STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
Christine Baker, Director
Office of the Director
1515 Clay Street, 17th Floor
Oakland, CA 94612
Tel: (510) 622-3959 Fax: (510) 622-3265

June 26, 2015

Robert R. Roginson
Ogletree Deakins
400 South Hope Street, Suite 1200
Los Angeles, CA 90071

Re: Public Works Case No. 2015-007
Stand-Alone Testing and Inspection of Fire Alarm Systems
California Department of Corrections and Rehabilitation

Dear Mr. Roginson:

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 stand-alone testing and inspection of fire alarm and sprinkler systems (work at issue) is subject to prevailing wage requirements because they constitute maintenance under Labor Code Section 1771.[1]

Facts

In March of 2014, the United States District Court for the Northern District of California ruled that the work at issue constituted maintenance within the meaning of section 1771 and was covered by the prevailing wage law in California. *See Bennett v. SimplexGrinnell, LP*, Case No. ll-cv-01854-JST, 2014 WL 910354 (N.D. Cal. Mar. 5, 2014) (*Bennett*).

In November of 2014, the California Department of Corrections and Rehabilitation (CDCR) issued an Invitation for Bid entitled "Electronic Smoke and Fire Detection Alarm Systems Maintenance, Inspection, Repair, Testing and Certification Services" (IFB). The IFB outlines the scope of work in a master agreement which provides that the contractor will provide all labor, supplies, materials, equipment, tools, transportation, and every other item of expense necessary to perform maintenance, inspection, repair, upgrade, testing, and certification services as needed on all smoke and fire detection alarm equipment, panels, and system components for a variety of CDCR Institutions located throughout the state.

The master agreement also provides that the contractor must perform quarterly, semiannual, and annual preventive maintenance service and safety inspection on equipment. These maintenance service and safety inspections include the testing, inspection, and cleaning of smoke and fire detectors each quarter so that all detectors are tested and cleaned at least once per year and replaced if they are found to be defective.

[1] All further statutory references are to the California Labor Code unless otherwise indicated.

Further, the contractor must test, inspect, and clean all duct smoke and fire detectors at least once per year; test and confirm fire dampers open and close when activated; test all door closers for proper function, certify function, and replace as needed; report to the Institution Contract Liaison and Fire Chief fire dampers that are not working properly; test and inspect all key-operated and manual pull stations each quarter; test all alarm bells and horns annually; and ensure that equipment meets the manufacturer's specifications for operation. The contractor must also inspect, test, and repair fire alarm control panels in each building. Further, all batteries for fire alarm panels must be replaced at least once during the term of the master agreement. Finally, the contractor must attach a service tag to each panel or system at the time of service.

The master agreement also mandates that all equipment requiring calibration be identified by placing inspection stickers on the equipment. Further, the contractor must provide unlimited visits for repair services requested or as necessary to keep the equipment operational and replace any parts that become worn or inoperable. The contractor must also provide all emergency repair requests.

The IFB does not contain any provision requiring the payment of prevailing wages.

Your coverage determination request is limited to those workers who perform stand-alone testing and inspection under the master agreement. These workers do not perform repairs at public jobsites. If repairs are requested, different workers are sent out to the jobsite to perform the repairs.

Discussion

You contend the work at issue is not subject to section 1771 because it does not fall within the definition of "public works" under section 1720(a). The *Bennett* court rejected this argument. We find the *Bennett* court's analysis of these issues persuasive and largely adopt its holding and reasoning as discussed below.

A. Relevant Provisions of California Prevailing Wage Law. (CPWL)

Section 1771 of the California Labor Code sets forth the requirement to pay "no less than the prevailing rate of per diem wages for work of a similar character in the locality where the work is performed" for all public works valued over $1,000. Section 1771 also states that the section "is applicable to contracts let for maintenance work."

The term "public works" is in turn defined in various provisions of the California Labor Code and its implementing regulations. Section 1720(a)(1) defines "public works" to include "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, . . . [including] work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work." § 1720(a)(1).

DIR's regulations implementing CPWL, codified at Title 8 of the California Code of Regulations, defines "maintenance," 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." 8 C.C.R. § 16000.[2]

B. Maintenance Work is Subject to Prevailing Wages Under Section 1771.

The *Bennett* court rejected your argument that section 1720 contains an exhaustive list of work that qualifies as "public work," and for that reason, maintenance work cannot be covered by section 1771 unless it is performed in connection with a "public work" as defined by section 1720. Specifically, you argued in *Bennett* and repeat the argument here that the only category of "public work" under which the maintenance work could fall is (a)(1) which defines public works as involving the "construction, alteration, demolition, installation, or repair work." § 1720(a)(1). Thus, the work must involve construction, alteration, demolition, installation, or repair work within the meaning of section 1720(a)(1)—which you refer to as "construction-related" activity—to be subject to the requirements of section 1771. Your argument is essentially that the work at issue does not involve construction-related activity, and as such, it is not "public work" covered by section 1771.

1. Section 1720(a)(1) is not an exhaustive definition of "public work."

As the *Bennett* court noted, several sections of the Labor Code other than section 1720(a), including sections pertaining specifically to prevailing wages, contain their own definition of "public work." *See, e.g.*, § 1771.7(b) (defining public works in the context of the Kindergarten University Public Education Facilities Bond Act); Cal. Lab. Code § 1720.3 (defining "public works" in the context of the payment of wages); Cal. Lab. Code § 1720.4 (same); Cal. Lab. Code § 1771.5 9 (discussing "public works" in the context of prevailing wages as including "maintenance work"). This demonstrates that section 1720(a)'s definition of "public works" is not all-inclusive.

2. "Maintenance work" is a type of "public work" under section 1771.

The Labor Code describes "maintenance work" as a type of "public work," without qualification, subject to prevailing wages under section 1771. *See* Cal. Lab. Code § 1771.5 (permitting awarding body not to require the payment of prevailing wages for "any *public works* project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, *or maintenance work*") (emphases added).

Section 1771's legislative history also supports the conclusion that "maintenance work" is a type of "public work." Prior to 1974, section 1771 read that prevailing wages "shall be paid to all workmen on public works *exclusive of maintenance work*." *See Reliable Tree Experts v. Baker*, 200 Cal.App.4th 785, 796 (2011) (*Reliable*) (emphasis added). In 1962, the Supreme Court of California affirmed that maintenance work was excluded from prevailing wage requirements,

[2] 8 C.C.R. § 16000 also defines "bid" as "[a]ny proposal submitted to an awarding body in competitive bidding for the construction, alteration, demolition, repair, *maintenance*, or improvement of any structure, building, road, property, or other improvement of any kind." (emphasis added).

citing section 1771. *Franklin v. City of Riverside*, 58 Cal.2d 114, 116 (1962). The *Franklin* court was silent on section 1720. This supports the assertion that the legislature intended to include maintenance work as a type of work subject to CPWL. Rather than making changes to section 1720, the legislature simply changed the section of law that had previously excluded maintenance work, to include such work.

3. Work need not fall within the scope of section 1720(a) to be subject to prevailing wages under section 1771.

As the *Bennett* decision explains, the California Court of Appeal in *Reliable* soundly rejected your claim that maintenance work does not qualify as "public work" subject to prevailing wages when it does not involve "[c]onstruction, alteration, demolition, installation, or repair work" under section 1720(a). In *Reliable*, the Department of Transportation (Caltrans) contracted with Reliable Tree Experts to prune trees along state-owned highways. 200 Cal.App.4th at 789. Reliable contended it did not have to pay prevailing wages for that work, because:

> . . . 'maintenance' is not '[c]onstruction, alteration, demolition, installation, or repair work,' the language of section 1720, subdivision (a)(1). Nothing else, not the language of 1771, not the extensive definition in Regulation 16000, is of consequence.

Id. at 795.

The *Reliable* court held "sections 1720 and 1771 *both* define the scope of what constitutes a 'public work,'" because "the scope of the Prevailing Wage Law is not to be ascertained solely from the words of section 1720, subdivision (a)(1)," as "[s]ection 1771 is also a part of the Prevailing Wage Law, and its language must also be taken into account." *Id*. (emphasis added). The Court further held that, though "[s]ection 1720 may not expressly include maintenance work within the definition of public work," maintenance work constitutes public work subject to prevailing wages because "section 1771 does" expressly define maintenance work as public work. *Id*. at 796. Indeed, under the plain language of section 1771, "maintenance work is within the general definition of public works." *Id*. Your argument that section 1720(a) limits the scope of prevailing wage maintenance work has been rejected by the California Court of Appeals. *See also Reclamation Dist. No. 684 v. State Dept. of Industrial Relations*, 125 Cal.App.4th 1000, 1005, n. 6, 23 Cal.Rptr.3d 269, 272 (Cal.Ct.App. 2005) ("maintenance work is within the general definition of public works.")

You have attempted to distinguish *Reliable* by claiming that case "involved heavy construction, namely the removal and pruning of diseased trees." However, as the *Bennett* court pointed out, the court in *Reliable* never considered whether the tree removal and pruning had anything to do with construction because the issue before *Reliable* was whether maintenance work is subject to prevailing wages regardless of whether it also falls within the scope of section 1720. The *Reliable* court answered this question in the affirmative, holding that maintenance work is a form of "public work" that is subject to prevailing wages.

4. DIR coverage determinations that pre-date *Reliable* do not apply to this case.

You have argued that DIR has determined that testing and inspection work that occurs after completion of a public work[3] is not subject to the payment of prevailing wages. Even if this claim is true, none of the coverage determinations you cite apply to this case.

First, DIR coverage determinations are not binding. *State Bldg. and Const. Trades Council of California v. Duncan*, 162 Cal.App.4th 289, 302-03 (Cal.Ct.App. 2008) ("the Director has discontinued the practice of designating coverage determinations as precedential; [s]he also stripped prior determinations of precedential value, and announced that past and future coverage determinations would be advisory only"); Important Notice Regarding the Department's Decision to Discontinue the Use of Precedential Determinations, available at http://www.dir.ca.gov/DLSR/09-06-2007(pwcd).pdf.

Second, none of the coverage determinations you cite involve stand-alone testing and inspection of fire alarm and sprinkler systems. Similarly, none analyze section 1771's requirement to pay prevailing wages for maintenance work.

Third, none of the coverage determinations you cite pre-date *Reliable*. Thus, to the extent that any determination contradicts *Reliable*, it has no weight on these facts and in this case.

5. CPWL is a worker protection legislation that must be liberally construed.

CPWL "was enacted to benefit employees as a class by requiring the payment of prevailing wages on public works." *Tippett v. Terich*, 37 Cal.App.4th 1517, 1533 (1995). "The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." *City of Long Beach v. Dep't of Indus. Relations*, 34 Cal.4th 942, 949 (2004) (quoting *Lusardi Constr. Co. v. Aubry*, 1 Cal.4th 976, 985 (1992)). Because CPWL was enacted to benefit workers and the public, it is to be liberally construed. *City of Long Beach v. Dep't of Indus. Relations*, 34 Cal.4th at 949-50; see also *Reliable Tree Experts v. Baker*, 200 Cal.App.4th 785, 797 (2011) (citing rule of liberal construction of CPWL to find tree trimming work to be covered "maintenance" work).

C. The Work at Issue is Maintenance Work Under Section 1771.

Under section 1771 and its implementing regulation, "maintenance" is defined as: (1) routine, recurring and usual work; (2) for the preservation, protection and keeping of any publicly owned or publicly operated facility for its intended purposes; (3) in a safe and continually usable condition for which it has been designed. 8 C.C.R. § 16000. Your determination request (and the briefing in the *Bennett* case) is silent regarding whether the work at issue meets this definition.

As the *Bennett* court found, we also find that testing and inspection of fire alarms and sprinkler systems under the master agreement meets all of these three elements.

[3] Of course, repair of a fire alarm and sprinkler system is on-going and never completed.

1. Testing and inspection work is routine, recurring, and usual work.

To satisfy the first element of the definition of "maintenance work" under Regulation 16000, the work must be "routine, recurring and usual." In determining whether this element is satisfied, courts look to the nature and frequency of the work at issue, as opposed to the terms of the contract under which it was performed. *Reliable*, 200 Cal.App.4th at 798.

Here, the routine, recurring, and usual nature of testing and inspection work is required by both regulation and contract. The state fire code found at Title 19 of the California Code of Regulations, which incorporates various provisions of the National Fire Protection Association (NFPA) guidelines by reference, requires that fire alarms and sprinkler systems be inspected and tested at predetermined intervals. *See* 19 C.C.R. § 901 (establishing variances from NFPA 25 for sprinkler testing frequency). The master agreement here may also call for more frequent inspections than what the state fire code would require. Here, for instance, the master agreement requires quarterly preventive maintenance service and safety inspection on equipment, including the testing and inspection of smoke and fire detectors each quarter. Thus, whether the frequency of inspections is established by the fire code, or pursuant to the master agreement, the testing and inspection occurs at set intervals according to a schedule. Thus, it is "routine, recurring and usual work."

2. Testing and inspection work serves to preserve public facilities for their intended purpose.

To qualify as "maintenance work," the work also must relate to the "preservation, protection and keeping of any publicly owned or publicly operated facility for its intended purposes[.]" The California Health and Safety Code, and its implementing regulations, require fire protection devices such as smoke alarms and sprinkler systems to be "maintained in an operable condition." *See*, *e.g.*, Cal. Health & Safety Code § 13113(a); 19 C.C.R. § 1.14. Under the master agreement, the explicit purpose of the testing and inspection is to ensure that the systems being inspected and tested function as intended.

3. Testing and inspection work is required for the safe, efficient, and continually usable condition of buildings.

Finally, to satisfy the last element, the work must be performed to ensure the safety and usability of the facility. Again, you do not challenge that this requirement is met by the explicit terms of the master agreement.

D. Work at Issue is Covered by CPWL Regardless of Whether the IFB or Master Agreement Included the Requirement to Pay Prevailing Wages.

The duty to pay prevailing wages "is mandated by statute and is enforceable independent of an express contractual agreement." *Rd. Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.*, 102 Cal.App.4th 765, 779 (2002). This is because section 1771 is "not limited to those workers whose employers have contractually agreed to pay the prevailing wage; it applies to 'all workers employed on public works.'" *Lusardi Constr. Co. v. Aubry*, 1 Cal.4th 976, 987 (1992) (emphasis in original).

E. Specific Questions Related to Worker Classifications, Rates, Scopes.

In your request, you have asked several specific questions to be answered for the work at issue. These questions are re-stated below for ease and their answers follow.

Question 1:

If stand-alone testing and inspection of fire alarms work is considered to be covered work, which specific classification of workers is entitled to prevailing wages. This includes workers conducting the testing and inspection duties but also other workers who only visually monitor panels and who do not perform any physical duties at the work site.

Answer 1:

All workers conducting testing and inspection duties, including those who visually monitor panels while at the work site, are entitled to prevailing wages.

Question 2:

For those employees found to be entitled to prevailing wages, the extent to which they must be paid prevailing wages (e.g. for the entire day, for time spent physically on the public work site, for time spent travelling to the public work site).

Answer 2:

The work day, for prevailing wage purposes, starts when the worker arrives at the job site even if he or she is unloading tools and materials. If the worker drove a company truck with materials and tools loaded on it from your business location, that travel time (including the return trip to the business location) would also be covered work time subject to prevailing wages.

Question 3:

For those workers found to be entitled to prevailing wages, whether the DIR intends to investigate and establish a prevailing wage determination for the covered work of such inspectors, or whether the DIR believes a prevailing wage already exists for the inspector's particular services found to be covered work**.** If the latter, (i) whether that determination is based on resort to an existing determination developed with respect to on-site work, or (ii) whether it actually reflects DIR investigation and assessment of the per diem wage-and-benefit rates that prevail in the local area for the actual activities of the inspectors being subjected to prevailing wage coverage.

Answer 3:

DIR publishes prevailing wage determinations for each county accompanied by scopes of work describing the types of tasks that each classification of worker performs, most of which are derived from collective bargaining agreements. The fire alarm and fire protection sprinkler fitter work at issue in this case falls within two primary scopes of work: on the fire alarm side, it is governed by

either the Electrician/Inside Wireman, or the Communication and System Installer, and Communication and System Technician scopes of work that were negotiated as part of collective bargaining agreements by California locals of the Industrial Brotherhood of Electrical Workers (IBEW) depending on the county in which the work is performed; and on the fire protection sprinkler side, it is governed by the Scope of Work for Plumber, Fire Sprinkler Fitter (Fire Protection and Fire Control) as part of collective bargaining agreements entered into by California locals of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (United Pipe Fitters). Each of these scopes of work has included testing and maintenance of fire alarms and fire protection sprinkler systems among their covered activities. The Department has issued Important Notices for "Burglar and Fire Alarm Installation" concerning the minimum rate of pay for the fire alarm installation work. These Important Notices are posted on the Department's website. Please refer to the Department's notices for the applicable determination in each county.

Conclusion

For the foregoing reasons, stand-alone testing and inspection of fire alarm and sprinkler systems is subject to prevailing wage requirements because they constitute maintenance under Labor Code Section 1771.

I hope this letter satisfactorily answers your inquiry.

Sincerely,

Christine Baker

Christine Baker
Director