

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



October 30, 2015

Scott Kronland
Altschuler Berzon, LLP
177 Post Street, Suite 300
San Francisco, California 94108

Re: Public Works Case No. 2015-012
Fire Sprinkler Inspection, Testing, and Maintenance Work
City of Santa Rosa

Dear Mr. Kronland:

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 Labor Code section 1773.5¹ and 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 fire alarm and sprinkler systems inspection, testing, and maintenance work (work at issue) is subject to prevailing wage requirements because they constitute maintenance under Section 1771.

Facts

On June 1, 2011, the City of Santa Rosa (City) and Santa Rosa Fire Equipment Service, Inc. (Contractor) entered into a General Services Agreement for Fire Sprinkler and Standpipe System Inspections at City Parking Garages (GSA Agreement F000092). GSA Agreement F000092 provides that Contractor will provide all labor, equipment and transportation to perform quarterly, annual and five-year inspections, testing, and maintenance of fire sprinkler and standpipe systems at various City parking garages. On January 23, 2013, the same parties entered into another General Services Agreement for the inspection, testing, and maintenance for fire alarm and detection systems and fire sprinkler systems at various other City facilities (GSA Agreement F00482).² The GSA Agreements contain a provision requiring the payment of prevailing wages to "any employee performing work covered by Labor Code section 1720 et seq." (GSA Agreement F000092 at p. 5; GSA Agreement F00482 at p. 4.)³

In March of 2014, a Northern District of California District Court ruled that the work at issue in another case constituted maintenance within the meaning of section 1771 and was covered by the

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

² Collectively, GSA Agreement F000092 and GSA Agreement F00482 are referred to as GSA Agreements.

³ City paid for services provided under the GSA Agreements using entirely City funds. (City's August 25, 2015 Letter to DIR at p. 1.) City's Purchase Order No. 137379, related to the GSA Agreements, states City's agreement to pay for fire safety "maintenance services, supplies, and repairs."

prevailing wage law in California. (*See Bennett v. SimplexGrinnell, LP*, Case No. 11-cv-01854-JST, 2014 WL 910354 (N.D. Cal. Mar. 5, 2014) (*Bennett*).

On June 16, 2015, Northern California Fire Protection Compliance Group (NCFPCG) requested a coverage determination for the work at issue described in the GSA Agreements.

Discussion

Relying on *Bennett*, NCFPCG contends the work at issue is subject to section 1771. As discussed in the June 26, 2015 coverage determination in Public Works Case No. 2015-007, Stand-Alone Testing and Inspection of Fire Alarm Systems (California Department of Corrections and Rehabilitation), we also find the *Bennett* court's analysis of these issues persuasive and largely adopt its holding and reasoning.

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

Section 1771 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 “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 the 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.)⁴

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

The *Bennett* court rejected the claim 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.

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

⁴ 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).

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]; § 1720.3 [defining “public works” in the context of the payment of wages]; § 1720.4 [same]; § 1771 [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 § 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*” under certain conditions] (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 stated 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, citing section 1771. (*Franklin v. City of Riverside*, (*Franklin*) 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.

Maintenance work qualifies as “public work” even 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. (*Reliable*, 200 Cal.App.4th at 789.) The issue before the Court in *Reliable* was whether maintenance work is subject to prevailing wages regardless of whether it also falls within the scope of section 1720. *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.*; 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.”].)

4. The CPWL is 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 Constitutes 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.) The determination request is silent regarding whether the work at issue meets this definition. As the *Bennett* court found, we also find that testing, inspection, and maintenance of fire alarms and sprinkler systems under the GSA Agreements meets all of these three elements.

1. Testing, inspection, and maintenance 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, inspection, and maintenance 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 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 GSA Agreements require preventive maintenance service and safety inspection of fire alarm and detection systems and fire sprinkler systems at set intervals according to a schedule. Thus, whether the frequency of inspections is established by the fire code, or pursuant to the GSA Agreements, the testing, inspection, and maintenance occur at set intervals according to a schedule. Thus it is “routine, recurring and usual work.”

2. Testing, inspection, and maintenance 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 tested, inspected, and maintained function as intended.

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

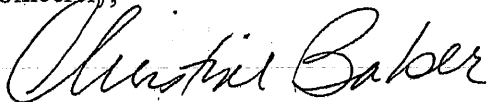
Finally, to satisfy the last element, the work must be performed to ensure the safety and usability of the facility. Again, this requirement is met by the explicit terms of the GSA Agreements.

Conclusion

For the foregoing reasons, the fire alarm and sprinkler systems inspection, testing, and maintenance work is subject to prevailing wage requirements because the work constitutes maintenance under Labor Code Section 1771 and Title 8 of the California Code of Regulations.

I hope this letter satisfactorily answers your inquiry.

Sincerely,



Christine Baker, Director