

DEPARTMENT OF INDUSTRIAL RELATIONS

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January 31, 2012

Anthony J. DeCristoforo
Stoel Rives LLP
500 Capitol Mall, Suite 1600
Sacramento, California 95814

Re: Public Works Case No. 2011-028
American Traffic Solutions
Axisis Red Light Camera Enforcement Systems
City of South San Francisco

Dear Mr. DeCristoforo:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws pursuant to section 16001(a) of title 8 of the California Code of Regulations. Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the installation and maintenance work performed in connection with the American Traffic Solutions' (ATS) Axisis Red Light Camera Enforcement Systems (Camera Systems) is public work subject to prevailing wage requirements.

Facts

In February 2006, the City of South San Francisco (City) began to explore the benefits of a "Red Light Camera Enforcement System" as authorized by California Vehicle Code (VC) section 21455. After receiving presentations from potential vendors ATS and Redflex Traffic System, Inc., City chose ATS.

City and ATS entered into a Professional Services Agreement (Agreement) effective October 6, 2006. The term of the Agreement is for five years from the date of the first issued and payable notice of violation and may be automatically extended for an additional five year term.

Pursuant to the Agreement, ATS agrees, among other things, to install and to maintain ATS' Camera Systems¹ at intersections to be agreed upon between City and ATS. Specifically, the Agreement provides in Exhibit A, ATS Scope of Work, as follows:

¹ The Agreement defines "Twin Camera System" to mean "a photo-traffic monitoring device consisting of one (1) front and one (1) rear camera and a traffic monitoring device capable of accurately detecting a traffic infraction on up to four lanes controlled by up to one (1) signal phase and which records such data with one or more images of such vehicle. "Twin Camera Systems" shall, where the sense requires, also include any enclosure or cabinet and related appurtenances in which the Axisis is stationed."

1.2.16 ATS will install Camera Systems at a number of intersections or grade crossings to be agreed upon between ATS and [City] after completion of site analyses ... In addition to the initial locations, the parties may agree from time to time, by additional Work Order(s), to add to the quantities and locations where Camera Systems are installed and maintained. ...

1.2.22 ATS normally shall provide technician site visits to each Camera System once per month to perform preventive maintenance checks consisting of camera enclosure lens cleaning; camera, strobe and controller enclosure cleaning; inspection of exposed wires; and general system inspection and maintenance.

Under the Agreement, City is required to pay ATS a monthly fee per intersection approach of \$4,995.00 where the Camera System is installed on a road or traffic intersection of 2 lanes and \$5,395.00 if four lanes.² The payment is for "all equipment, services and maintenance." Funding for the Camera System comes from City's General Fund. The Camera Systems installed by ATS remain the property of ATS.

City received approval from Caltrans in May 2009 to begin installing the Camera Systems. ATS subcontracted the installation work to Republic ITS (Republic).

The scope of the installation work at two City intersections is described in a May 14, 2009, Work Order between ATS and Republic as follows:

Provide and install all wire, pipe, ground boxes and install ATS provided poles, cabinets and equipment ...

Provide an operational automated red light enforcement system per the construction plans dated 4/13/09 ...

Install ATS-furnished material at referenced locations with a prospective turn-on date of June 12. Work includes pre-construction meetings, project manager coordination with utilities, City and State officials. Permit work and permit fees for Caltrans and City. Coordinate with adjacent landowners per City request. pothole and pothole restoration for approximately 75 utility conflicts. Directional bore approximately a total of 2,600 LF of 2 or 3-in conduit. Furnish and install No. 5 pull boxes per plan. Furnish and install conductors per plans. Furnish and install 14 foundations and associated ATS gear per plan. Perform Landscape and decorative concrete restoration once work is complete. All other materials to be provided by ATS.

The total estimated cost to be billed by Republic for each approach is "not greater than \$43,850 for a total amount not greater than \$263,100.00."

² "Approach" is defined as "one direction of travel of one or more lane (sic) on a road or a traffic intersection up to 4 lanes controlled by up to two (2) signal phases."

ATS describes the installation work as follows:

The contractor, Republic ITS, installs the necessary conduit, wire and foundations per approved plans. The contractor sets a new service pole/pedestal for ATS to obtain its own power from PG&E. Once the power pole/pedestal has been inspected and approved by the city electrical inspector, PG&E comes out and delivers the power.

The maintenance work on the Camera Systems is being performed by ATS. It describes the work as follows:

A preventive maintenance check is performed by ATS. The check includes cleaning the camera lens, the camera, the strobe and controller enclosure. Additionally, the ATS field service technician performs a general system inspection, including inspection for any exposed wire and maintenance. This procedure generally takes the ATS field service technician 45 minutes to complete.

The Agreement provides that City will determine the intersection approaches at which the Camera System will be installed and must approve or reject within 7 business days drawings which detail the installation work to be completed. In addition, City must designate a project manager to coordinate City's responsibilities under the Agreement and a Municipal Court manager to oversee all Court-related program requirements. City's Police Department processes potential red light violations to determine which violations shall be issued.

Discussion

Labor Code section 1771³ generally requires the payment of prevailing wages to all workers employed on public works. Public work 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 ..."

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 (Section 16000) 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.

ATS does not dispute that the work involved in installing the Camera Systems at designated intersections is "installation" performed under contract within the meaning of section 1720, subdivision (a)(1). "Installation" consistently has been defined in prior public works coverage

³ Unless otherwise indicated, statutory references are to the California Labor Code.

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 cameras, enclosures, and related appurtenances are mounted or otherwise attached to poles that are secured to the ground with concrete foundations. Likewise, it is not disputed that the Agreement requires ATS to perform routine maintenance of the Camera Systems.

There also is no dispute that City's payments to ATS under the Agreement are out of public funds. The question raised is whether they are payments for the installation and maintenance work. In this regard, ATS argues that the Agreement is not a contract for public work or a contract let for maintenance but, rather, is a contract for the provision of services with the installation and maintenance work merely incidental to the operation of the program and the other services provided by ATS. ATS also argues that the maintenance work is not covered work because the work is not performed on a "publicly owned or publicly operated" facility.⁴

In support of its position that the installation and maintenance work are merely "incidental" to the "intent and purpose" of the Agreement, ATS relies principally on *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576 (*McIntosh*) and PW 2008-025, *Construction of Animal Community Center, Humane Society Silicon Valley* (August 5, 2009) (*Humane Society Silicon Valley*). The facts of this case are distinguishable, however, and render those cases inapplicable.

In *McIntosh*, the County of Riverside entered into a 30-year ground lease with Helicon, Inc., a non-profit corporation, for 5.65 acres of undeveloped land in which the County held a ground lease. Helicon was required to use the land for the construction and operation of a residential care facility for emotionally disturbed minors. In a memorandum of understanding incorporated into the sublease, the County agreed to place minors in the facility using AFDC-FC funds, which the court described as "undoubtedly public funds." The AFDC-FC funds were to be used to pay for the minors' care and treatment. (*McIntosh, supra*, 14 Cal.App.4th at p. 1586.) The court found that the AFDC-FC payments were "payments for later services" and not for construction. The court explained:

By a memorandum of understanding incorporated in the sublease, the County "commits" to placing minors in the finished facility and using what are undisputedly public funds to pay for their care and treatment there However, that is payment for later services, not preliminary construction. We hold that paying for public services does not make incidental construction work done by a private provider of those services "public works" under section 1720, subdivision (a). The statute requires payment for "construction"; to take that as meaning "services" would violate plain, unambiguous language, which we cannot do.

(*Ibid.*)

⁴ Republic argues that the installation work is not subject to prevailing wage requirements because the camera system it installed is owned by ATS. However, there is nothing in the statutory scheme that limits public work to the installation of equipment or materials owned by the public entity. Rather, if the work meets the elements of "public works" under section 1720(a)(1), it is subject to prevailing wage requirements. See, e.g., PW 2005-018, *Installation of Temporary Fencing and Power Communications Facilities/East High School, Antelope Valley Union High School District* (February 28, 2006), wherein the Director found that the installation and removal of temporary fencing and temporary power and communications facilities at a school construction site was covered work.

Humane Society Silicon Valley entailed the construction of an Animal Community Center. The only public funds involved were paid by the City of Sunnyvale to the Humane Society Silicon Valley (HSSV) pursuant to an Animal Services Agreement (ASA), which took effect after HSSV moved into and began operation of the new facility. The ASA provides that the city will pay an initial \$1 million Capital Payment, and an annual "Host Fee" and "Live Animal Cost." The ASA specifically states that the "Host Fee" and "Live Animal Cost" payments are for the provision of services for animals. The Director found that they therefore fell within the holding of *McIntosh* cited above as payment for on-going services rather than for construction. In addition, pursuant to section 1720, subdivision (c)(3) and consistent with prior public works determinations, the Capital Payment was determined to be "de minimis" in the context of the overall cost of the project, and, thus, even if considered to be a public subsidy for construction, it did not render the project paid for, in part, out of public funds.

The facts of this case show that the work involved in installing and maintaining the Camera Systems is specifically required by the Agreement and is *essential* to the functioning of the program. Plainly, you cannot have a "Red Light Camera Enforcement System" without installing and maintaining cameras and related equipment at designated intersections. As ATS acknowledges, "the term of the Agreement does not even begin until the date of the first issued and payable notice of a violation (Agreement at 1), *which obviously cannot occur until after the camera system is installed;*" and, further, that "ATS must perform routine maintenance to its cameras and related equipment *in order to carry out the objectives of the Agreement.*" (Italics added.) Thus, the installation and maintenance of the Camera System cannot be considered to be merely incidental to City's interest in monitoring red light violations. Accordingly, the Agreement is a contract for public work, installation, and is "let for maintenance work."⁵

Moreover, in *McIntosh* and *Humane Society of Silicon Valley*, the public funds paid only for public services. By contrast, it is clear that in this case the public funds paid to compensate ATS are in consideration for *all* equipment, services, and maintenance provided by ATS under the Agreement's scope of work provision, which specifically includes installation and maintenance of the Camera Systems. That the monthly fee paid by City may also pay for other administrative services provided by ATS is not relevant. The relevant consideration is that the public funds pay for the installation and maintenance work.⁶

ATS argues in the alternative that even if the Agreement is a "contract let for maintenance," the maintenance work here is not covered because it is not performed on a "publicly owned or publicly operated facility." Section 1771 sets forth no such condition and Section 16000 only

⁵ As the Court stated in the recent case of *Reliable Tree Experts v. Baker* (2011) 200 Cal.App.4th 785, 795-796: "Read together, sections 1720 and 1771 both define the scope of what constitutes a "public work." Just three years ago we explained that the interplay between them was "fairly straightforward in operation." No material reason requires reconsideration of that characterization. Section 1720 may not expressly include maintenance work within the definition of public work, but section 1771 does." (Case cites omitted.)

⁶ ATS' attempt to distinguish PW 2010-010, *Photo Red Light Enforcement Program, City of Hayward* (August 12, 2010) is without merit. Though that case dealt only with installation and contained *additional* facts supporting the coverage determination, the material facts on which that decision is based are indistinguishable from the material facts of this case.

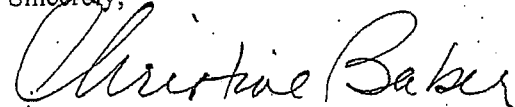
states that maintenance "includes" such work.⁷ Regardless, the maintenance work here is performed on a publicly operated facility.

One of the statutory conditions that a public entity must meet if it wishes to implement a red light photo enforcement program is that the public entity must "operate" the program. In particular, VC section 21455.5(c) specifically mandates that "Only a governmental agency, in cooperation with a law enforcement agency, may operate an automated enforcement system."⁸ This legislative mandate is sufficient to meet the requirement of Section 16000 that the facility be "publicly operated." Thus, the maintenance work is subject to prevailing wage requirements under section 1771.

For the foregoing reasons, under the facts of this case, the installation and maintenance work performed in connection with the ATS Red Light Camera Enforcement Systems are subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Christine Baker
Director

⁷ "Includes" is ordinarily a term of enlargement rather than limitation. *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774.

⁸ The Legislature provides several examples of the types of activities that the governmental entity must perform, including, most relevant here, day-to-day administrative functions which include, but are not limited to, ensuring that the equipment is regularly inspected and certifying that it is properly installed and operating properly, all functions of the routine maintenance work ATS is required to perform under the Agreement. (VC section 21455.5(c)(2)(B),(C).) VC section 21455.5(e) provides that these activities may be contracted out but only if the governmental agency "maintains overall control and supervision of the system."