

DEPARTMENT OF INDUSTRIAL RELATIONS

Katrina S. Hagen, Director

Office of the Director

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December 19, 2022

Scott Yetter

Best Energy Reduction Technologies, LLC

840 First Ave, Suite 300

King of Prussia, Pennsylvania 19406

Re: Public Works Case No. 2022-001
Installation of Electrical Usage Plugs
Washington Unified School District, Fresno County

Dear Mr. Yetter:

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 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 Installation of Electrical Usage Plugs, secured with screws, for the Washington Unified School District in Fresno County is a public work and therefore subject to prevailing wage requirements.

Facts

Best Energy Reduction Technologies, LLC (Bert) participates in performance contracts² for schools, colleges, and local governments through contractors such as Johnson Controls, Inc. (Johnson Controls). According to its website, "Bert is the leading Wi-Fi based plug load management system supplier, saving school districts, colleges, local governments and sporting venues over 5 million kWh annually." Bert's plug load management system saves energy by eliminating overnight standby loads and by

¹ Unless otherwise indicated, all further statutory references are to the California Labor Code and all subdivision references are to the subdivisions of section 1720.

² According to a report from the California Energy Commission (CEC), performance contracts are "used to guarantee a certain level of energy savings over a set period of time. The savings are the basis of positive cash flows used to pay off the project loan "that financed the energy savings project." (CEC, *Huntington Beach Advanced Energy Community Blueprint – A Scalable, Replicable, and Cost-Effective Model for the Future* (Apr. 2019) <<https://www.energy.ca.gov/sites/default/files/2021-06/CEC-500-2019-047.pdf>> [as of Dec. 15, 2022].)

collecting building data. Devices continue to use energy in standby mode, even at times when buildings are unoccupied. Bert's system uses the owner's existing wireless network to automatically turn devices off nights and weekends when the building is empty.

General Contractor Johnson Controls, which has a publicly-funded contract with the Washington Unified School District located in Fresno County,³ entered into a subcontract with Bert to provide and install "plugload reduction" at six school district sites. (Subcontract between Johnson and Bert, p. 1.) Under terms of the written subcontract, Bert was required to provide an electrical usage plug management system to automatically measure and control small electrical loads such as a copier, printer, vending machine, etc. Bert has characterized the installation as simply plugging in the device into the electrical outlet. According to Bert, the installation of this plug load management system consists only of three steps. First, Bert remotely installs its software onto the school's server. Second, Bert plugs its smart electrical usage plugs into an existing electrical wall outlet at the school. Finally, Bert plugs the school's devices into the smart plugs. (See Jan. 20, 2022 Letter from Bert.)

Bert later clarified that its smart plugs can also be attached to the faceplate of existing outlets with a screw to anchor the smart plugs so they cannot be unplugged. (See Sep. 21, 2022 e-mail from Bert.) Using a screw to attach the smart plugs to the existing outlets is meant to keep persons from unplugging the devices. (See Oct. 13, 2022 e-mail from Bert.) For the purposes of anchoring and permanently attaching the smart plugs to the electrical outlet, Bert used screws to attach many of their smart plugs into the existing electrical outlet faceplates for Washington Unified School District in Fresno County.⁴ (See Washington USD-BERT Installation As-Built 6-17-22 Spreadsheet.)

Discussion

Section 1771 provides that all workers on public work projects over \$1,000 must be paid at least the general prevailing rate of wages. Section 1720, subdivision (a)(1) (hereafter section 1720(a)(1)) generally defines "public works" to mean: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds" "There are three basic elements to a 'public work' under section 1720(a)(1): (1) 'construction, alteration, demolition, *installation*, or repair work'; (2) that is done under contract; and (3) is paid for in whole or in part out of public funds." (*Busker v. Wabtec Corporation* (2021) 11 Cal.5th 1147, 1157, italics added.) The second and third elements are easily satisfied. The work is being performed by Bert under a subcontract with Johnson Controls. Johnson Controls has a contract with Washington Unified School District in Fresno County and the work will be paid for out of the school district's funds. The only element in dispute is whether the work at issue constitutes "installation" for the purposes of section 1720(a)(1).

³ There is also a different Washington Unified School District located in West Sacramento, Yolo County.

⁴ The subcontract also includes work involving the installation of "Bert 120I Inline" units, which "must be installed by a license[sic] electrician." The installation of Bert 120I Inline units is indisputably subject to prevailing wage requirements.

“Installation” has been consistently defined in prior public works coverage determinations as work involving the bolting, securing, or mounting of fixtures to realty. (See, e.g., PW 2005-039, *Kiwi Substation - Orange County Water District* (Apr. 25, 2007); PW 2007-005, *Erection and Removal of Portable Fencing System - Peninsula Camp Ground - Folsom Lake State Recreation Area* (June 26, 2007); PW 2005-041, *Pre-rinse Spray Valve Program (Phase II) – California Urban Water Conservation Council* (May 11, 2006).) Further, “fixture” is defined in relevant part as “permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws;” (Civ. Code, § 660.) The determination of whether an installation project is a public work can be made by assessing the method of installation and whether that installation is permanent or temporary.

Several coverage determinations are relevant to the facts in this case. The first involves the placement of temporary flow-monitoring devices. (See PW 2018-007, *Temporary Sanitary Sewer Flow Monitoring Services – City of Stockton* (May 26, 2021) (*Temporary Flow Monitoring*)). The flow-monitoring devices at issue in the *Temporary Flow Monitoring* determination were affixed to a wall with concrete anchor screws. However, the devices were not permanently attached. Their placement was for a temporary time period and therefore the affixing of the devices was not considered installation and was therefore not a public work. (*Ibid.*) In another determination, the attachment of vinyl prints on billboards for a temporary basis was not considered a public work. (See PW 2015-015, *County Sponsored Messages on Private Billboards – County of Kern* (Sept. 9, 2016) (*County Billboards*)). The work in *County Billboards* consisted of temporarily attaching the prints to billboards by straps which could be removed within a short time without damage to the print itself or the billboard sign. (*Ibid.*) The determination concluded that the attachment of the vinyl prints was not a public work because the prints were meant to be attached only temporarily; they could be easily removed at the end of their respective display periods; and there was no physical attachment to the billboard by “cement, plaster, nails, bolts, screws, or anything similar.” (*Ibid.*)

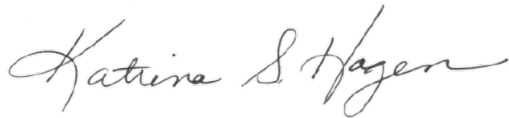
In the present matter, many of the Bert plugs installed at the Washington Unified School District in Fresno County were screwed into the existing outlet in order to anchor the plug into the wall. The Bert plugs are attached to the realty by screws and the installation is meant to be permanent. Unlike the prior determinations discussed above regarding temporary flow monitoring devices (*Temporary Flow Monitoring*) and billboards (*County Billboards*), the Bert smart plugs have no set time frame for removal. The Bert plugs are used to control the electrical load of various electronic devices and are installed with the intention that they remain plugged in for an indeterminate amount of time. The purpose of screwing the plug into the existing electrical outlet faceplate is to ensure that the plug is not removed. The work at issue here is not simply plugging in a device, as Bert has tried to characterize the work. Based on both the manner and permanence of the installation, the work to install the Bert smart plugs constitutes installation for the purposes of section 1720(a)(1) and is subject to prevailing wage requirements.

Conclusion

For the foregoing reasons, the Installation of Electrical Usage Plugs, secured with screws, for the Washington Unified School District in Fresno County is a public work and is subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Katrina S. Hagen".

Katrina S. Hagen
Director of Industrial Relations