* covering acceptance testing comports with the purpose of the prevailing wage law. "The overarching purpose of the prevailing wage law is to 'protect and benefit employees on public works projects.' [citation.]" (*Kaanaana v. Barrett Business Services, Inc.* (2021) 11 Cal.5th 158, 166.) "It protects those who work under contract for covered districts from substandard wages, benefits the public through the superior efficiency of well-compensated workers, and results in higher wages to make up for lack of job security and benefits that normally attach to public employment." (*Id.* at p. 172.) The prevailing wage law is construed liberally to achieve these goals (*id.* at p. 166), all of which are fulfilled under a determination that acceptance testing work done under contract on this publicly-funded project is subject to prevailing wage requirements, a conclusion that the public entity UCI appears to prefer and agree with.<sup>8</sup>

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<sup>7</sup> See the Department's current prevailing wage determination for Los Angeles County <<https://www.dir.ca.gov/oprl/2021-1/PWD/Determinations/Subtrades/LOS.html>> (as of July 28, 2021). The reference to NETA testing has existed in the determination since at least August 22, 2005.

<sup>8</sup> UCI states that it "is the University's opinion that the Primary Electrical Improvements Step 4 project was a public work under section 1720 of the Labor Code

**Conclusion**

For the foregoing reasons, the electrical acceptance testing work conducted by Electrical Reliability Services, Inc. performed for the University of California, Irvine Primary Electrical Improvements Step 4 is subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Katrina S. Hagen".

Katrina S. Hagen  
Director of Industrial Relations

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and was therefore subject to the payment of prevailing wages by the Design Builder, Helix Electric, Inc., and all of its subcontractors.”