

DEPARTMENT OF INDUSTRIAL RELATIONS
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October 10, 2019

Via E-Mail and U.S. Mail

John J. Korbol, Hearing Officer
Office of the Director-Legal Unit
355 S. Grand Avenue, Suite 1800
Los Angeles, CA 90071

Re: Public Works Case No. 2018-016
 BAS Preventative Maintenance
 Superior Court of California, County of Riverside

Dear Mr. Korbol:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws (CPWL) pursuant to Labor Code section 1773.5¹ 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 preventative maintenance of the building automation systems (BAS) at the Riverside County Superior Court is subject to prevailing wage requirements because it constitutes maintenance under section 1771.

Facts

On October 1, 2014, the Superior Court of California for the County of Riverside (the Court) contracted with Athena Engineering, Inc. (Athena) for preventative maintenance of the BAS at each of the following Superior Court buildings: Riverside Hall of Justice, Riverside Family Law Court, Larson Justice Center, Riverside Juvenile Court, Blythe Courthouse, and the Southwest Justice Center.

Building automation is an essential component in new "smart buildings." A BAS is a system of digital sensors and controls hardwired throughout a building to the lights, security components, fire alarms, elevators, and HVAC system. These sensors and controls are routed to centralized controllers, which can be programmed to run building automation routines for the purposes of climate control, security, energy efficiency, and occupant safety (e.g., shutting down the elevators when a fire alarm goes off, turning off the lights at 5pm, or turning off the HVAC system on the weekends).

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

The BAS will also have one or more computer terminals in the building where the BAS reports issues with building operation to building staff and can receive human inputs and control. A building with a BAS will be more secure, more comfortable for occupants, will use less energy, and will prevent wear and tear, which will prolong the life of the building.

The work of BAS maintenance under Athena's contract with the Court is divided into three sets of tasks: monthly, quarterly, and annual maintenance. Monthly maintenance consists of review of the operation history of the BAS system on the BAS computer workstation in the building, troubleshooting issues with the BAS, updating the system to correct for errors, and maintenance of workstation hardware. Quarterly maintenance requires executing planned maintenance routines on controllers and sensors throughout the building from the BAS workstation and field controllers, vacuuming out of control boxes, calibration of sensors, controllers, and thermostats, and replacement of air filters. A two-person team is involved in quarterly maintenance, with one technician adjusting and triggering field controllers while a second technician monitors the response by the BAS on the workstation.

Annual maintenance requires a full walk through visual inspection of the entire system and re-commissioning of controllers and sensors, inspection of wired connections, and verification of accurate readings from inputs. After each monthly, quarterly, and annual maintenance visit, Athena's field technicians generate a report showing the history of the work performed and any recommended additional system enhancements or repairs by the building's maintenance staff.

Athena's BAS technicians do not currently perform electrical repairs to wire or conduit.²

Discussion

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 projects valued over \$1,000. Section 1771 also states that the section "is applicable to contracts let for maintenance work."

DIR has a "long-standing" and "soundly reasoned" regulation defining maintenance under section 1771, which the courts have construed as "completely harmonious with the entirety of the Prevailing Wage Law." (*Reliable Tree Experts v. Baker* (2011) 200 Cal.App.4th 785, 797 (*Reliable Tree*).) DIR's regulation defines "maintenance" as follows:

Maintenance. Includes:

- (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

² Athena asserts in its position statement that it has never performed electrical work. An April 11, 2018 letter from David Aldana, Assistant Deputy Executive Officer-Facilities for the Court, submitted in support of Athena, states that the current contract does not require electrical work. However, the December 2014 First Amended Agreement and October 2016 Second Amended Agreement between Athena and the Court each require Athena's technicians to perform low voltage electrical work, including wiring and conduit, necessary to BAS maintenance.

safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

(2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

Exception:1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.

Exception:2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.

(Cal. Code Regs., tit. 8, § 16000.) Under this definition, work may constitute covered maintenance even if it is not the traditional work of the construction trades. (See *id.* [only section 2 requires craft work]; see also *Reliable Tree, supra*, 200 Cal.App.4th at pp. 795-796 [rejecting the argument that covered maintenance must be traditional construction work under section 1720.]) What matters is that the work is routine, recurring and usual, and intended to keep a public facility operating as designed.³ (Cal. Code Regs., tit. 8, § 16000.)

The BAS maintenance at the Riverside County Superior Court meets the definition of maintenance in Regulation 16000 above. 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. (*Reliable, supra*, 200 Cal.App.4th at p. 798.) Here, the contract explicitly requires monthly, quarterly, and annual maintenance on a regular schedule, which all parties admit has occurred.

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 purpose.” Here, the six court buildings under the contract are “smart buildings,” which require a BAS to function fully for their intended purpose. Thus, on its face, BAS maintenance, even if it consists only of calibration, testing and inspection, is maintenance of an essential building system like the stand-alone fire alarm and fire sprinkler testing and inspection found covered by a federal district court and the Department. (See *Bennett v. SimplexGrinnell LP* (N.D. Cal., Mar. 5, 2014, No. 11-CV-

³ The Department’s coverage determinations have hewed to this standard. (See, e.g., PW Case No. 2016-015, *Snow Removal and Snow Staking Services - County of El Dorado* (Jan. 31, 2017) [regular snow removal to clear public thoroughfares is covered maintenance]; PW Case No. 2015-016, *Public Works Contractor Registration Requirement for Maintenance Work - Western Municipal Water District, Riverside* (Feb. 5, 2016) [routine inspection, testing, and calibration of water treatment equipment by the manufacturer at a public facility is covered maintenance]; PW Case No. 2015-007, *Stand-Alone Testing and Inspection of Fire Alarm Systems - California Department of Corrections and Rehabilitation* (Jun. 26, 2015) [inspection and testing of fire alarms and sprinklers in a public building is covered maintenance; it keeps an essential system of public structure operating as intended].)

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01854-JST) 2014 WL 910354, at *6; PW Case No. 2015-007, *Stand-Alone Testing and Inspection of Fire Alarm Systems - California Department of Corrections and Rehabilitation* (Jun 26, 2015); PW Case No. 2015-012, *Fire Sprinkler Inspection, Testing, and Maintenance Work - City of Santa Rosa* (Oct. 30, 2015).)

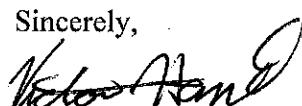
Finally, to satisfy the last element, the work must be performed to ensure the safety and usability of the facility. Athena admits that the BAS maintenance it performs also serves to keep the occupants safe and comfortable by ensuring continued operation of building security, fire, and climate control systems. Moreover, BAS maintenance preserves the building's structural components including plumbing and HVAC systems by conserving energy and reducing wear and tear on the building. BAS maintenance, thus, serves to preserve and protect the public structure.

Conclusion

For the foregoing reasons, the above-reference project constitutes public works and is subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Victoria Hassid
Chief Deputy Director⁴

⁴ See Government Code sections 7 and 11200.4.