

DEPARTMENT OF INDUSTRIAL RELATIONS
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Re: Public Works Case No. 2011-009
Service Authority for Freeway Emergencies (SAFE)
Installation, Repair and Maintenance of Freeway and Highway Emergency Call Boxes

Dear Ms. Lay and Mr. Mowrey:

This constitutes the determination of the Director of Industrial Relations regarding the 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 installation, repair and maintenance of the freeway and highway emergency call boxes is public work subject to prevailing wage requirements.

FACTS

The work at issue entails the installation, repair and maintenance of freeway and highway emergency call boxes in thirteen counties. The work takes place within the context of a state program to improve the safety of the motoring public and to allow timely roadside assistance to drivers through the creation of a local public agency called Service Authority for Freeway Emergencies (SAFE). Authorized by Streets and Highways Code sections 2550 et seq., the SAFE program facilitates the purchase, installation, operation, maintenance and repair of roadside call boxes. Under Streets and Highways Code section 2551, a SAFE can be set up in different ways: a county may establish a service authority for freeway emergencies; a county may designate the county transportation commission to act as the service authority; and counties and cities may designate a council of governments to act as a service authority for their area.¹ Call boxes are

¹ This determination pertains to two requests for public works coverage determinations. One request addresses call box maintenance and repair work performed in San Luis Obispo, Santa Cruz, Monterey, and Mendocino counties under the auspices of four SAFE authorities in those counties. The second request concerns call box maintenance and repair work performed in nine Northern California counties under the auspices of the Metropolitan Transportation Commission SAFE.

linked to call answering centers, where operators dispatch the California Highway Patrol, tow truck operators, and/or emergency service providers.

The installation, maintenance and repair of call boxes required by the SAFE authorities in San Luis Obispo, Santa Cruz, and Monterey counties are similar. The sole source of funding for the call box maintenance and repair activities in those counties is a one dollar (\$1) annual fee per registered vehicle in the county, levied by the SAFE authorities as authorized by Streets and Highways Code section 2555.

On July 1, 2009, the San Luis Obispo Council of Governments,² acting as the SAFE for San Luis Obispo County (SLO SAFE), entered into a contract (SLO Agreement) with CASE Systems, Inc. (CASE) for maintenance and repair of call boxes owned by the SLO SAFE. The cost is \$37.08 per month per call box. The purpose of the SLO Agreement is to install, repair and maintain the call box system in a good clean, operating condition. The scope of work requires CASE workers to perform corrective maintenance, preventative maintenance, installation and relocation of call boxes, record-keeping, and other administrative work. Corrective maintenance entails repairs to call box components necessitated by damage caused by vandalism, vehicle collision "knock downs," lightning, flood, fire, and other acts of nature. Preventative maintenance is required for each call box in approximate six month intervals. Preventative maintenance duties require CASE workers to check solar panel current level and battery pack voltage level; inspect and treat for corrosion external electrical connections to the solar panel and antennae transmission lines; check outer door, handset, and lighting of call box for proper operation; and clean the call box and its immediate vicinity.

On May 1, 2007, the Santa Cruz County Regional Transportation Commission SAFE (Santa Cruz SAFE),³ acting as the SAFE in Santa Cruz County, entered into a contract (Santa Cruz Agreement) with Comarco Western Technology (Comarco) at a flat monthly fee of \$416.64 per box per year, increasing annually according to the consumer price index. CASE assumed the Santa Cruz Agreement on May 20, 2008, and the parties amended the agreement on May 10, 2010. The scope of work under the Santa Cruz Agreement tracks the SLO Agreement, requiring corrective and preventative maintenance, call box replacement, relocation, and removal as required by Santa Cruz SAFE. Preventative maintenance is required for each call box in approximate six month intervals.

On October 24, 2001, the Transportation Agency for Monterey County,⁴ operating as the SAFE for that county (Monterey SAFE), entered into a contract (Monterey Agreement) with Comarco at a fee beginning at \$302.04 per box per year, increasing annually according to the consumer price index. CASE assumed that contract from Comarco on May 20, 2008. The scope of work under the Monterey Agreement calls for corrective and preventative maintenance; call box replacement, relocation, and removal; and administrative tasks, similar to that described in the SLO Agreement and the Santa Cruz Agreement. On August 25, 2011, Monterey SAFE issued an invitation for bids

² San Luis Obispo Council of Governments consists of San Luis Obispo County and seven cities in that county.

³ The Santa Cruz County Regional Transportation Commission consists of four cities in Santa Cruz County, the Santa Cruz County Board of Supervisors, and the Santa Cruz Metropolitan Transit District.

⁴ The Transportation Agency for Monterey County includes local officials from twelve cities and five county supervisorial districts in Monterey County

for a three year contract commencing February 1, 2012. The invitation for bids calls for corrective and preventative maintenance; call box replacement, relocations, removal, and administrative tasks.

The Mendocino County SAFE program⁵ does not have a multi-year contract for maintenance of its call box system due to budget constraints. If there is a problem with a specific call box, staff personnel of the Mendocino County SAFE program attempt to correct the problem. If unable to correct it, Mendocino County SAFE contracts with CASE to complete the repairs on a time and materials basis. Many of the tasks performed by CASE employees under the SLO Agreement, Santa Cruz Agreement, and Monterey Agreement are performed by CASE employees under the Mendocino County SAFE program.

On July 1, 2011, the Metropolitan Transportation Commission SAFE (MTC SAFE) entered into a contract (MTC Agreement) with Republic Intelligent Transportation Services (Republic) to perform all work necessary to maintain the MTC SAFE call box system in a satisfactory condition for a three year period at a cost of \$20.88 per month per call box. The MTC SAFE program receives federal funding of \$1,991,925 under the Surface Transportation Program (STP), which is a part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (23 U.S.C. §§ 101 et seq.). STP funding is disbursed by the Federal Highway Administration (FHWA) to the California Department of Transportation (CDOT), which in turn disburses portions of the funds to the SAFEs.

Much like the SLO Agreement, Santa Cruz Agreement, and Monterey Agreement, the scope of work under the MTC Agreement requires corrective maintenance, preventative maintenance, installation and relocation of call boxes at the request of the MTC SAFE, and routine administrative work. Preventative maintenance is done for each call box approximately twice a year.

DISCUSSION

Labor Code section 1771⁶ generally requires the payment of prevailing wages to all workers employed on public works. "Public works" is defined in section 1720, subdivision (a)(1) to mean: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds" Section 1720, subdivision (b)(1) defines the phrase "paid for in whole or in part out of public funds" to include "the payment of money or the equivalent of money by the state or political subdivision" Further, section 16000 of title 8 of the California Code of Regulations provides that "public funds" includes "state, local, and/or federal monies," and section 16001(b) provides as follows:

Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort.

Section 1722 defines "awarding body" as "department, board, authority, officer or agent awarding a contract for public work." Section 1722's promulgating regulation further defines "awarding

⁵ Mendocino County SAFE members include the County of Mendocino and four cities in that county.

⁶ Unless otherwise indicated, statutory references are to the California Labor Code.

body” as follows: “Any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works.” (Cal. Code Regs., tit. 8, § 16000.)

In addition, under section 1771, public work includes work performed under “contracts let for maintenance work.” Section 16000 of title 8 of the California Code of Regulations defines “maintenance” in relevant part to include:

- (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.

The work under the CASE and Republic agreements entails work that is performed under contract.⁷ The questions here are whether the work is paid for in whole or in part out of public funds, whether the work is installation and/or repair work within the meaning of section 1720, subdivision (a)(1), and whether the work is maintenance work within the meaning of section 1771 and its implementing regulation.

The Work Is Paid for In Whole or In Part Out of Public Funds.

The work under the SLO Agreement, Santa Cruz Agreement, and Monterey Agreement is paid for in whole or in part from payments from the SAFEs using funds emanating from the DMV, which collects fees the SAFEs levy on vehicle registrations in their respective counties. (Veh. Code § 9250.10, subds. (a) and (b).) SAFEs are awarding bodies as defined by section 1722 and section 16000 of title 8 of the California Code of Regulations. Therefore, because the money is retained in the public coffers of both the DMV and the SAFEs, and because the SAFEs award the contracts and pay Republic and CASE, the work under the above-referenced agreements is paid for in whole or in part out of public funds within the meaning of section 1720, subdivision (b)(1).

CASE contends that the court in *San Diego Service Authority for Freeway Emergencies v. Superior Court (Cubic Communications)* (1988) 198 Cal.App.3d 1466 (*San Diego SAFE*) determined the Vehicle Code fees in question were not public funds. CASE argues that because no competitive bidding was required for the contract at issue, the court impliedly determined that call box maintenance work was not public work. CASE is mistaken.

The court in *San Diego SAFE* did not address the question whether the work was subject to the California prevailing wage law (CPWL). Instead, the court addressed whether the San Diego SAFE was required to comply with competitive bidding rules to implement the emergency call box system on San Diego County freeways. The court acknowledged the usual rule that, absent a

⁷ The call box work by CASE for Mendocino County SAFE is not done pursuant to a bid or multi-year agreement, as done with other SAFEs cited in this determination. The work is contracted for on the basis of time and materials. This does not mean, however, that the work is not done “under contract” for purposes of the California prevailing wage law. (See *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63-64 [“under contract” language in § 1771 refers to work done under contract as opposed to work carried out by a public agency with its own forces].) The form of the contract, whether it is a construction agreement or a purchase order, is of no moment in determining whether a project is a public work.

statutory requirement, a public entity is not bound to engage in competitive bidding. (*San Diego SAFE, supra*, 198 Cal.App.3d at p. 1469.) Since the enabling legislation for SAFEs did not contain a specific requirement for competitive bidding, the court declined to require it. In so ruling, the court did not address whether the vehicle registration fees collected under Vehicle Code section 9250.10 constituted public funds within the meaning of section 1720, subdivision (b)(1).

As for the MTC Agreement, the work is paid for by MTC SAFE with \$1.99 million in federal STP funds disbursed by FHA to CDOT, which, in turn, disburses the funds to MTC SAFE. The work is therefore appropriately characterized as a federally funded or assisted project under section 16001(b) of title 8 of the California Code of Regulations. Under that regulation, state prevailing wage rates are required whenever a federally funded or assisted project is controlled or carried out by a California awarding body. Here, the work is under the control of MTC SAFE, the local public agency that awarded the contract to Republic. Therefore, the application of state prevailing wages is required.⁸

Whether the Work Involves Repair and/or Installation Within the Meaning of Section 1720, Subdivision (a)(1).

The definition of "public works" under section 1720, subdivision (a)(1) includes installation and repair work. "Repair" has been defined in prior public works coverage determinations as "to renew; restore; revive." (Webster's New World Dictionary of American English (3d College Ed. 1988, at p. 1137.) (See, PW 2002-034, *Sacramento State Capitol Exterior Painting Project, Restoration and Hauling of Decorative Cast Iron Elements* (July 18, 2002) [defining "repair"].) Here, in performing corrective maintenance under the MTC Agreement, SLO Agreement, Santa Cruz Agreement, Monterey Agreements, and the time and materials contract used by the Mendocino County SAFE program, workers restore the call boxes to operational use after damage to call box components due to vehicle collision, natural causes, vandalism, or other causes. This work constitutes "repair" within the definition of section 1720, subdivision (a)(1).

"Installation" has consistently been defined in prior public works coverage determinations as work involving the bolting, securing or mounting of fixtures to realty. (See, e.g., PW 2008-034, *Installation of Smart Classroom Technology, Fresno Unified School District* (July 27, 2009.) Here, the work involves securing the pedestals and poles to the ground, wall or bridge, and mounting or otherwise attaching the call box, its housing, and its components to the pedestal or pole. Upon the occurrence of call box damage or destruction from vehicle collision, vandalism and other causes, both CASE and Republic are called upon to install a pedestrian pad, retaining

⁸ According to the request for a coverage determination as to the MTC Agreement, MTC SAFE takes the position that the work is not a public work because the project is fully funded by federal monies and the federal Davis-Bacon Act does not apply to service contracts. As seen by the above analysis, under the applicable regulation, the CPWL applies to the work. (Cal. Code Regs., tit. 8, § 16001(b).) Whether the Federal Davis-Bacon Act (40 U.S.C. §§ 3141 - 3148) covers maintenance work done under a service contract is irrelevant to this determination. This conclusion is consistent with prior public works coverage determinations issued by the Department. (See, e.g., PW 2002-024, *John O'Banion Community Learning Center, Housing Authority of the County of Merced* (December 4, 2002); cf. PW 2008-030, *Lili Valley Water System Improvement Project, City of West Point* (November 3, 2008).) It is sufficient that the project is "controlled or carried out" by a California awarding body. (Cf. *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 Cal.App.4th 873, 886 [federal agency has ultimate authority over actual construction and paying contractors].)

wall, or handrail. Also, the agreements contemplate relocation of existing call boxes and construction of new call boxes. Accordingly, this work constitutes "installation" within the meaning of section 1720, subdivision (a)(1).

Whether the Work Is Maintenance Work Within the Meaning of Section 1771 and Its Implementing Regulation.

Section 1771 requires prevailing wages for maintenance work, which is defined by regulation to include the routine, recurring and usual work 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. (Cal. Code Regs., tit. 8, § 16000.) Under this definition, the first question is whether the work is being done on a "publicly owned or publicly operated facility." Because the evidence submitted by the parties shows the call boxes in each county are owned by the governing SAFE, the call boxes subject to the work in question are considered "publicly owned" within the meaning of the regulation.

The next question is whether the work performed by CASE and Republic is "routine, recurring, and usual" within the meaning of the regulation. Preventative maintenance is performed on each call box at approximate six month intervals over the term of the agreements. While contractual scopes of work for each SAFE vary slightly, the common obligation is for the contractor to perform on a regular basis all work necessary to keep the call boxes operational. The maintenance activities on the various components of the call boxes are tasks completed on a routine basis. Therefore, this work is "routine, recurring and usual" within the meaning of the regulation.

Further, the maintenance tasks described by the parties preserve the call boxes for their intended purposes in a safe and continually usable condition for which they were designed. The call boxes would not be usable in an emergency if solar panel current level and battery pack voltage level were inadequate. Nor would they be usable if external electrical connections associated with solar panel and antennae transmission lines were not treated to prevent corrosion. Similarly, other maintenance tasks such as checking and fixing any malfunctioning of the call box components relate to preserving and keeping the call boxes for their intended purpose in a safe and continually operable condition for which they are designed. Accordingly, the preventative maintenance tasks constitute "maintenance" under the regulation. (Cal. Code Regs., tit. 8, § 16000.) This conclusion is consistent with other public works coverage determinations pertaining to maintenance work. (See PW 2006-004, *Traffic Signal Maintenance, Sonoma County* (August 30, 2002 and June 3, 2006) [inspecting, cleaning, and resetting signal controllers and monthly maintenance to verify proper functioning is public work].)

Finally, CASE argues that industry practices, including past and present contracts and invitations for bids, do not require prevailing wages. Those circumstances are of no moment. "The conditions of employment on construction projects financed in whole or in part by public funds are governed by the prevailing wage law." (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.) When the Director determines what is a public work, the parties' contracts do not control the analysis. (*Id.* at pp. 987, 989.) Prevailing wages are required "when a public entity and a private contractor enter into an arrangement that is in substance a contract for a public work." (*Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 965.) Here, the facts show the SAFE agreements are, in

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substance, contracts for public work for which prevailing wages are required.⁹

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Christine Baker
Director

⁹ CASE requests the Director to establish a statewide prevailing wage rate for "maintenance technician" to cover all SAFEs and eliminate the different rates paid in different counties for similar work. The role of the Director in issuing a public works coverage determination, however, is limited to deciding whether the project or work in question is public work under sections 1720 and 1771. The determination of the general prevailing rate of per diem wages for a given classification is a separate one, made by the Director under section 1770.